JUDICIAL FRAMING OF IN-CUSTODY INFORMERS:

ONTARIO CRIMINAL COURT CASES OVER 30 YEARS

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ABSTRACT

Wrongful conviction literature has highlighted many problems often associated with the use of in-custody informers as evidence in criminal trials (Campbell, 2018; Genua, 2006). Recently, scholars have attempted to learn more about in-custody informers in Canadian criminal trials by reviewing cases that use informant evidence (Beshley, 2017). This thesis explores the role of in-custody informers in Ontario criminal trials over a 30-year period, from 1987 to 2017. The research project conducted a content analysis of 28 cases, which were divided between those that occurred prior to the implementation of the Ontario Crown Policy Manual on in-custody informers (pre-1997) and those after its creation (post-1997). The analysis revealed that over time judges have become increasingly aware of the relationship between in-custody informant evidence and wrongful convictions. The research also found that the use of accomplice testimony has become more common in these cases over time. Using social constructionism as a conceptual framework helps to understand the role judges play in framing in-custody informers in practice, as well as possible explanations for the rise in accomplice testimony in these cases. From a wrongful conviction perspective, this thesis emphasizes the need to review the use of cooperating witness evidence more broadly to develop a more thorough understanding of the role of incentivized witness testimony in possible miscarriages of justice.

Keywords: in-custody informers, jailhouse informants, wrongful convictions, miscarriages of justice, social constructionism, Ontario Crown Policy Manual

ACRONYM LIST

ICIC – In-Custody Informer Committee

ONCA – Ontario Court of Appeal

SCC – Supreme Court of Canada

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INTRODUCTION

In-custody informers, frequently referred to as jailhouse informants, are polarizing figures in the Canadian criminal justice system.[1] The most notable characterization of these witnesses in Canada comes from Justice Peter Cory, whose strong language demonstrates the common perceptions associated with this type of evidence:

> Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they will seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocence people and how much they tend to corrupt the administration of justice. Usually their presence as witnesses signals the end of any hope of providing a fair trial (Cory, 2001, p. 101).

The presence of in-custody informer evidence in high profile wrongful convictions throughout Canada in the 1990s precipitated widespread recognition of the problems associated with this type of evidence specifically, and wrongful convictions more generally (Roach, 2012). The wrongful conviction literature has widely expanded in the wake of such erroneous convictions to uncover the problems that may arise when in-custody informers testify at criminal trials (Campbell, 2018). This research project seeks to add to the wrongful conviction literature in the Canadian context by reviewing Ontario criminal cases in which in-custody informers were called to testify as witnesses at trial. Specifically, the research hopes to shed light on the realities of the

[1] In-custody informer, commonly referred to as a jailhouse informant, is the preferred terminology used in the Ontario Crown Manual. Both terms will be used synonymously as they refer to the same type of informant witness one who "claims to have received one or more statements from an accused person while both are in custody about offences that occurred outside the custodial institution" (Ministry of the Attorney General of Ontario, 2017, p. 58). For the purpose of this thesis the terms 'informer' and 'informant' will be used synonymously to avoid redundancy.

use of this type of witness to determine if the common perceptions associated with this evidence can be said true in Ontario criminal cases.

The purpose of the research is to deliver a critical analysis of the use of in-custody informers in Ontario and illustrate how the legal system is constructing and defining these witnesses in practice. The research will review 28 unique cases and respective written judicial decisions, in which a jailhouse informant's evidence was used during trial and analyze them using qualitative content analysis as the primary research method. The study will consider the recognition of wrongful convictions that occurred in part through jailhouse informant evidence as the beginning part of a process that encouraged the legal system to review how it employs such evidence in criminal trials. In so doing, the thesis will review relevant legal publications that redefined the concept of jailhouse informants in Ontario; these include Commissions of Inquiries on wrongful convictions that heard in-custody informer evidence and the Ontario Crown Policy Manual on the use of in-custody informants in criminal proceedings.

The research project will use social constructionism as a conceptual framework for interpreting and understanding the concept of jailhouse informants, as well as the data more broadly. Social constructionism encourages the research to consider the framing of in-custody informers within the legal system and how that can change over time. The recognition of the miscarriage of justice of Guy Paul Morin in effect forced the development of the Ontario Crown Policy Manual to dictate how and when in-custody informers could be used during criminal proceedings in Ontario (Genua, 2006). The creation of the Manual in 1997 encouraged this project to consider the data chronologically and differentiate between cases that occurred prior to the development of Crown policies and after its initial conception. Thus, the Crown policy on

jailhouse informants is a significant historical event that may have changed the way these witnesses are employed and framed in criminal matters in Ontario courts.

While wrongful conviction literature has framed the issue of jailhouse informants in a way that overwhelmingly links this type of evidence to erroneous convictions, few practical studies exist that succinctly evaluate the claims regarding the problems associated with this evidence. The aim of the research is to uncover the realities of the use of in-custody informers in Ontario criminal courts as well as the perceptions and reactions of legal professionals, such as judges, when this type of evidence reaches the Courts. In order to do so this research evaluates how trial judges and appellate courts frame in-custody informant evidence and how these witnesses and the perceptions of such witnesses have changed over time.

The thesis is compiled of five chapters, not including this introduction, and will commence with a review of the literature relating to the history of informant evidence in the Commonwealth system and Canada, the development of the legislation and case law that dictates the use of such evidence, and relevant research that frames how jailhouse informants are conceived in wrongful conviction literature. Chapter Two will review the conceptual framework guiding this research project, social constructionism, and the application of such concepts in previous studies relating to the function of the legal system. Chapter Three will address the methodology followed in this research project, detailing criteria for selecting cases for this study and the collection methods used. Chapter Four will present the significant findings of the data and analyze the patterns and trends found in the reviewed written judicial decisions. Chapter Five concludes with a review of the broader research findings using a social constructionist framework and its implications, in addition to discussing the limitations of the study and considerations for future research endeavours.

CHAPTER ONE: REVIEW OF THE LITERATURE

Over the past thirty years, the Canadian criminal justice system has become increasingly aware of the occurrence of wrongful convictions ("FPT" Report, 2019). Many high-profile cases have revealed the ways miscarriages of justice may occur. One of the first wrongful convictions of the modern era in Canada to receive significant media attention was the case of Guy Paul Morin, whose prosecution relied heavily on the testimony of two particularly disreputable jailhouse informants. Such instances of erroneous convictions facilitated the development of policies and guidelines attempting to regulate the use of jailhouse informants following significant government-initiated Inquiries that highlighted problems that can be associated with their use.[2]

In-custody informants are often said to threaten the reputation of the criminal justice system, help convict the innocent and have no respect for the truth-seeking function of the trial process (MacFarlane, 2006; Sherrin, 1997b). At the same time, it is also argued that our system is dependent upon informants and their testimony is indeed reliable at times (Trott, 1996; Yaroshefsky, 2002). Informers can be valuable tools in apprehending individuals sought by law enforcement and assist in the efficiency of the criminal justice system. In order to understand the conundrum faced by the criminal justice system with the use of informants, it is important to first outline how informant evidence came to be used in Canadian courts. A review of the evidentiary safeguards used in Canada will demonstrate how the courts address informant and in-custody informer testimony. An analysis of the problems often argued to be associated with the use of in-custody informers will provide the context for understanding how wrongful convictions may result from their use. Commissions of Inquiry into different wrongful convictions in Canada will

[2] See *Appendix A* for a copy of the Ontario Crown Policy Manual on in-custody informants from 1997 and *Appendix B* for the 2005 update.

be assessed in relation to their efforts to change how the system addresses such evidence. Finally, the implementation and development of the Crown Policy Manual will be reviewed to demonstrate the changes that occurred to the manner in which Ontario Crown counsel are able to use these witnesses over time.

1.1 Types of Informants

An informer is "a person who informs or prefers an accusation against another, whom he suspects of the violation of some penal statute" (Black's Legal Dictionary). In criminal law, informers bring information to the attention of law enforcement officials in some capacity. Any ordinary, law-abiding citizen can be an informer, usually referred to as a "citizen informant" (Sherrin, 1997a, p. 106). An informant's identity may be kept confidential after providing information to law enforcement for "intelligence-gathering" purposes; their identity will remain protected by law, except for exceptional circumstances (Coughlan, 2016; Fitzgerald, 2015, p. 25). Any informant can become a "state agent" if they go beyond providing information to acting under the direction of law enforcement (Paciocco & Stuesser, 2015, p. 303). [3]

Criminal informants provide intelligence based on their unique position of either directly engaging or being in close association with criminalized activities or individuals. Criminal informants may be a confidential informant or an accomplice; they may play a more central role in an investigation and be called to testify at a preliminary hearing or trial (Paciocco & Stuesser, 2015).[4] There are many terms associated with criminal informants who collaborate with the police and Crown as part of a criminal investigation: if they are called to testify during a criminal proceeding they may be referred to as a "cooperating witness" (Fitzgerald, 2015, p. 25; Raeder,

[3] According to the *Criminal Code of Canada* [1985] sec. 184.1(4) an agent of the state is a "peace officer" or "a person acting under the authority of, or in cooperation with, a peace officer".
[4] As per the *Criminal Code of Canada* [1985] sec. 21(1) an accomplice or co-accused would be considered "parties to offence" because they aid or abet in committing a crime.

2007, p. 1414), "collaborating witness" ("FPT" Report, 2019), or a "corroborative witness" (Arcaro, 1993, p. 103).[5]

An in-custody or jailhouse informer is commonly defined as a type of criminal informant who "claims to have received one or more statements from an accused person while both are in custody about offences that occurred outside the custodial institution" (Ministry of the Attorney General of Ontario, 2017, p. 58). Both the informer and the accused are awaiting trial or sentence, sometimes the informer has already been convicted and is serving a sentence; the accused may be imprisoned in relation to another matter. Unlike criminal informants who claim to have insider knowledge of a crime, jailhouse informants are unique in that they claim to have received information regarding an offence directly from an accused person. How these alleged confessions ultimately make it to the courtroom vary by jurisdiction (Campbell, 2018).[6]

In-custody informants can be recruited by the police and become "agents of the state", in such circumstances the informant would have approached the police with claims of receiving a confession; in turn, the police will ask the informant for more information and, in some cases, to fashion a recording device.[7] For an in-custody informant to be deemed by the Courts as an agent of the state, it must be proved that the relationship between the accused and the informant would have been different, but for the intervention of the police.[8] Both in-custody informers and state agents may receive benefits in exchange for their help in prosecutions including receiving more lenient sentences, charge reductions or withdrawals, favourable letters from law enforcement,

5 For the purpose of this paper, the terms collaborating, cooperating, and corroborative witnesses will be used synonymously.
6 The use of alleged confessions in courtrooms will be discussed further in the sections on Case Law and Evidentiary Safeguards.
7 See: *R. v. Baltrusaitis* [1996] O.J. No. 1697; *R. v. Fatima* [2006] O.J. No. 3634.
8 See: *R. v. Broyles,* [1991] 3 S.C.R. 595.

early parole, payments or relocation for the informant and their family and other benefits (Botting, 2010; Campbell, 2018).

1.2 History of Informant Evidence

The use of informants in Commonwealth legal systems can be traced back to "the system of approvers" established in 1275 in Britain (Zimmerman, 1994, p. 153). The "approvement" process allowed a prisoner arraigned for treason or a felony offence to confess to a crime and name his accomplice(s) (Black's Law Dictionary). In return for proving his own guilt, the approver was eligible for a pardon, so long as the Courts accepted his evidence against his accomplice (Radzinowicz, 1956). The approver's accusation was considered evidence that could be used against an accused person to determine the accomplice's guilt. If the Court accepted the approver's appeal, the jury would decide whether to convict the accomplice and the judge would warn the jurors of the dangers on convicting the accomplice on uncorroborated evidence. The approver was not permitted to alter his allegations during the appeal process believing that any alterations would make the confession unreliable. If the accused accomplice was convicted the approver would be pardoned and forced to leave the country, and if the accomplice was acquitted the approver was sentenced to death (Hillyard & Percy-Smith, 1984; Sherrin, 1997a).

The approver system saw corruption at many levels: accused persons, sheriffs and jailers (working with approvers) would threaten to accuse innocent people to extort ransoms (Sherrin, 1997a). Eventually, approver appeals came to be viewed as "manipulative, abusive, and desperate" and their credibility continually questioned because of the benefits they could receive, and the difficulty of refuting allegations made by approvers (Zimmerman, 1994, p. 155). Scholars often argue that public criticism and widespread abuses of the approver system resulted in guidelines limiting the types of rewards that could be received by approvers and that

eventually, the stringent rules and continued exploitation led to the dissolvement of the practice by the 15th century (Tak, 1997; Zimmerman, 1994). However, Musson (1999) refutes claims that abuse of the approvement process was the reason for the system's demise. Instead, Musson's (1999) study found that Crown policies responding to rising crime rates and political discontent encouraged the use of the approver system and that eventually the jury was so skeptical of approver appeals that they would often acquit the approvee and hang the approver. Thus, the system remained because it provided the Crown with assistance in detecting and prosecuting criminal activity.

Regardless of the real reason behind the ending of the approver system, in the 16th century, a similar policy was established, this time called the "King's mercy" (Zimmerman, 1994, p. 156). The King's mercy allowed judges to stay or withdraw felony charges if it was determined that the defendant had committed the crime out of necessity (Hale et al., 1847). Judges were also permitted to offer a pardon if the accused person provided evidence of another criminal act. Eventually, the King's Mercy saw the same sort of problems associated with the approver system and was replaced by fourteen statutes that regulated the use of pardons for Crown witnesses in England (Radzinowicz, 1956). Where statutes did not exist, equitable principles were available for individuals to apply for more lenient sentences. This new system became known as the "common informer system" and extended the availability of rewards in exchange for the implication of individuals in crimes to ordinary citizens as well as criminal defendants (Zimmerman, 1994).

It was not until the "Highwayman's Act" of 1692 that informants were provided with monetary rewards in exchange for information on the criminal activity of others (Fitzgerald, 2015, p. 3). This practice developed with the common informer system and allowed for persons

who brought certain crimes to the attention of the authorities to be entitled to a portion of any fine that was imposed upon conviction. In an attempt to limit the abuses, the Crown created restrictions that would bar certain persons from acting as informers (Arnold-Baker, 2015). During the 19th century, the common law replaced the rule that forbid individuals with felony convictions from testifying with a regulation that allowed for their testimony so long as the trial judge provided an instruction to the jury that the evidence of a witness with "an unsavoury or criminal background" should be "examined with great caution" (MacFarlane, 2006, p. 465-466).

Under the common informer system, the offering of pardons to accomplices in exchange for evidence implicating an accused person became a regular feature of the British justice system, both within England and abroad in their colonies. While many critics of this practice complained of corruption and abuse, officials argued the system was a necessary evil to investigate crime absent a professionalized police force (Hillyard & Percy-Smith, 1984). Since benefits were legislatively codified, authorities would have no discretion over informants receiving benefits, leading to further corruption. Despite widespread abuse, the common informer system developed with the evolution of the courts system and the creation of an organized police force (Tak, 1997). [9]

The historical uses of informants demonstrate that informers have assisted in criminal investigations since crimes have been prosecuted (Sherrin, 1997b). Like criminal witnesses, in-custody informers have an extensive history in criminal investigations in the common law (Campbell, 2018; see *R. v. Vigeant,* [1930] S.C.R. 396). Despite significant technological advancements, the professionalization of police forces, and development of modern forensic

[9] Give that one of the rationales for using informants was due to a lack of organized and professional police forces it seemed that informants helped solve crimes in a timelier fashion, they had access to information that was not possible for police officers, and using informants was more cost effective than undercover operations (Zimmerman, 1994).

investigative techniques (Hunt, 2019) the police still require assistance with "invisible crimes," such as organized crime and drug crimes, and conspiracy investigations (Zimmerman, 1994, p. 83). In the case of invisible crimes, informants help the police obtain information that is considered to be nearly impossible to access by the police themselves. In recent years Canadian police forces have increasingly turned to informants when investigating organized crime and domestic terrorism. For example, informants were used by the Montréal and Québec police forces to combat domestic-terrorism and infiltrate the Front de Libération du Québec (FLQ) prior to and during the October Crisis of 1970 (Tetley, 2007). Police informants have been most valuable in organized crime investigations in the 1990s and early 2000s targeting biker gangs such as the Hell's Angels in the provinces of Ontario and Québec.

These informants do not come without significant risk to the legitimacy of the criminal justice system. One informant, a former Hell's Angel hit-man, Yves 'Apache' Trudeau, confessed to 43 murders (Cherry, 2005); another former Hells Angel hit-man, Daniel 'Dany' Kane, continued to engage in criminal activity while acting as a police informant (Sanger, 2006). More recently, the former vice-president of the Fallen Saints Motorcycle Club, Noel Harder, was kicked out of the Witness Protection Program for using drugs and continuing to engage in criminal activity while under government protection and working as an informant (Warick, 2019). These cases highlight the problems that can arise when criminalized individuals, with much to gain, are trusted to provide evidence. The possible frailties of informant evidence have long been cited by Canadian courts. It is through case law that evidentiary safeguards have emerged to address the use of informant evidence in courts.

1.3 Case Law and Evidentiary Safeguards

The history of informants in the United Kingdom highlights the paradox of the reliance upon, and reluctance to use these individuals in criminal proceedings. The concern over using informants was first articulated in the United Kingdom by Lord Reading writing for the Court of Criminal Appeal in the *King v. Baskerville,* [1916] 2 K.B. 658 at page 669:

> it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence.

Initially, Canada followed this traditional perception that such individuals could be competent witnesses but require special consideration by the courts when assessing their evidence (*R. v. Gouin,* [1926] SCR 539, p. 541). Underlying this principle was the belief that criminalized individuals were amoral, unreliable and unable to tell the truth by virtue of their willingness to commit crimes and break societal codes. *Baskerville* and subsequent Canadian judgements recognized that the trial, in its fact-finding mission, provides both an opportunity and motive to manufacture evidence (Brooks, 1978). Early Canadian criminal cases stress the importance of the trial judge's instructions to the jury about acting on "unconfirmed evidence" of accomplices testifying as witnesses (*R. v. Gouin,* [1926] SCR 539, p. 542). If a trial judge failed to instruct the jury on the special considerations required before acting on uncorroborated evidence of an accomplice in some cases the conviction could be quashed (*Brunet v. The King,* [1928] S.C.R. 375).

Initially, informants did not require such a warning because they did not fit within the legal definition of an accomplice. In 1930, the Supreme Court of Canada ("SCC") ruled that it is for the jury to determine if an "agent provocateur, police spy or informer" may be included in

such definition (*R. v. Vigeant*, [1930] SCR 396, p. 400-401). This decision did not change the legal definition of an accomplice, but recognized that other witnesses, particularly informants, may share similar characteristics of an accomplice, making their testimony potentially unreliable. *Vigeant* provided more discretion to the jury, recognizing their role as triers of fact.

The rule set out in *Vigeant* remained until 1987 when the SCC shifted away from stringent common law rules governing the testimony of unsavoury witnesses in court, in favour of judicial discretion. In an attempt to simplify the law and control problems associated with potentially unreliable witness testimony the SCC established what has become known as the *Vetrovec* warning, in reference to the case in which the rule was established (Dufraimont, 2008; see *R. v. Vetrovec,* [1987] 1 S.C.R. 811). A conspiracy drug trafficking case out of British Columbia, the evidence presented at trial in *Vetrovec* was largely based around the testimony of an accomplice. In his final charge to the jury, the trial judge warned the jury about the dangers of considering the accomplice's evidence because he was an untrustworthy witness, likely providing evidence out of his own self-interest. Mr. Vetrovec was convicted and the appeal made its way to the SCC where it held that if the trial judge feels that any witness is untrustworthy, then the judge should instruct the jury to look for evidence supporting the witness's testimony before determining the guilt or innocence of the accused (*R. v. Vetrovec,* [1987] 1 S.C.R. 811; *R. v. Bevan,* [1993] 2 S.C.R. 599; *R. v. Kehler,* 2004 SCC 11, [2004] 1 S.C.R. 328). Once the trial judge determines that the *Vetrovec* caution is to be given, then the judge must determine whether the warning should also include examples of specific evidence the jury could use to support the evidence of the unsavoury witness (*R. v. Bevan,* [1993] 2 S.C.R. 599).

The *Vetrovec* decision meant that no longer were trial judges compelled to caution the jury on accomplice evidence, but that any witness whom the judge viewed as untrustworthy was

susceptible to this caution (affirmed in *R. v. Potvin,* [1989] 1 S.C.R. 525). The language applied in *Vetrovec* signifies a shift in the perception of crime and deviance that no longer viewed criminalized witnesses as inherently untrustworthy.[10] In making a warning about witness evidence discretionary, the Court provided the judiciary with wide discretion to consider evidence of a witness, in relation to other (more reliable) evidence. The *Vetrovec* caution recognizes that the trial judge is in the best position to assess the environment of the case and its evidence, and their experience as a judge will inform them on the best way to proceed. The broad powers afforded to the judge in matters of evidentiary assessment can be problematic for defence counsel and prosecutors, who may disagree with the way in which the judge chooses to approach the *Vetrovec* caution.

These rulings have received mixed reviews by critics who suggest that highlighting suspect evidence is counter-productive because it brings unwanted attention to possible problematic evidence (Campbell, 2018; Skurka, 2002). What is inherently problematic about the *Vetrovec* warning is that it can potentially boost the credibility of the informant and reinforce the reliability of the alleged confession. Regardless of whether or not a *Vetrovec* caution is delivered, Hamamrskjold (2011) argues that the testimony of an in-custody informer intrinsically and adversely affects the jury instructions. A charge to the jury necessitates that the judge review different aspects of the evidence with the jury. If the trial judge does not provide a *Vetrovec* warning to the jury, the jury may perceive that as the judge's implicit acceptance of the informant's evidence, that the judge believes in the credibility or reliability of the informant's evidence. Conversely, if the judge does issue a *Vetrovec* warning and reviews too much evidence

[10] No formal requirements exist in constituting a fair and proper *Vetrovec* warning. However, the National Judicial Institute has published model jury instructions for *Vetrovec* warnings, which can be found at: https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/.

that is possible of confirming the informant's testimony, then the jury may perceive the impugned evidence to be more reliable than it actually is.

In the years following the establishment of the *Vetrovec* warning, several high-profile wrongful convictions brought to light the frailties of jailhouse informant evidence.[11] In *R. v. Brooks* [2000] 1 S.C.R. 237, the SCC was confronted with the question of whether or not *Vetrovec* warnings for in-custody informants should be mandatory. When assessing the testimony of jailhouse informants, the Court in *Brooks* found that the testimony of two jailhouse informants did not necessarily require a "clear and sharp" *Vetrovec* warning (*R. v. Brooks,* [2000] 1 S.C.R. 237, p. 253).[12] Encompassing the essence of *Vetrovec, Brooks* re-affirmed the shift away from British jurisprudence of cautioning jurors on potentially problematic evidence in favour of judicial discretion to provide warnings in "appropriate circumstances" (*R. v. Brooks,* [2000] 1 S.C.R. 237, p. 254). Should the trial judge find a particular witness unsavoury and caution the jury on their evidence, it is also her/his duty to inform the jury of the reason(s) for special scrutiny of the witness' testimony (*R. v. Khela,* [2009] 1 S.C.R. 104; *R. v. Hurley,* [2010] 1 S.C.R. 637). Though some scholars argue that the *Vetrovec* caution is virtually mandatory when an in-custody informer testifies (Skurka, 2002), the SCC has specifically rejected the idea of "pigeon-holing" witnesses into specific categories (*R. v. Brooks,* [2000] 1 S.C.R. 237, p. 245).[13]

The common law permits judges to exclude certain evidence however, the *Vetrovec* warning is viewed as a sufficient evidentiary safeguard to ensure the jury properly acts on the

[11] This will be further discussed in Section 1.8.1 of this chapter on Commissions of Inquiry in Canada.
[12] The ruling was split 3-1-3 in favour of judicial discretion on jailhouse informants, thus there seems to be a disagreement over the "appropriate remedy" for acknowledging the dangers of such evidence (Roach, 2007, p. 225).
[13] See: *R. v. Bevan,* [1993] 2 S.C.R. 599 and *R. v. Vermeylen,* [1993] 87 C.C.C. (3d) 132: both judgments determined that there are certain circumstances where a warning must be given, thus the discretion is not absolute.

evidence of witnesses of unsavoury character. The trier of fact is considered the "primary safeguard against inaccurate factual determinations" (Paciocco, 1987, p. 359) so long as there is a proper jury instruction by the trial judge (*R. v. Mezzo,* [1986] 1 S.C.R. 802). The Courts have clearly articulated that evidence is only inadmissible if its prejudicial effect (potential to impair the jury's judgment) outweighs its probative value (usefulness in jury's fact-finding mission) (Genua, 2006; Roach, 2007). At the same time, unreliability does not amount to inadmissibility (*R. v. Buric,* [1997] 1 S.C.R. 535) because the trier of fact is considered to be competent and able to reasonably deduct for themselves how reliable a piece of evidence is. This means that there is no legislative, common law or constitutional basis for excluding unreliable evidence or including jailhouse informant testimony in Canada.[14]

Canadian case law has continued to loosen evidentiary safeguards, permitting more and more evidence from informants to go before the jury (Genua, 2006). The jury, as the finder of fact, is instructed to weigh the evidence before them in relation to the credibility of the witness and the reliability of their evidence. Credibility and reliability may be assessed through the witness's appearance, mannerisms and demeanour, apparent motive or interest in the matter, reputation for truthfulness, criminal record and the "consistency of their testimony with other evidence" (Sherrin, 1997a, p. 118). When a witness is called, the party that calls the witness presents their evidence, then the opposing party is provided with the opportunity to cross-examine the witness to explore their credibility and reliability. The jury can also consider the results of the cross-examination when considering the witness' reliability and credibility. The right of defence attorneys to cross examine witnesses is viewed as one of the most important

[14] Roach suggests that "highly unreliable evidence" can be excluded using section 7 of the *Charter of Rights and Freedoms* (2007, p. 213). While his assertion is theoretically instructive, in practice this approach has been unsuccessful in Ontario (see Chapter Four: Results and Analysis).

procedural safeguards against an erroneous conviction (Roach, 2007). This right to cross-examination necessitates that prosecutors maintain full, frank, fair and timely disclosure. In relation to an in-custody informer this means providing the defence with criminal and prison records, previous testimony as an informant, benefits or other promises, and any other information that may be relevant to their credibility and reliability (Campbell, 2018; Sherrin, 1997b). The reduction of evidentiary safeguards from common law principles has not diminished the problems commonly associated with the use of in-custody informant evidence. In-custody informers are generally viewed as the most unreliable of all informants, but the most infrequent type of informant to testify in court (Roth, 2016). Studies suggest that informant testimony, commonly comprised of a jailhouse confession, may have a potent impact on juror decision making.

1.4 Confession Evidence: Secondary Confessions[15]

A great deal of psychological research has suggested that confession evidence from an accused person is extremely compelling and more persuasive than eyewitness and character testimony (Kassin & Neumann, 1997; Kassin & Wrightsman, 1981). Recent research has proposed the same is true of secondary confessions (Wetmore, Neuschatz, & Gronlund, 2014).[16] Secondary confessions are generally defined as "statements made by one person alleging that

[15] The term secondary confession is used by psychological scholars in their experimental studies of confessions made by an accomplice or jailhouse informant. The term "jailhouse confession" refers specifically to evidence of a jailhouse informant regarding another inmate's alleged confession; for stylistic purposes the two terms will be used synonymously.

[16] Though the results are compelling and undoubtedly theoretically instructive, the experiments have limited generalizability due to the fact that they took place in experimental settings. Critiques of previous effect studies relating to jury instructions seem to be applicable in this instance (see: Leverick, F. (2014). *Jury directions*. In, J. Chalmers, F. Leverick, & A. Shaw, (Eds.), *Post-corroboration safeguards review: Report of the academic expert group* (101-117). The majority of the experiments consulted for this section used undergraduate psychology students as participants, limiting the generalizability to the wider population, and the experimental design did not simulate the jury experience, limiting the experiments reliability.

another person has admitted guilt"; such confessions are made to jailhouse informants or accomplice witnesses and are not "direct admissions of guilt" (Neuschatz et al., 2012, p. 179).[17]

Experimental studies have found that secondary confessions have a very strong influence on juror conviction rates. Comparing primary and secondary confessions has demonstrated that both types of evidence are "generally perceived" to be equally "indicative of guilt" (Wetmore, Neuschatz, & Gronlund, 2014, p. 354). Evidence of a secondary confession from a cooperating witness has been found to have "a strong influence on conviction rates when compared with the absence of such testimony" (Neuschatz et al., 2008, p. 146). This research suggests that regardless of the credibility and reliability assessments jurors are required to consider, confession evidence indirectly or directly coming from the defendant is very compelling to jurors and may not be closely scrutinized in practice.

Even when jurors are provided with information about a cooperating witness's history of testifying for the prosecution (Neuschatz et al., 2012), or defence present expert evidence regarding the "potential unreliability of secondary confessions," the guilt ratings remain consistent (Neuschatz et al., 2012, p. 189). The findings of these studies are quite alarming, especially when considering the malleability of memory, the influence of "motivational bias" (Roth, 2016 p. 768), and the difficulty a defendant may have in refuting claims of a jailhouse confession. These findings directly challenge Trott's assertion that:

> ordinary decent people are predisposed to dislike, distrust, and frequently despise criminals who 'sell out' and become prosecution witnesses. Jurors suspect their motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable, openly expressing disgust with the prosecution for making deals with such 'scum' (1996, p. 1385).

[17] These studies used both mock-jailhouse informants and mock-accomplice testimony, as such the findings reflect the use of both, typically referred to as cooperating witnesses.

Jurors give great weight to secondary confessions and may be unable to determine whether the information presented is truthful. Secondary confessions have been shown to be more persuasive than other types of evidence (Wetmore, Neuschatz, & Gronlund, 2014) and may even have an impact on an eyewitness' confidence in their identifications and cause them to alter their selection in photo lineups (Mote et al., 2018).

When assessing the impact of incentives on false secondary confessions, Swanner and Beike (2010) found that the offer of incentives influenced individuals to provide untrue secondary confessions despite having no personal knowledge of incriminating evidence. When comparing true secondary confessions with false secondary confessions, Swanner, Beike, and Cole (2010) found that incentives did not affect the number of true secondary confessions but did increase the number of false secondary confessions. It is possible that the motivation to fabricate jailhouse confessions may not be readily apparent to jurors. Studies have found that even when motivations are known, such as the knowledge of cooperating witness's receipt of benefits, juror conviction rates are not affected (Neuschatz, et al., 2008; Neuschatz, et al., 2012). This is true even when participants recognize that a witness is motivated by self-serving interests (Neuschatz et al., 2008). The conclusions of these experimental studies suggest that secondary confession evidence can be very compelling, which makes questioning the reliability and credibility of the evidence extremely important. These studies suggest that there is a great potential for erroneous convictions as a result of this type of testimony. The following sections of this review of the literature outlines common critiques of the use of in-custody informers, particularly as they relate to their association with wrongful convictions.

1.5 Informer Inducements

Self-interest may be the most compelling inducement for in-custody informants to testify against a fellow-inmate. Compensation for testimony is believed to be a strong motivator for in-custody informants who typically are "career criminals and conmen" (Botting, 2010, p. 21). The possibility of a sentence reduction may also be a powerful incentive: Dodds reports that one in seven inmates in the United States receive "preferential sentencing for helping the government" (2008, p. 1075). Incentives to lie and the possibility of rewards make the truthfulness of in-custody informant testimony inherently suspect. Many scholars have argued that it is the knowledge of reward that is the greatest motivating factor for an in-custody informant to testify for the prosecution (Rich, 2012; Uviller, 2002). Jailhouse informants may be compelled by their anger towards the accused, fear of other inmates or the custodial setting, survival, the 'need' to frame someone else for a crime (s)he committed, or simply "the thrill of playing detective" (Sherrin, 1997a, p. 111).

The custodial setting, known for its poor conditions, safety concerns, and deprivations, may incentivise individuals to try to receive some advantage to alleviate the pains of imprisonment (Campbell, 2018). An institutional setting may make the benefits seem subtle, while having major effects. Thompson argues that the circumstances of being in custody makes jailhouse informers "less reliable sources of information" than other informants (2012, p. 352). The prospect or promise of benefits may provide a strong motivation to lie and the experience of (often) career criminals provides the proper tools to manufacture evidence against the accused.

1.6 Manufacturing Informant Testimony

The potential motivating factors underlying jailhouse informant evidence may persuade an inmate to concoct a jailhouse confession. To the layperson, manufacturing this kind of evidence may seem practically impossible, but informers have proven shown to be quite

resourceful in their mission to obtain evidence against an accused person. Informants have been found to use real evidence against an accused to concoct a story of a jailhouse confession. In-custody informers may obtain information about a case through newspapers and using the internet or cell phones to access other media (Dufraimont, 2008). Inmates can gain information by eavesdropping on the accused's conversations with other inmates, over the phone, or during a visit (Botting 2010). The informant may even discuss the case with the accused directly and use that information to turn exculpatory statements into inculpatory ones. Informants may have people they know gather information on their behalf, sending relatives or friends to attend the accused's court appearances (Sherrin, 1997a). The custodial setting provides many opportunities for possible confessions, as there are a plethora ofare many situations an accused may find themselves in with another inmate, absent others. Informants may find documents pertaining to the accused's case in their cell and use the information to concoct a plausible confession. Informants may pose as public officials to obtain information or seek out evidence from the police during interviews. Jailhouse informants may unintentionally learn information about an accused's case from law enforcement or prosecutors (Roth, 2016). The police and Crown attorneys play an important role in the collection and assessment of jailhouse informant evidence.

1.7 The Role of Police and Prosecutors

The fact that police and prosecutors can offer benefits to inmates in exchange for incriminating statements against another inmate makes the evidence a commodity (Botting, 2010). The current environment of 24/7 news cycles and social media, the emphasis on victims' rights, and growing caseloads puts a great deal of pressure on police and prosecutors to solve crimes. In an effort to solve crimes quickly, police may turn to informants to help with difficult

investigations (Natapoff, 2009). The informer may have a history of informing on other inmates, having developed tactics and techniques to make the alleged confession appear more believable (Dodds, 2008). Taslitz's study reveals that police may be more likely to believe stories that "are consistent with culturally-reinforced racial biases" (2008, p. 1096). Due to their experience, in-custody informants will likely present as reliable and credible witnesses, testifying with conviction. Jailhouse informant testimony can provide compelling evidence and save time and effort in circumstantial or "hard-to-win" cases (Raeder, 2007, p. 1436). The ease of access of informant evidence may provide an incentive to prosecutors to obtain jailhouse informant evidence which may not necessarily be inaccurate.

Experimental research has indicated that current police approaches to detecting lies are ineffective and police are no better than laypeople at determining truth or deception (Kassin, 2008; Taslitz, 2008). Police and prosecutors may be misled by jailhouse informant evidence because of an informant's ability to lie convincingly. Prosecutors may be tempted to build a case around a jailhouse confession and present it to the jury, instead of using more costly avenues of evidence, such as forensic testimony. The evidence of a jailhouse informant may support the prosecutor's theory of the case and work as "confirmation bias," solidifying and reassuring the Crown of the accused's guilt (Leo, 2005; Roth, 2016).

The prosecutor's role in the adversarial system is to represent the state as a non-partisan party seeking the truth (Sherrin, 1997a). The Crown's duty to remain impartial is integral to the presentation of evidence, as jurors tend to associate informant evidence with the prosecution and may unfairly characterize the informant in the same light. Borchard's (1961) study of wrongful convictions revealed that environmental factors, such as the culture of the Crown Attorney's office, may affect the prosecutor's ability to objectively assess the evidence provided by a

jailhouse informant.[18] Absent external pressures from the media and public, Crown offices may engage in "noble cause corruption" and view the criminal trial as a game, emphasizing the importance of 'winning' cases (Green, 2005; MacFarlane, 2006, p. 436).[19]

Scholars have argued that Canadian prosecutor's offices engage in a culture that lacks accountability, one that is unwilling to admit error or wrongdoing, and confuses the office's purpose with the function of law enforcement (Green, 2005; Kennedy, 2016a). The most notable example of noble cause corruption and problematic Crown culture in the Canadian context comes from Manitoba. George Dangerfield, a now retired Crown prosecutor, contributed to four wrongful convictions in Manitoba by withholding evidence, making deals with jailhouse informants, and coercing confessions (CBC News, 2018). Mr. Dangerfield's actions cannot be described as just a 'bad apple', but as a reflection of the wider Crown culture of that office that allowed him to engage in such activities with virtually no accountability for his actions. The study of numerous wrongful convictions in Canada demonstrate the problems that can be associated with jailhouse informants, particularly when Crown Attorneys rely too heavily on such evidence.

1.8 Miscarriages of Justice and In-Custody Informers

The use of in-custody informant testimony has been identified as being present in anywhere between 21% (Campbell, 2018, p. 107) and 50% (Botting, 2010, p. 20) of wrongful convictions in Canada. According to the National Registry of Exonerations, in the United States jailhouse informant testimony was a factor in 8% of all exonerations, 15% of all murder

[18] Originally published in 1932.
[19] That is, the ends (a guilty verdict) justify the means (the way in which evidence was obtained).

exonerations and 23% of all death row exonerations (Gross & Jackson, 2015).[20] Typically, wrongful convictions cannot be explained by one phenomenon alone and multiple causes may interact in a single case to produce a miscarriage of justice (MacFarlane, 2006; *R. v. Horan,* [2008] ONCA 589). The defendant's individual characteristics,[21] the role of the defendant or other individuals involved with the trial process,[22] and structural inefficiencies[23] may intersect to contribute to a wrongful conviction; miscarriages of justices in Canada have highlighted many of these issues. In response to some high-profile wrongful convictions, various provincial governments have conducted Commissions of Inquiries and made significant, although non-binding recommendations in an attempt to curtail their occurrences.

1.8.1 Canadian Commissions of Inquiry

A number of Commissions of Inquiry undertaken over the past 20-years demonstrate the very serious dangers of using the evidence of in-custody informers. In factfact, four Commissions of Inquiry have been undertaken by three different provincial governments pertaining to the wrongful conviction of six different people in relation to jailhouse informant evidence in recent years. Given that the focus of this research is on the use of in-custody informant testimony, the Inquiries that found jailhouse informant evidence to be a contributing factor to the wrongful conviction are significant. The Commission of Inquiry (1998) examining the wrongful conviction of Guy Paul Morin in 1992, after he was acquitted in 1986, chaired by

[20] Though alarming, this should not be regarded as new information by any means: Borchard's 1932 study found that in 14 of the 65 cases of wrongful convictions involved a cooperating witness perjuring themselves by using or fabricating circumstantial evidence against the accused to develop their evidence.
[21] Race, ethnicity, socio-economic status, mental competency (presence of a mental illness or personality disorder), or gender (Carling, 2017).
[22] Police or prosecutorial tunnel vision, professional misconduct, ineffective or incompetent defence counsel, the use of a jailhouse informer or perjury by a witness, eyewitness misidentification, faulty forensic expert evidence or testimony, false confessions (Kennedy, 2004; Denov & Campbell, 2005).
[23] The culture and practices of police and prosecutor's offices (Kennedy, 2016a; MacFarlane, 2006), the practice of plea bargaining (Kennedy, 2016b).

Justice Fred Kaufman dealt with the issues associated with in-custody informant testimony. While awaiting trial on the first-degree murder of Christine Jessop, two jailhouse informants, Mr. X and Mr. May, alleged that Mr. Morin confessed to killing Jessop. The Inquiry determined that the two jailhouse informants called by the prosecution were unreliable and motivated by self-interest. While one informant was diagnosed as a pathological liar, the other admitted to hearing voices and lying in the past. The former informant recanted his testimony after the second trial and then recanted his recantation; while the latter told the police he would "give them anything they wanted if they got him to a halfway house" (Kaufman, 1998, p. 10).

Following Justice Kaufman's Commission, the Manitoba government ordered that Justice Peter Cory review the wrongful conviction of Thomas Sophonow in 2000. Thomas Sophonow was tried three times for the murder of Barbara Stoppel. The first trial resulted in a mistrial, and the latter two convictions were later overturned by the Manitoba Court of Appeal for issues related to the instructions provided by the trial judge to the jury. In Mr. Sophonow's case, there were significant problems with the conduct of the police and the Crown during the investigation, in addition to the use of jailhouse informant evidence. Specifically, 11 inmates volunteered to testify against Sophonow, and three were ultimately called to testify as jailhouse informants (Cory, 2001). One informant, Mr. Martin had previously testified in nine other cases and had a conviction for perjury, while another, Mr. Cheng requested the 26 pending fraud charges against him be dropped and to be released from jail, which was later satisfied by the Crown (Cory, 2001).

Former Chief Justice Antonio Lamer chaired a Commission of Inquiry relating to three problematic homicide convictions from the 1990s in Newfoundland and Labrador. In only one of the reviewed cases, that of Randy Druken, was the testimony of a jailhouse informant permitted

who had a history of crimes of dishonesty and attempting to inform on other cases. The in-custody informant failed a polygraph test and his testimony was inconsistent with the other evidence presented at trial (Lamer, 2006). The last Commission to be released relating to in-custody informant evidence was Former Chief Justice of the Ontario Superior Court Patrick LeSage's report on the conviction of James Driskell in Manitoba in 2007. Driskell was convicted of murdering his co-accused on a theft charge, Perry Harder, in 1991. The case of Driskell was largely predicated upon the testimony of two jailhouse informants, one of whom was financially compensated in exchange for testifying and was granted immunity from pending charges (LeSage, 2007). Driskell's case also saw the use of hair-microscopy analysis, a forensic testing procedure now completely discredited over concerns of its reliability (Campbell, 2018).

Kaufman's Inquiry (1998) was the first in the string of Inquiries to be released, providing 33 recommendations on proposed limitations to the use of in-custody informer evidence. During the hearings, Kaufman reviewed the updates to the Ontario Crown Manual on jailhouse informants, created in 1997, and found them to be commendable.[24] In addition to the changes to be made to the Crown Manual, Kaufman recommended that the Policy use a broader definition to consider other witnesses whose evidence raise similar concerns, that an informer registry be established and maintained by the Ministry of the Attorney General of Ontario and a national in-custody informer registry should also be created (Kaufman, 1998). The Commission emphasized the importance of diligent record keeping and information gathering, and the significance of corroboration and confirmation from other witnesses or evidence that could support the alleged confession (Kaufman, 1998). Kaufman (1998) argued for the introduction of reliability hearings to determine the admissibility of the proposed in-custody informant evidence in order to provide

[24] See *Appendix A* for the 1997 Ontario Crown Manual on in-custody informants.

an additional safeguard to ensure that the Crown meets their responsibilities for full and fair disclosure. The Inquiry also reviewed other factors that contributed to Mr. Morin's wrongful conviction and included recommendations on improving police investigation procedures and accountability, judicial instructions to juries and forensic science practices.

Commissioner Cory's report took a more conservative approach to the evidence of in-custody informers. Justice Cory recommended that in-custody informants should, "as a general rule", be "prohibited from testifying" (Cory, 2001, p. 72). For trial purposes, he detailed that if a jailhouse informant is to testify it ought to be limited to only one person because of the significant weight jurors attach to this type of evidence and the cumulative impact it may have. Justice Cory further commented that "it should become apparent to all that a good case for the Crown does not need to be supported by the treacherous testimony of jailhouse informants" (2001, p. 74).

Both Cory (2001) and LeSage (2007) found that the Crown's office had failed to disclose pertinent information in relation to the credibility of the informant to the defence. Cory (2001) advocated for the diligent recording of interviews with in-custody informants and the thorough review of the alleged confession to determine whether such information could have been gleaned from sources other than the accused. LeSage's (2007) Commission findings revealed insufficient recording techniques in the police and prosecutor's use of the two informants in the discussion of possible rewards for their assistance.

Cory (2001) advocated for making a *Vetrovec*-type warning mandatory to highlight to the jury the unreliability inherent to this kind of evidence; he suggested there be specific mention of an in-custody informer's ability to obtain information that seemingly could only be known to the perpetrator of the offence. Justice Lamer (2006) agreed with the conservative approach to in-

custody informant evidence set forth by Justice Cory in the Sophonow Commission and sought to have the Newfoundland Crown's office adopt such principles.

Combined, these Commissions of Inquiry highlight the important role of the Crown and police in their handling of jailhouse informants. Most importantly, in all four of the reviewed cases, there were multiple factors that led to the wrongful conviction. It was never the case that it was only the jailhouse informant evidence that was problematic, but that the police and prosecutors also failed in their capacities and hindered the defendant's right to a fair trial. Finally, in the cases of Sophonow and Morin, there were multiple trials, with various results, that highlighted the role of the judge, specifically as it related to instructions provided to the jury in allowing miscarriages of justice to occur.

1.8.2 Ontario Crown Policy Manual on In-Custody Informers

Commissioner Kaufman's recommendations were not legislatively binding however, in 1997, in response to the wrongful conviction of Guy Paul Morin and the Commission of Inquiry on the proceedings of Mr. Morin, the Attorney General of Ontario formalized guidelines regarding how and when in-custody informants could be used in Ontario criminal court cases. The initial Policy defined an in-custody informer as "someone who receives one or more statements from an accused, while both are in custody, where the statements relate to offences that occurred outside of the custodial institution" (Crown Policy Manual, 1997, p. I-2-1).[25] It provides Crown counsel with a list of considerations that they are to review when determining whether or not to call an in-custody informer as a witness at trial. The Manual states that jailhouse informant evidence is "subject to a number of frailties" because of their circumstances (e.g. incarceration) that may cause them to seek benefits in exchange for their evidence (1997, p.

[25] See *Appendix A* for a full copy of the 1997 Ontario Crown Policy Manual.

I-2-2). The Policy reiterates to Crown counsel that there is a possibility that the motivations of in-custody informants may be suspect or manufactured. Prosecutors are urged to consider if there is compelling public interest to present the evidence of an in-custody informer and other corroborating evidence. This Policy stipulated that only if the jailhouse informant's evidence is the principle or exclusive evidence against an accused, the prosecutor must notify their supervising Director and gain their approval prior to calling the witness at trial.

The Policy encourages the Crown to assess the reliability of the informant's evidence and outlines 10 ways prosecutors could do this assessment. According to the Manual, some indicia of reliability include: some sort of record of the conversation the informer had with the accused (e.g. notes taken shortly after their conversation or a diagram); how long after the alleged confession the informant notified authorities; whether or not the informant has prior knowledge of the accused or the offence; how the authorities reported the statement (e.g. was the statement taken under oath, did the police ask non-leading questions); consider whether any circumstances would provide a motive or opportunity to fabricate a confession; the relationship between the accused and the informant; the general character of the informant; the informant's criminal record (Crown Policy Manual, 1997, p. I-2-3). The Crown ought to consider whether or not the informant requested inducements and whether those benefits were promised by authorities, and also consider the informer's history as an informer. The Policy provides prosecutors with the limits of their relationship with in-custody informants, suggesting that trial counsel should not have direct contact with the informer. Finally, the Manual outlines the disclosure obligations of the Crown in relation to the in-custody informer and their evidence.

The Guy Paul Morin Commission took several years to complete and prior to its publication, Commissioner Kaufman assessed the Crown's 1997 Policy and provided

recommendations on how to improve it (Genua, 2006). In response to the recommendations, Crown amended the policy to include an In-Custody Informant Committee ("ICIC"). Frequently referred to as 'Kaufman Committees' the ICIC is a review body that analyses proposals from prosecutors who wish to use in-custody informants as witnesses during criminal trials ("FPT" Report, 2005). The ICIC is made up of a chairperson, and two or four other members including, a local Crown attorney, one or two "experienced" Crown counsel from "another region", and the Director of Crown Operations from the case's region ("FPT" Report, 2005, p. 98).[26] When the ICIC was first established it only reviewed evidence in relation to in-custody informers, as defined by the 1997 Manual, that were to be called at trial.

The Attorney General of Ontario updated their practice memorandum on jailhouse informants once again in 2005, with the changes coming into effect on March 31, 2006. This 16-page document expands on the 1997 and 1999 policies, using stronger language to caution Crown counsel contemplating using in-custody informers as witnesses. The introduction of the document states: "Experience has demonstrated that substantial risks to the proper administration of justice may arise from the use of in-custody informers as witnesses. This practice memorandum calls to the attention of Crown counsel the dangers in the use of in-custody informers" (Crown Policy Manual, 2005, p. 2). Like the 1997 Policy, the concern for Crown counsel when contemplating the use of these witnesses is a compelling public interest. During this process, the Crown is encouraged to work with police to obtain the information necessary to complete "an objective assessment of reliability" of the proposed informer and their evidence (Crown Policy Manual, 2005, p. 2).

[26] This means that, with the exception of the chairperson, the composition of the ICIC can change by case.

Determining whether there is compelling public interest encourages the Crown to request a record of any considerations promised or conferred by the police to the informer and consider what role these considerations may have in the reliability or truthfulness of the proposed evidence. However, the Policy also reminds counsel that the informant's reliability is not enhanced by a lack of benefits as it is difficult to know the exact motivations of the informer. The most significant factor when contemplating public interest is the seriousness of the alleged offence, but severity is not justifiable on its own. The policy considers that knowledge of the possibility of receiving benefits in exchange for testimony may motivate informers to fabricate information, therefore the policy discourages the "repeated use of in-custody informers" but does not ban them outright (Crown Policy Manual, 2005, p. 5). The public interest component is also reviewed in relation to the reliability of the in-custody informer and their evidence.

The 2005 Policy expands on the indicia of reliability considered in the 1997 Manual by encouraging counsel to look for confirming evidence independent of other jailhouse informants. The 2005 Manual recommends that Crown look for details in alleged confessions that would be difficult or impossible to gleam from sources other than the perpetrator of the crime. The confession should be considered in relation to external sources that could provide the information allegedly received from the accused. Crowns are to consider the informant's character, reputation for dishonesty and their medical and psychiatric history (if applicable). The Policy continues to encourage prosecutors to look for credible and independent confirming evidence that supports the informant's evidence. The update details the different considerations that may be promised or considered by Crown in exchange for the evidence. However, the Policy does not deem security measures that ensures the safety of the informant or their family as a

benefit but outlines many other possible inducements.[27] In contrast with the 1997 Policy, now new cases that rely on the unconfirmed evidence of a jailhouse informant must be approved by the ICIC and the Assistant Deputy Attorney General.

The 2005 Manual also provides guidelines for prosecutors using informers at preliminary inquiries, in addition to trial proceedings. It provides a list of documents that the Crown must provide to the Committee for their review of the informant's reliability. Thus, it is ultimately the ICIC that will decide whether or not an informant will be called to testify at trial. The Committee's decision will be based on the reliability of the informant's evidence, as presented by the Crown, which also considers the public interest in proceeding with the case using such evidence. While the 2005 Manual is more extensive than its 1997 counterpart, it is the purpose of the policy that is perhaps the most intriguing change. The latter memorandum's principle purpose "is to help prevent miscarriages of justice, which can occur when in-custody informers falsely implicate accused persons" (Crown Policy Manual, 2005, p. 16). For this research, the progression and changes to Ontario Crown policies and practices relating to the use of in-custody informers were considered in relation to the data itself, orienting the research techniques and informing how the data were to be coded.

Conclusion

A jailhouse informant is a specific subspecies of informant, defined by the way they receive information and the setting where it is received. Informants, and in-custody informers, have existed in the legal system for centuries, having frequently been a point of contention among those working in the system due to the problems associated with their use. The legal

[27] The inducements include: "bail; reduction or modification of sentence or charge; stay, withdrawal or dismissal of charges; financial assistance or reward; amelioration of current or future conditions of incarceration; any other leniency or benefit; the extension of any of the above to any person connected with the in-custody informer." (Crown Policy Manual, 2005, p. 3).

system has attempted to address in-custody informer testimony in court with the creation of evidentiary safeguards that address the potential frailties of such evidence.

Despite standards to bring attention to the problematic aspects of jailhouse confessions, jurors still tend to put great emphasis on informant evidence. The benefits that in-custody informants can exchange for testimony against an accused person may provide the motivation to manufacture evidence. Miscarriages of justice in Canada have highlighted the dangers associated with in-custody informant evidence. The literature describes jailhouse informants as manipulative and capable of deceiving police, prosecutors, judges and juries into believing their evidence in order to benefit themselves. Though the initial changes to Crown directives were significant, and the continued updates are laudable, Cunliffe and Edmond (2017) argue that the Canadian legal community has been slow to accept lessons emerging from wrongful conviction reports and literature; features of such injustices tend to reoccur in spite of the continued development of rules and guidelines designed to curtail them. The literature outlines the problems often associated with the use of in-custody informants, the majority of which has been done in relation to wrongful convictions. While miscarriages of justice have prompted significant policy changes to practices in the Ontario Crown's office, to the point where guidelines have been developed around the use of informants, to date little is known about the nature and extent of their use. That will be the focus of this thesis.

CHAPTER TWO: CONCEPTUAL FRAMEWORK

The objective of this chapter is to provide an overview of the conceptual framework used to interpret the data from this research. The chapter begins by reviewing the theory of social constructionism, first discussing the ontological and epistemological assumptions underlying constructivism. The research seeks to use a social constructionist framework to guide a content analysis of the data. Concepts related to social constructionism, including frames, claims, claims-makers, social problems and domains will then be discussed. The research orients the legal system as a domain that produces social constructs through legal text. From this perspective, jailhouse informants can be considered a social construct that continues to be defined and redefined by the way these witnesses are discussed in written judicial decisions. In recent years concerns have arisen regarding the role of jailhouse informants' testimony when it was implicated in several wrongful convictions. At the same time, wrongful convictions have undergone a claims-making campaign and can now be considered as a social problem. It will be argued that judges, at both the trial and appeal level, construct jailhouse informants through framing and reframing the issues commonly believed to be associated with their use through written judicial decisions.

In rendering court decisions, judges engage in an interpretive process of constantly defining and refining the meaning of, amongst other matters, jailhouse informants within the context of a criminal trial. Judges are influenced and thus interact with other forces within the legal domain, such as evidence and facts of a particular case, legal arguments raised by trial lawyers, previous trial and appellate court decisions, legislation, policies and jurisdiction. To date, no social constructionist inquiries have endeavoured to conduct this type of contextual analysis, however, similar research studies will be reviewed to demonstrate the viability of this

approach, followed by a more thorough examination of the applicability of such concepts to the current research study.

2.1 Constructivism and Social Constructionism

Widely considered to be the foundation of the social constructionist perspective, Berger and Luckmann's *The Social Construction of Reality* (1966) provided a framework for viewing language as a tool to negotiate meaning. The theory considers how social conditions change in different social contexts. Embedded within the constructivist paradigm is the epistemological assumption that the world is inherently social, constructed as a result of interaction and language (Houston, 2001).[28] The approach builds on the assumption that human beings construct social experiences and maintain social practices through interaction (Berger & Luckmann, 1966; Norris & Bonventre, 2015). This means that there is no one reality, but there can be a multitude of realities representing multiple truths. Time, space, history and culture are implicated in the processes through which we come to understand the world. Appreciating the context within which social phenomena occur determines how they will be understood, making collectivity and shared values, concerns and beliefs important in this perspective. Reality is viewed as "the result of an interactive process of learning and constructing language, symbols, meanings and definitions of situations through interacting with other people and through our individual and collective experiences" (Kraska, 2006, p. 179).

Constructivism and social constructionism differ with respect to where their emphasis lies. Both perspectives focus on interpretations and the meaning-making process;[29] however, it is

[28] The constructivist paradigm constitutes the theoretical underpinnings of what is now referred to as social constructionism.

[29] The meaning-making process is the way in which people interpret and assign meaning to their worlds. This process may be realized verbally, through interacting with others, or may be internal, through interacting with symbols and language.

how these interpretations occur that differentiates constructivism and social constructionism. For constructivists, interpretations occur at the individual level; the focus lies at the processes of creating personal meaning (Karataş-Özkan & Murphy, 2010). Social constructionism is more concerned with the role of institutions in the meaning-making process (Alvesson & Sköldberg, 2017). It is not institutions in the literal sense of the word, but specific social settings through which an individual learns how to interpret meaning in a specific way. Social constructionists believe that it is the process of socialization that restricts or encourages an individual to apply meaning. For example, how an individual interprets an interaction between him or herself and a co-worker will depend upon their field of work. An office place may prompt a different reaction or way of interpreting the interaction than if the conversation occurred between two employees working at a coffee shop. Social constructionists would purport that the interaction will implicitly be different because the two settings have different meanings attached to them.

The theoretical underpinnings of social constructionism demand an interactive, interpretive analysis of reality that recognizes construction as an ongoing socio-historical process (Pfadenhauer, 2019). Culture is also implicated in this process, as it provides the context for understanding language and discourse and helps to frame rhetoric (Best, 2017; Elder-Vass, 2012). Social conditions can only be understood insofar as they are able to relate to the sociocultural climate, thus history is an integral stimulus in the application of meaning (Smith, 2010; Gergen, 2001). Through this approach, meaning is realized interactionally as individuals navigate the social world (Best, 2013). Interactions occur at multiple levels: an individual can negotiate meaning within themselves, with another individual, a group of individuals, and/or a social structure. Social constructionism acknowledges that the social world is not free and distinct from individuals but considers reality to be socially constructed and built on individual

perspectives that inform how one sees the world (Best, 2013). Embedded within socio-historical and cultural assumptions, truth is a product of social processes. Truth is created through human interactions, occurring through individual interpretations and social experiences. Reality is constructed through symbolic systems, such as language, but is not limited to only symbols (Hruby, 2001). How an individual act is then influenced by multiple factors, or a range of structures, that compete to reinforce their meaning (Houston, 2001). There is no 'right' or 'wrong' way of interpreting meaning, rather something is *more* 'right' or *less* 'wrong' because reality and truth are shaped by context.

Berger and Luckmann's (1966) original conception of social constructionism emphasized the role of the individual and social facts, considering the roles of institutions or social structures as secondary (Alvesson & Sköldberg, 2017). As the framework developed, theorists became more concerned with the notion that social structures (e.g. institutions) may and can inform social facts. Some strains of social constructionism believe that experiences and observations are produced (and reproduced) by established underlying structures (Burr, 2015). Structures construct knowledge through discourse to impose constraints on human agency within an institution. This approach recognizes that "reality does not determine knowledge" rather it merely restricts how one interprets the world (Burr, 2015, p. 114). To understand a given phenomenon one must "explore the processes by which people [assign] meaning to their worlds" (Best, 2013, p. 239), while accounting for the function of structure in influencing social meaning (Houston, 2001). For this research project, this means that the interpretations presented in judicial decisions are ultimately constrained by the social structure in which they are produced, that is the legal system. Thus, the language and discourse presented in the data frame how relevant concepts, such as in-custody informants, are defined.

2.2 Knowledge and Discourse

The knowledge process is continuous as it relies on patterns and repetition to reinforce an individual's sense of connection so that the negotiation of meaning becomes practically intrinsic (Pfadenhauer, 2019; Young & Collin, 2004). The knowledge process is reliant on the interaction of language and discourse in the context of individual and collective interaction (Kraska, 2006; Sandu & Ponea, 2010). Thus, how knowledge is processed is contingent upon its historical and cultural context. The structures that underlie social life organize and categorize knowledge and ideas through language and discourse. Discourse emerges from "social entities that have causal relationships with non-discursive social and cognitive processes" (Ignatow, 2015, p. 104). Language is organized to facilitate a sense of collective understanding of a given social phenomenon, practice or structure (Karataş-Özkan & Murphy, 2010; Sandu & Ponea, 2010). Therefore, language interacts with and informs how individuals will act to negotiate meaning and experiences. During this process, rhetoric is strategically harnessed discourse that constrains or changes the meaning-making process (Best, 2017). In this sense, in-custody informants are defined through the language used to describe them. Therefore, jailhouse informants are a socially constructed entity, whose meaning is negotiated through the interpretive process of language that creates knowledge.

Language constructs knowledge and meaning through interactions between individuals and their surroundings. Language will be structured and reoriented in accordance with the social structure or domain in which communication occurs. The power of language, and the reality it conveys, is necessarily socio-historically and culturally embedded and will depend on context. Because language constructs knowledge, the way social phenomena are constructed will also orient how concepts associated with a given phenomenon are understood. How individuals act

emerges from a complex process of social negotiation, that process can differ depending on the group or structure that an individual is engaging with (Pfadenhauer, 2019). Burstein refers to the group or structure as "domains" that culturally construct and constrains how individuals act or process information within a given organization (1991, p. 328). For example, the legal system can be considered a domain because its actors will interact with others in the legal system in potentially different ways than how they would operate outside of that system. Concepts, or social constructs, may transcend meaning in different contexts or domains and operate independently of its domain of origin (Sandu & Ponea, 2010; Smith, 2010). In the legal system, the role of judges is to interpret laws and rules of governance to determine how to proceed in a given situation. Knowledge, concerning the judge's role in a legal proceeding, is highly specialized and relatively independent making it difficult for laypersons to understand its complexities, providing judges and other legal professions with the "power to define reality in a particular realm" (Koppl, 2010, p. 221).

2.3 The Legal System

The legal system and its actors have a near monopoly over defining crimes and criminality (Best, 2013). The law is viewed as a normative structure in that its claims have legitimate or "*de facto"* authority over constructions within its domain that are seldomly challenged (Bertea, 2009, p. 1). This authority arises out of a cultural understanding that recognizes police, lawyers and judges as having specialized training and knowledge. Part of the role of the legal system is then to maintain such normativity and the creation of jurisprudence is one way that the system attempts to maintain its authority (Bertea, 2009). For example, judges yield power because of their unique position that enables them to define legal concepts in a specific way through their written decisions. Judges, particularly those on the higher courts, are

tasked with defining and refining jurisprudence (common law), which in turn allows them to frame social meaning (Silber, 2013). Judges shape the law "within the social context in which they operate, constructing legal interpretations, rules, and regimes" (Malloy, 2010, p. 267). Legal texts, such as judicial decisions and statutes, are not publicly disseminated and are only accessible to those who have the necessary tools and skills to find and understand them (Edelman, Abraham, & Erlanger, 1992). A judge's ability to create the law (in the common law, judge-made law) is rarely questioned, perhaps due to a lack of understanding of the complexities of the legal system, or because of the socio-historically embedded legitimacy of the criminal justice system. In common-law jurisdictions, the law is typically not understood as emerging from its original sources such as codes and statutes, but through other sources that interpret case law to make it more digestible, including lawyers, judges and the media (Edelman, Abraham, & Erlanger, 1992; Silber, 2013). [30] Therefore, how a written decision defines a given construct will ultimately impact on how other sources negotiate the meanings the judiciary convey. As such, a judge's interpretation will usually be disseminated to the public through a process of interpretation by multiple sources.

From a social constructionist perspective, the legal system is a domain, whose influence goes beyond its sphere and permeates into other areas of social life. The legal system is a complex form of social interaction and negotiation with bureaucratic concerns over its capacity to influence the social world. It has its cultural context and actors engaging with that system recognize its unique features and adjust their behaviours and interpretations accordingly. The interaction between actors engaging with the legal system and the norms of the system work to reproduce the perceived legitimacy of the system. The legal system represents "the collective

[30] Framing the judge and lawyer as universal experts will be analyzed in more detail, *infra*.

character of interpretative construction" as its actors and organizations navigate the domain's discourse, language, symbols and knowledge (Sandu, 2010, p. 29).

Legal professionals, such as judges and lawyers, are designated experts of their domain and their knowledge constitutes universal expertise (Koppl, 2010). As experts, they can yield power in defining and redefining social phenomena deemed to be within the legal system's domain. Their specialized knowledge provides them with the ability to define and frame constructs. In writing judicial decisions judges contribute to the construction of the legal system. Case law or the formal writing of a judicial decision contributes to the common law as case law becomes part of precedent. Case law determines how legal practitioners interpret legal issues and frame legal arguments (Kirby, 2013). Case law both produces and is a product of the legal system, creating and redefining concepts within the law's domain.

The focus of this research project is to determine how a social construct, that is an in-custody informer, is being framed and how that may change over time. The development of law and legal principles arise from the work of judges and courts who write decisions that create a framework for lawyers who practise criminal law. Lawyers become bound by these decisions, but in every legal argument lawyers from both sides submit materials (judicial decisions) that justify their positions. Judges then consider both sides and rules regarding what they believe is more consistent with the common law, statute, rules, regulations and procedures as they see fit. Both lawyers and judges are bound to common law jurisprudence, but judges are tasked with considering many factors in rendering their decision.

Written judicial decisions are a form of legal texts that produce and reproduce meaning. Judicial decisions interpret legal arguments regarding the status and use of a social construct, in this case, jailhouse informant evidence, in a criminal trial. A judicial decision will frame in-

custody informants specifically concerning the legal argument raised by defence and Crown counsel. In the formulation of a judicial decision, judges must consider the legal arguments presented by the lawyers in each case, the facts of the case, and the common law status of jailhouse informants. In doing so, judges are bound by previous judgments (interpretations) of how to address jailhouse informants, as well as other legal principles that may be invoked. The judge interprets the facts of the case and discerns what is relevant (or legitimate) and what is not with respect to their decisions. A judge's role is outlined by the legal system and thus is constrained by their ability to interact with the case itself. Because case law is written and decided by judges, this means that jurisprudence is also determined by judges. Judges interpret the law and their decisions create meaning within the legal system. Every decision relies on previous decisions to a greater or lesser degree, while at the same time creating new ways of understanding and applying the law (Kirby, 2013). In this regard, judges are tasked with the construction of the meanings we assign to in-custody informants and how actors working within the legal domain interact with in-custody informers.

2.4 Social Problems

Traditionally, social constructionists trace the processes by which social phenomena develop and are thus perceived as social problems. Social problems have been defined as "activities of individuals or groups making assertions of grievances and claims with respect to some putative conditions" (Spector & Kitsuse, 2001, p. 75). To understand a social problem, one must explore the processes by which individuals allege, assert and claim what the nature of the problem is (Best, 2013). This thesis accepts that the occurrence of a wrongful conviction is a social problem. Often referred to as the Innocence Movement, the campaign to reorient society's understandings of erroneous convictions was precipitated by high-profile wrongful convictions

in North America in the 1990s, as a result of the advent of DNA technology (Godsey, 2017). During the process through which a social condition changes to be considered a social problem, individuals engage in what is commonly referred to as claims-making, or a claims-making campaign. The process of making a claim, or claims-making, is an information strategy conducted by social actors. Actors and/or organizations that make claims about a social phenomenon are "claims-makers" because they negotiate a "condition to reflect their cultural and structural circumstances" and attempt to encourage others to understand and adopt their "arguments and interpretations" (Best, 2013, p. 237). Claims-making is tactical and strategic and necessarily entails that no truth about a situation can exist; instead, a situation is assessed and defined by individuals interacting with a condition (Hagan, 2010).

Part of a social problems campaign requires claims-makers to make claims, assertions or grievances that frame how a particular 'problem' should be understood. To be deemed a social problem, claims about a given phenomenon are constructed and disseminated to the appropriate audiences. Claims are strategically informed statements made about a social condition to reorient the way people think about or interpret a situation or action. Claims can be verbal or visual, using "language, discourse, symbols, images and other information" to define a particular situation (Hagan, 2010, p. 560). They are framed strategically through discursive devices in an attempt to encourage the reinterpretation of a social condition.

As stated, this thesis conceptualizes wrongful convictions as a social problem, however, the concept of wrongful convictions is not necessarily new to academia (Leo, 2017). The 'Innocence Movement' is used to describe the process through which wrongful convictions have become recognized as being a social problem over the last 30 years. This shift in understanding is widely believed to be a product of technological advancements in DNA evidence testing that

saw a quick influx of exonerations in many jurisdictions that received significant media attention (Norris, 2017). In response to the media attention, many developments have occurred: various organizations have been created to help exonerate those claiming to be innocent; existing institutions have developed to address the problems associated with wrongful convictions; and new statutes and regulations have sought to minimize the occurrence of erroneous convictions (Zalman, 2017). The current project does not seek to problematize the concept of wrongful convictions as a social problem, nor will it attempt to go into the specific claims-making campaigns that resulted in the phenomenon being considered a social problem. Instead, under this conception, in-custody informers are viewed as an example of a contributing factor to wrongful convictions as a social problem. Therefore, wrongful convictions are problematized through viewing jailhouse informants as a social construct associated with a social problem.

2.5 Social Constructionist Approaches to Similar Research Studies

It is necessary to review how social constructionist approaches have been applied in different areas of research that relate to this research project to demonstrate the viability of this framework. Social constructionism is a multidisciplinary approach because its theoretical underpinnings are easily applicable to multiple fields of study. Derived from sociological studies, it has also been used in literary and communications research, postmodern approaches and psychology (Leeds-Hurwitz, 2016; Young & Collin, 2004). Social constructionism has been widely applied as a framework for studies about the processes of criminalization, including how legislation can target specific populations and criminally sanction their actions (Lindgren, 2005; Norris & Bonventre, 2015). The framework has been used to analyze the power dynamics of intersecting entities that construct understandings of criminality (Jenness, 2004). These studies have analyzed the role that the media (Jan, 2014; Lipschultz, 2007; Lombardo, 2010) and experts

play (Caldeira & Wright, 1988; Hagan, 2003; Hagan & Levin, 2004; McGuire & Caldeira, 1993) in constructing social phenomena. Inquiries have also reviewed the processes of institutions that produce public policies (Burstein, 1991; Burstein & Hirsh, 2007; Fischer, 2009; Hagan, 2010), legislation (Flores & Schachter, 2018; Gustafson, 2009) and constitutional law (Silber, 2013) and criminal law (Valcore, 2018). A review of these studies and others demonstrate that social constructionism is a viable framework for understanding how case law defines and negotiates meaning. Public policy research, undertaken using a social constructionist approach, has focused its attention on investigating how policy is created. In particular, these inquiries have analyzed the assumptions underlying claims made by interest groups, governments, and activists. Though this project is not reviewing public policy, research in this area reviews the creation of texts and its implications. The current research seeks to review legal texts to determine how constructions are being framed.

Best (2013) discusses the viability of using social problems theory within a constructionist framework. He reviews the processes through which a social phenomenon becomes a social problem with the creation of new public policy. He outlines the six stages of the process: claims-making, media coverage, public relations, policymaking, social problems work, and policy outcomes. Best sees claims-making as a form of rhetoric, whose arguments "involve grounds, warrants, and conclusions" (2013, p. 242). Here, Best (2013) is referring to the process of framing, which has traditionally been defined as the strategic presentation of certain themes, claims and subject matter, while choosing not to present others. Framing, through the processing of articulating grounds, warrants and conclusions, attempts to promote a certain way of understanding and thinking about a particular social condition. Language constructs meaning through its ability to frame concepts and social problems in a particular manner. Best asserts that

the "grounds for claims identify the nature of the problem" and "reflect the social context from which they emerge" (2013, p. 243).

Recently Best (2017) applied this framework to a study comparing two popular hazards, legal recreational marijuana and gun control, to demonstrate the power of rhetoric in constructing popular hazards. He emphasizes the importance of social context in shaping policy choices and the role of political resources and cultural constructions in evaluating popular hazards and their policies (Best, 2017). In comparing the academic literature for and against the popular hazards debates in the public sphere, Best (2017) found that publicly, rhetorical claims are made in more obvious ways but they both use compelling, albeit atypical stories to prove their points. The rhetoric surrounding popular hazards is selective and draws on long-standing idealizations about how the world is or ought to be, ensuring that claims can resonate culturally with their audiences. For the current research project, Best's works demonstrate the importance of language and rhetoric in creating meaning within an organization and larger society. This is important in the consideration of how the judiciary is framing in-custody informers.

Previous studies have also sought to understand the underlying processes of public policy. Burstein's (1991) analysis of public policy focused on policy domains as a component of the system of politics. For Burstein, domains "are cultural constructs around which organizations and individuals orient their actions" (1991, p. 328). Domains are characterized "by causal autonomy" as "policy outcomes are affected primarily by forces within each domain" (Burstein, 1991, p. 330). Policy decisions seldom consider judicial decision making or implementation, but that case law and legislation have the power to culturally redefine phenomenon and influence public policy in other ways. Case law and legislation operate as informational tools that may be used by interest groups attempting to redefine a social problem (Burstein & Hirsh, 2007). Public

policy is only effective if it can rationalize a situation effectively to its audiences. Hagan's (2010) analysis of international human rights claims-making purports that it is the construction of claims that determine the availability of employable strategies for solving social problems. For Fischer (2009), public policy is created through actors and organizations competing for social and political meaning that resonate with images shaping individual and public interests. It is the use of information strategies that define how a situation should be perceived (Hagan, 2010). Judges engage in a similar process as their written decisions inform how others will interpret particular concepts, both legally and socially.

The public policy literature conceives the social construction process as being intertwined with discursive power in some way, whether that be within a domain or outside of it. Burstein's (1991) approach provides a basis for understanding the underlying assumptions that allow for judicial decision making to operate in the way that it does. This research project does not seek to question the institutionalization of the legal system itself, in which case Fischer's (2009) emphasis on social meaning would be more valuable. Both Hagan (2010) and Fischer (2009) provide an important element that must be considered in the analysis: discourse is a tool that provides rationales for actions or inactions and can be strategically employed to justify decision-making processes. This research project focuses on the process of creating case law, that judges have the authority over the outcome of a legal argument, at the same time, however, this authority is constrained by legal precedent and jurisprudence. What is important is that jurisprudence constrains or influences how a judge is able to resolve a legal argument or questions raised during a criminal trial. Moreover, it is the variance (or lack thereof) in these decisions that are important. The significance arises out of the ability of judges to define and redefine social constructs through framing. In this regard, judicial decisions are one aspect of

social processes operating at a specific level of social life within the legal domain (Jenness, 2004).

Schauer (2005) argues that because the legal system is so deeply embedded in society, it is not fruitful for scholars to attempt to analyze how that came to be. Instead, he believes that inquiries should review how legal concepts are socially constructed and change over time to understand the legal system as a process of constant definition and redefinition. Criminal case law can then be viewed as a historical event that may be reconstructed in the process of negotiating and interpreting meaning. Endeavours to analyze how case law is constructed are not dissimilar from studies that analyze the construction of identities through narratives provided by the media (Grometstein, 2010; Jan, 2014). Valcore (2018) used media and public policies as indicators of the social construction of laws prohibiting homosexuality, without accounting for the roles of the courts and other entities that frame social understandings. While some studies interpret the social construction of criminalization through media discourse, it is equally viable to use the production of law itself (case law) to interpret the framing of an aspect of criminality.

Silber (2013) found that legal discourse can influence and alter how social constructs are perceived and defined. A judicial decision can provide a way of understanding a social construct when research evaluates the reality a decision is attempting to construct or frame. Similarly, Flores and Schatcher (2018) analyze how legal concepts are not only legal constructions, but also social productions. In all of these studies, the legislation creates the constraints of criminal law while judicial decisions, through case law, frame and redefine those laws in practice. These studies point out that constructionist endeavours to understand the law typically review matters of identity, such as sex, gender, race and ethnicity (Flores & Schatcher, 2018; Haney-López, 2006; Silber, 2013; Valcore, 2018). Such studies demonstrate that despite being a specific form

of rhetoric, interpretations of legal discourse are instructive ways of understanding sociocultural phenomena (Sandu, 2010). Instead, what is imperative for this research is that these studies provide a basis for assessing the social implications of a legal construct. In other words, the social world interacts with the legal domain and may guide interpretations and understandings of a social phenomenon through legal texts (Jenness, 2004). It may constrain interpretations of a phenomenon within the legal domain, with implications for social interactions outside of the legal system (Flores & Schatcher, 2018; Gustafson, 2009). Therefore, this project must not only uncover the ways in which in-custody informers are being framed, but also the way such constructions inform how we think about these witnesses more broadly.

Given that these previous studies demonstrate a framework for understanding the viability of the use of social constructionism in interpreting legal discourse, attention will now turn to the application of this framework for the current research study. The aim of social constructionist inquiries is to understand the processes, contextually analyzed through time and space, that produce a social phenomenon (Best, 2013). Inquiries review a "taken-for-granted-truth" and examine how knowledge is processed, paying particular attention to the ideology, interests and power underlying the production of such knowledge (Alvesson & Sköldberg, 2017, p. 29). Using social constructionism broadly as a conceptual framework allows for the consideration of "the role of power in shaping meaning and interpretation"; it recognizes human agency while appreciating the impact of social structures (Houston, 2001, p. 846).

As previously mentioned, this thesis conceptualizes wrongful convictions as a social problem and jailhouse informants are traditionally understood to be a potential cause of such erroneous convictions. The project will use social constructionism as a conceptual framework for understanding and interpreting written judicial decisions concerning in-custody informers. In this

capacity, jailhouse informers are a social construct, which only exists through an interpretive process of harnessing language strategically to create knowledge about these witnesses. The research project conceptualizes legal texts as cultural symbols capable of reflecting the interpretations of the law and the state of the legal system at a given time. In producing written decisions, judges are effectively framing the issues associated with in-custody informants, which ultimately define how these witnesses are perceived in practice.

CHAPTER THREE: METHODOLOGY

The central focus of this thesis is to examine how the judiciary frames in-custody informants in Ontario criminal cases, through written decisions rendered at both the trial and appellate level. These decisions were reviewed historically to establish links between changes in Crown policy and case law to understand the legal system's perceptions of in-custody informants through the written judicial decisions produced by actors in the system. After reviewing published judicial decisions from 1991 to 2017, 28 cases were selected to complete a content analysis to answer the research question: *how do trial judges and appellate courts frame in-custody informant evidence?* The research question was developed with the knowledge that before 1997, the Ontario Attorney General's office did not have codified guidelines determining when and how in-custody informants could be used in criminal trials. The development of guidelines for the use of in-custody informant testimony at trial by Crown counsel was a direct response to wrongful convictions that are widely believed to have occurred because of perjured in-custody informant testimony. By comparing the decisions made during the *Pre-Policy* era (before 1997) with its *Post-Policy* counterpart (after 1997) this thesis aims to contribute to developing the jailhouse informant literature to include a more robust understanding of these witnesses.

This research project acknowledges that within the period under study the Supreme Court of Canada ("SCC") rendered several decisions specifically addressing the use of in-custody informant witnesses as evidence in criminal trials.[31] Combined, the changes in Crown approaches and case law are thought to have altered the use of in-custody informants in criminal trials (Genua, 2006). To date, no research has reviewed cases where in-custody informants were

[31] See: *R. v. Brooks,* [2000] 1 S.C.R. 237; *R. v. Hurley,* [2010] S.C.J. No. 18 for SCC decisions specifically relating to the use of jailhouse informants. Also see: *R. v. Broyles,* [1991] 3 S.C.R. 595.

called to testify and compared these cases over time in a specific province. Research has yet to take into account the changes in Crown policy and case law to determine how these policies have potentially altered how this evidence is used during trial and how appellate courts have responded to this evidence on appeal.[32] Thus, the research is concerned with how these witnesses are framed by Ontario courts at different points in time. The nature of this research does not allow for any direct causal inferences to be drawn between judicial decision-making and changes in legal policies and case law. However, these cases were analyzed to narrow the gap that exists in criminological literature on in-custody informants as witnesses and their relationship with wrongful convictions and miscarriages of justice.

3.1 Case Selection Criteria

Twenty-eight Ontario criminal court cases were selected to answer the research question and are differentiated by the name on the legal citation.[33] Legal texts, specifically written judicial decisions at the trial and appellate level, were selected as data because of their unique relationship with the criminal justice system. Decisions, and the operations that occur in their creation, use specific legal terminology and follow specialized guidelines that dictate how decisions are to be administered. While some changes have occurred operationally through the development of case law, the structure of the law and legal system has maintained its integrity throughout the time-period of study. Judicial decisions, particularly at the appellate level, are

[32] Olena Beshley's master's thesis, *Jailhouse Informants in Canadian Criminal Courts* (2017), was the first Canadian study to review the use of in-custody informants in Canadian court cases. Beshley's thesis sought to find patterns amongst the individuals who became in-custody informants, in addition to understanding how appeal courts viewed their evidence. While this thesis is extremely instructive, comparing appeal court decisions from different provinces neglects the unique jurisdictional authority of each provincial appellate court. The project also did not consider the fact that each provincial Crown Attorney's office has their own guidelines and mandate governing the use of in-custody informants at criminal trials. Further, the thesis did not account for other changes, such as case law and public recognition of miscarriages of justice, throughout the time period under study that may have altered how the Courts construct in-custody informants.

[33] All but 3 of the 28 cases have more than one judicial decision available relating to the case.

extremely important tools in understanding available avenues for preparing and navigating a criminal trial. Thus, written judicial decisions at an earlier period of time may impact how future cases are executed.

To become part of this research study, cases needed to include the testimony of an in-custody informant at the trial level.[34] For the purpose of case selection, in-custody informers are those individuals "who [claim] to have received one or more statements from an accused person while both are in custody about offences that occurred outside the custodial institution" (Ministry of the Attorney General of Ontario, 2017, p. 58).[35] This definition comes directly from the Ontario Crown Manual and was used precisely for consistency; how the Crown frames in-custody informers has a direct impact on how the witness will be treated before their testimony is adduced as evidence at trial. This is done intentionally because part of the research objective is to determine whether the guidelines set out in the Crown Manual have altered the use of these witnesses. Thus, cases were only included if the witness had claimed to have been told or had heard the defendant confess to committing a crime that occurred outside of the institution.[36]

Cases that went to trial were considered for this study and the trials had to proceed on criminal charges to be included in the data. Moreover, an appeal decision or a sentencing decision had to be available to be included in the data set. No distinctions were made between factual or legal innocence or guilt during the case selection process. To advance academic knowledge of in-custody informers and develop a more thorough understanding of these types of

[34] In some instances, a defendant was tried multiple times, and it was unclear if an in-custody informant testified at each trial. Nonetheless, all trials were reviewed. The findings are delineated by the case named followed by a number in parenthesis to show at which trial the information is referencing.
[35] This definition does not include informants "who claim to have direct knowledge of an offence independent of the statements provided by the accused person" (Ministry of the Attorney General of Ontario, 2017, p. 58) or "police undercover operatives outside prisons" (Campbell, 2018, p. 128).
[36] This differentiates in-custody informers with prison informers, who provide information to institutional authorities about misconduct that occur within the prison.

witnesses, as many cases as possible had to be included, only including cases of factual or legal innocence could have limited the study significantly. Cases were not excluded if in-custody informants became or worked as police agents when the initial jailhouse testimony still met the criteria for definition. Cases were selected by jurisdiction and only matters tried in Ontario criminal courts were used. This limitation was necessary as each provincial appeal court renders decisions that are legally binding on matters in the rest of the province; other provinces have their own jurisdictions and are not bound by the Ontario Court of Appeal decisions ("ONCA").[37] Furthermore, each provincial Crown Attorney's office has developed guidelines on how and when in-custody informants can be used in their jurisdiction (Campbell, 2018).

3.2 Data Collection Process

Data was collected for this study to better understand the use of in-custody informants in Ontario criminal trials. As a consequence, the research project involved an analysis of written judicial decisions from Ontario criminal trials that included in-custody informant testimony to determine how courts have addressed such evidence since 1991.[38] To address the central question of this thesis, cases were selected using the LexisNexis Quick Law database. LexisNexis is a Canadian legal database that publishes judicial decisions from Canadian Courts from multiple levels (e.g. trial division, appellant courts, Supreme Court of Canada) and areas (e.g. criminal litigation, civil litigation) of the legal profession. It was determined that only Ontario cases would be used for two reasons. The first being that each province has developed its own Crown Policy Manuals, whose guidelines determine how and when in-custody informants will be permitted to testify at criminal trials. Secondly, each province has its own Appeals Court,

[37] However, Appellate Court decisions from different jurisdictions may be instructive at times to the rest of the country and other provinces (Greene et al., 1998).
[38] 1991 was the earliest case available (*R. v. Gray*), as such it became the starting point of the data collection process.

and the decisions of appeal courts are legally binding in that province. Thus, appellate decisions will inform how other cases will proceed in that province.[39]

The year indicated in the legal citation of the judicial decision represents the year in which the decision was rendered; for decisions at the trial level, the year provides the time frame for understanding the data. To understand the type of Crown policy that was under operation at the time of a given case, it was integral to look at the date of the verdict. Although criminal cases, particularly more serious cases, can take weeks, months, and in very extraordinary cases years to wind their way through the Courts, the date of verdict or sentencing was available in all but one case.[40] None of the cases provided a date for when the trial commenced, however, the date of the verdict provided a strong estimate for determining what Crown Policy would be in operation before the start of the trial. In fact, in the cases that seem to have occurred just prior to the development of the In-Custody Informant Committee ("ICIC"), commentary on judicial decisions made it clear the policy was being followed, providing information that allowed for accurate categorization of the data set.

The LexisNexis search included cases dating back to 1991, with offences occurring as early as May 1987, with the most recent case rendering a verdict in June of 2017. The searches were conducted multiple times, with the final search completed on November 15, 2019. The terms "jailhouse informant," "in-custody informant," "in-custody informer," and "jailhouse confession" were entered into the LexisNexis search bar; results were then narrowed by jurisdiction to only include Ontario court cases. Combined, these searches yielded 95 unique

[39] Put plainly, every in-custody informant case that is brought to the Ontario Court of Appeal will inform lawyers working on similar cases how those cases should be run. Thus, if the Ontario Court of Appeal decides that every time an in-custody informant testify the judge must provide a caution to the jury, then all other cases must do the same. However, if the case is heard in another province, then it will not follow the same rules. At the same time, all provinces and territories are under the ultimate jurisdiction of the Supreme Court of Canada.

[40] Fortunately, this case was that of *R. v. Simmons,* [1998] O.J. No. 152 [*Simmons*], whose Court of Appeal decision was rendered in 1991, making it clear that Crown policies on in-custody informants had not yet been developed.

cases (consolidated from 365 duplicates). The "jailhouse informant" search term yielded 70 unique cases, of which 25 were selected to form the original data set. All other search terms showed cases that also appeared in the "jailhouse informant" search, except for six cases. The "in-custody informant" search included two new cases, both of which were later excluded as they did not meet the case selection criteria. The "in-custody informer" search found one new case that did not meet the selection criteria. Finally, "jailhouse confession" yielded three new cases, one of which (*R. v. Warner*) met the case selection criteria to be included in the data set. Two additional cases, *R. v. Gray* and *R. v. Simmons,* were found for a total of 28 cases.[41] When available, LexisNexis has a "case history" link which provides all of the other decisions relating to the case. For every case that the relevant search term was found and determined to fit the strict in-custody informant definition the rest of the case's 'history' would then be reviewed. This helped to provide a more thorough understanding of the case, and at times provided additional information on the in-custody informant witness.

For each search term, every unique case was reviewed to see where and how the search term arose in the legal decision. Seventeen cases were excluded because jailhouse informants were not used. In these cases, witnesses were either police or confidential informants, an accomplice, co-accused, or an unsavoury witness for other reasons. Seven cases were excluded because the cases involved civil litigation, extradition hearings or custody appeals and no information on the criminal trials were available. Two of the 10 cases were criminal preliminary hearings; they were excluded because the Crown Policy on in-custody informants is different for preliminary hearings and the evidence standards are lower than in criminal trials. Eight cases were excluded because the term was used in passing, by either referencing case law that

[41] In written judicial decisions, a section of the decision includes a discussion on relevant case law relating to the ruling. It was in those sections of decisions already included in the data set that the two cases were found.

discussed jailhouse informants or used jailhouse informants as an example. In one of the eight cases, ONCA simply stated that no jailhouse informants testified. Finally, the case of *R. v. King,* [2019] OJ No 377, was excluded from the official data set because it related to the perjury charge of an in-custody informant, rather than a case where one was used but was later reviewed for other purposes.[42]

3.3 Content Analysis

A qualitative content analysis was chosen as a research technique because its principles are consistent with the underlying assumptions of this research project's conceptual framework of social constructionism. The research project incorporated some numerical techniques, such as comparisons and percentages to examine the total number of cases, the judicial decisions made at the trial level, the number of successful and unsuccessful appeals and the grounds of appeal sought. The research needed to consider numerical comparisons before undertaking any qualitative analysis to provide a general basis for the trends and patterns that would be discussed in the analysis. Other social constructionist endeavours have found similar approaches to be quite useful in uncovering patterns, meanings, themes and processes underlying the texts of a research study (Best, 2013; Burman, 2010). Content analysis is a multi-faceted unobtrusive approach to systemically code and analyze qualitative data to uncover a text's "manifest" and "latent" content (Bernard & Ryan, 2010; van den Hoonaard, 2014, p. 121). Where manifest content reviews the "words, phrases, and images" that physically appear in the text being studied, latent content is the interpretation of their patterns (Schulenberg, 2016, p. 239). Paying attention to both manifest and latent content allows the researcher to review parts of the data that are

[42] This case relates to the perjury conviction of Mr. Albert King. Mr. King testified as an in-custody informant at a preliminary hearing that occurred in August 2016. This case was reviewed because Mr. King was also an in-custody informant for the *Brooks* case, which is included in the data set. It also seems to be the first recorded perjury conviction of an in-custody informant in Ontario, which makes the case particularly important for analysis.

immediately observable, while also uncovering implicit meanings embedded within the data. The analysis provides a basis for considering the underlying symbolism and structural meanings of patterns and trends embedded within the physical data.

A qualitative approach to content analysis allows the researcher to emphasize language and rhetoric, by identifying themes found in the data (Bellotti, 2015). In particular, it provides a basis for analyzing how the (legal) text communicates social constructions (Burman, 2010). Content analyses can be used to critically examine the constructions and interpretations of interactions operating and competing within the criminal justice system.[43] Just as media studies using social constructionism review how language is used to negotiate societal norms and beliefs (Burman, 2010), legal rhetoric can be seen as undergoing a similar process whereby legal professionals operating within the criminal justice system use specific language to communicate their codes, norms and values.

Content analysis allows for both inductive and deductive approaches, in which coding categories can emerge from the data itself but may also be predetermined by the researcher (Schulenberg, 2016). This research project began using an inductive approach, however after certain concepts emerged and a conceptual framework was selected, a deductive approach was used to code the data. Coding is the systematic process of sorting and labelling specific words, terms, and concepts in the data (O'Reilly, 2009). The coding process began with a general reading of all judicial decisions available from each case; any reference to the in-custody informer was highlighted. After the first reading, a coding sheet was created to maintain the case citation with a summary of the case, the type of judicial decision, the relevant dates, the trial and appeal decisions, grounds of appeal and comments about evidence used in the case. The second

[43] As mentioned in Chapter Two: Theoretical Framework, this research project conceptualizes the legal system as a sphere or domain of influence. Its actors, legal professionals, operate within the constraints of the legal system.

reading was used to confirm the relevance of the highlighted portions and each section was then transferred to a second coding sheet that divided the highlighted portions into judicial commentary regarding the in-custody informer's evidence, judicial comments regarding the state of the case law or legislation relating to informant testimony, statements regarding other evidence adduced at trial and any mention of attempts to exclude or limit the use of in-custody informant evidence. Themes and patterns were colour coded to gain a more thorough understanding of how the justices were defining in-custody informants. This was done by assessing the justice's tone or portrayal of the informant's evidence. For example, negative commentary, stemming from negative comments (e.g. the informant has "a general reputation for dishonesty") about the informant's character was underlined in red pen, whereas positive comments (e.g. the informant has "really turned her life around") was underscored in blue.

The information from the second table was used to create a third coding sheet relating to the jailhouse informants, the patterns that arose in judicial discussions about the informant guided this coding sheet. The codes included the name and age of the informant, history of the informant (subcategorized by criminal history, informing history, psychiatric history, and substance abuse history), the benefits sought, offered and received, the reasons provided for informing, the time-lapsed before providing the information to the police and the nature of the informant's relationship with the accused. The second coding sheet was then reviewed again to review trends and insights and make links between the cases. It was during this process that the researcher realized that accomplice evidence was being used in cases where in-custody informers were also being used. This prompted a final reading of all cases to investigate the use of accomplice evidence further and to confirm the patterns and themes identified during the coding process.

Following the rigorous coding process, the data, written judicial decisions, were separated into two periods: those occurring prior to jailhouse informants being deemed a potential cause of wrongful convictions and those following this period. The first era occurred before November 13, 1997; this time-period was selected because the Crown Policy Manual in Ontario did not have codified guidelines governing the use of in-custody informers as witnesses at trial before the 1997 date. Thus, cases that had trial decisions listed up until 1997 would not have been affected by official Crown policies. This era will be referred to as *Pre-Policy Section;* 15 cases selected for this study make up this first era.[44] The second era is from 1997 to 2017, which corresponds to when the Crown Policy Manual for Ontario effectively enforced a strategy that restricted the use of in-custody informants.[45] The era between 1997 and 2017 will be referred to as the *Post-Policy Section* and includes 13 cases.

There were two updates to the Crown Policy on in-custody informants that occurred in the *Post-Policy Section* that bare mentioning. In 1999, the Attorney General of Ontario implemented the ICIC to review the proposed evidence and history of informers giving evidence prior to testifying at trial ("FPT" Report, 2005).[46] Because no cases in the data set were tried between the creation of the Crown Policy in 1997 and the implementation of the ICIC in 1999, there was no reason to believe that this would limit the impact of the findings. In 2005, the Crown Policy Manual created an Informer Registry to keep track of ICIC decisions and maintain information on informants for trial proceedings.[47] The introduction of the Registry did not alter

[44] In one of these cases, *R. v. Babinski,* [2005] O.J. No. 138 [*Babinski* 1], the defendant's third trial occurred following the creation of the Crown policy on in-custody informants. This case was still included in the *Pre-Policy Section* because the third trial did not see the use of a jailhouse informant and therefore was not consulted as part of the data analysis.

[45] See *Appendix A* for a copy of the 1997 Crown Policy Manual on in-custody informants.

[46] The ICIC was created in June 1998 but did not officially begin hearing cases until January 1, 1999 ("FPT" Report, 2005).

[47] See *Appendix B* for a copy of the 2005 Crown Policy Manual on in-custody informants. The Crown policy was written in 2005 and brought into force March 2006.

the Crown's mandate on jailhouse informants, nor did it change the way the ICIC investigated proposed informants.[48] However, the 2005 Policy went into more detail and directed the Crown's attention to how miscarriages of justice can occur when jailhouse informants falsely incriminate accused persons.[49] Because the data suggest that there are no demonstrable differences between the cases tried between the introduction of the Policy and the expansion of the Policy, this is not considered to have affected how jailhouse informants are employed.[50]

[48] There is reason to believe that the ICIC always maintained a registry internally, but the 2005 Mandate codified that this registry would now be made accessible to Crown attorneys and defence counsel ("FPT" Report, 2011).
[49] See Chapter Three: Methodology for a review of the pertinent changes to the Crown Policy Manual from 2005.
[50] Initially, the data were separated between pre-1997, 1997 to 2005, and 2006 to 2017 to account for the change in Crown policy in 2005. Although the data are an estimate, there were limited changes observed in the coding patterns between 1997 and 2005 and 2006 and 2017. As such, the data were combined to form a pre-policy and a post-policy analysis.

CHAPTER FOUR: RESULTS AND ANALYSIS

To answer the research question posed in Chapter Three: Methodology (p. 50), a content analysis using a social constructionist framework was conducted for this study of 28 Ontario criminal court cases involving in-custody informant evidence.[51] This section will review the major findings of this research project, while also highlighting smaller areas of contention. Specifically, the majority of this analysis will present findings relatively consistent with academic knowledge regarding in-custody informers. Although this research is consistent with traditional academic studies about this type of evidence and wrongful convictions, the data in this study cannot draw any conclusions about miscarriages of justice.

4.1 General Case Demographics

The date the offence was committed was available in 21 unique cases, with crimes occurring as early as May 1987, spanning to July 2013.[52] The verdict or sentencing date was also available in 21 cases, ranging from June 28, 1991, to June 22, 2017. Of the 28 cases, 15 verdicts were rendered before November 1997, 13 were decided between 1998 and 2017. These cases span over 40 defendants/appellants and 36 in-custody informants.[53] An additional seven accomplices testified against their would-be co-defendants. In only two of these matters, *R. v. Chenier* and *R. v. Baltrusaitis,* were civil actions brought forth in direct response to the criminal proceedings.[54] The remainder of the more significant findings will be discussed below.

[51] Given that this was a qualitative content analysis, the findings presented in this chapter are not intended to be statements asserting statistical significance.
[52] While there was no discernible beginning time period, *per se*, for the pre-policy era 1987 is used as an estimated marker of the beginning of the *Pre-Policy Section*. The earliest recorded crime where the use of jailhouse informants was mentioned in the decision was in May of 1987, so 1987 was chosen as the approximate starting date.
[53] In *R. v. White,* [2014] O.J. No. 273 [*White*] one of the co-accused was tried separately as a youth and therefore was not included in the offender count.
[54] While interesting the civil matters are not relevant for the purposes of this thesis.

The comparative analysis revealed three patterns in the use of jailhouse informant evidence in Ontario criminal courts, as evidenced through reported decisions for the designated time-period. The first part of the analysis will review how the data conform to what has been found in the literature regarding in-custody informers, including reference to the types of cases where such evidence is most commonly used and the similarities among informants themselves. The second part of the analysis will review some changes in how legal actors are using jailhouse informant evidence. Specifically, data in the *Post-Policy Section* shows that judges are more likely to make the connection between in-custody informers and wrongful convictions, whereas before the development of policy there does not seem to be a recognition of this relationship. The final section of the analysis will review a new finding in relation to the cases that use in-custody informants, concerning the emerging role of accomplice testimony.

4.2 In-Custody Informers: Benefits and History

Overall, the literature portrays a specific image of jailhouse informants that highlights the problems often associated with their use. The literature often describes in-custody informants as unreliable witnesses citing their criminal past, their histories of informing on other criminalized individuals and the belief that they are motivated by self-interest (Botting, 2010; Dodds, 2008). Furthermore, the possibility of inducements (e.g., the fact that informants gain a benefit for providing testimony about a given defendant) is frequently cited as being the motivating factor for jailhouse informants to provide evidence of an alleged confession (Campbell, 2018). While the data were unable to reveal the exact motivations of the jailhouse informants in the majority of cases, some examples illustrate that the courts at times would highlight questionable motivations:

> "*…his motivation for telling the authorities about the appellant and for cooperating with them throughout was a product of his own self-interest*" (*R. v. Baltrusaitis,* [2002] O.J. No. 464 [*Baltrusaitis* 1]*,* para. 41).

> "*Blackwood was a jailhouse informant with an established history of dishonesty and a clear motive to lie*" (*R. v. McFarlane,* [2012] O.J. No. 2374 [*McFarlane* 1], para. 2).
>
> "*It is clear Mr. K's motivation at the outset was to obtain an advantage for himself in exchange for providing evidence against J.F. More particularly, he did not want to do any further jail time for charges pending against him*" (*R. v. J.F.,* [2017] O.J. No. 2655 [*J.F.*], para. 34).

Their comments seem to echo concerns brought forth by scholars that in-custody informants are often motivated by self-interest (Campbell, 2018; Dufraimont, 2008). However, there were some instances where judges stated that despite the seemingly questionable motivations of the in-custody informer, the evidence presented was compelling enough that the informant's motivations were not as relevant. For example, in the case of *R. v. Rodney* [2016] O.J. No 6593 [*Rodney*], the informant, Joseph Mariano had originally taken notes of the defendants' conversations in the hopes of providing the information to the police in exchange for leniency. Mr. Mariano was released from custody, the notes were retrieved from authorities, and he received a subpoena compelling him to testify at the trial of Rodney and his co-accused. While the judge in *Rodney* discussed numerous reasons why Mr. Mariano's evidence should be approached with caution, the judge acknowledged that it would be next to impossible for Mr. Mariano to have received the information from anyone but the accused due to the nature of the evidence provided.

The data also revealed the criminal history of jailhouse informants in most of the cases reviewed for this analysis. In 21 of the studied cases the Courts made specific reference to the in-custody informant's criminal history.[55] Most commonly, the Courts referred to their criminal

[55] *R. v. Gray,* [1991] O.J. No. 1084 [*Gray*]; *R. v. Wells,* [2001] O.J. No. 81 [*Wells*]; *R. v. Brooks,* [1998] O.J. No. 3913 [*Brooks*]; *R. v. Babinski,* 44 O.R. (3d) 695 [1999] O.J. No. 1407 [*Babinski* 3]; *R. v. Warner,* [1994] O.J. No. 2658 [*Warner*]; *R. v. Stark,* [2000] O.J. No, 1406 [*Stark*]; *R. v. Dhillon,* [2002] O.J. No. 2775 [*Dhillon*]; *R. v.*

history as being "extensive" or "lengthy" [56] and particularly made note of when histories included crimes of "dishonesty".[57] Fourteen informants in 13 cases had been an informant in some capacity *prior* to testifying at the current trial;[58] seven of the 14 informants also attempted to receive benefits in exchange for their information.[59] The following are some examples:

> *"…fearful that he would be 'hammered' on the offences he was facing because of their nature and his prior record, Doe asked his lawyer to speak to the Crown with a view to obtaining a reduction in sentence in exchange for information"* (*Baltrusaitis* 1, para. 43).

> *"It was the evidence of Detective Sergeant Rolf Prisor that when he first spoke to Mr. X in response to a request by another inmate, D.F. Mr. X wanted to be released from custody on charges he faced in Peel Region, as well from an [text deleted by LexisNexis Canada]. Mr. X also wanted to be sent to OCI for a treatment program for alcohol abuse"* (*R. v. Fatima,* [2006] O.J. No. 3634 [*Fatima 2*], para. 19).

Of the informants that sought out some sort of benefit in exchange for their information, eight received such benefits.[60] Benefits included: early release from custody,[61] withdrawal of pending charges,[62] transfers to different institutions,[63] conjugal visits with their significant other,[64] money,[65] and entry into the Witness Protection Program.[66]

Baltrusaitis, [1996] O.J. No. 1697 [*Baltrusaitis* 2]; *R. v. Tavenor,* [2001] OJ No. 207 [*Tavenor*]; *R. v. Trudel,* [2004] O.J. No. 248 [*Trudel*]; *R. v. Snow,* [2004] O.J. No. 4309 [*Snow*]; *R. v. Simmons,* [1998] O.J. No. 152 [*Simmons*]; *R. v. Mallory,* [2007] O.J. No. 236 [*Mallory* 1]; *R. v. Campbell,* [2005] OJ No. 4669 [*Campbell*]; *R. v. Baptiste,* [2000] OJ No 1639 [*Baptiste* 1]; *Dell*; *Fatima* 2; *R. v. Bailey,* [2016] O.J. No. 3508 [*Bailey*]; *Rodney*; *J.F; R. v. Chenier,* [2001] O.J. No. 1279 [*Chenier* 3].

[56] *J.F.*; *Warner*; *Mallory* 1; *Rodney*; *Snow; Trudel*; *Tavenor*; *R. v. Abbey,* [2009] O.J. No. 3534 [*Abbey* 2]; *Dhillon*; *Baltrusaitis* 2; *R. v. Chenier,* [2006] O.J. No, 489 [*Chenier* 2]; *Fatima* 2.

[57] *J.F.*; *R. v. McFarlane,* [2006] O.J. No. 4859 [*McFarlane* 2]; *Fatima* 2; *Campbell*; *Simmons*; *Baltrusaitis* 1; *Dhillon*; *Stark*; *Babinski* 3; *Tavenor*; *Rodney.*

[58] *Fatima* 2*, R. v. Baptiste,* [2000] O.J. No 1641 [*Baptiste* 3]*, Mallory* 1; *Simmons*; *R. v. Pilgrim,* [1997] O.J. No. 6070 [*Pilgrim* 2]; *Snow*; *Tavenor*; *Dhillon*; *Stark*; *Babinski* 3; *Brooks*; *Gray*; *McFarlane* 2.

[59] This number is not definitive as it is possible that informants in other cases received a benefit, but it was not referred to by the courts in the written decisions.

[60] *R. v. McInnis,* [1999] O.J. No. 1353 [*McInnis*]; *Wells*; *Stark*; *Mallory* 1; *Trudel*; *Babinski* 3; *Baltrusaitis* 2; *R. v. Baptiste,* [2000] O.J. No. 1642 [*Baptiste* 4].

[61] *Wells*; *Babinski* 3; *Stark.*

[62] *Stark.*

[63] *McInnis.*

[64] *McInnis.*

[65] *Baltrusaitis* 2*; Mallory* 1.

[66] *Babinski* 3*; Trudel*; *Mallory* 1; *Baptiste* 4.

Table 1 illustrates that it was more likely that these witnesses would have a history of being some type of informant and receive benefits in exchange for their testimony in the *Pre-Policy* era when compared to its *Post-Policy* counterpart. Even though in the *Post-Policy* era it was less likely that informants would receive benefits, throughout the period under study more often than not informants did not it receive inducements in exchange for their testimony. The use of informants who have a reputation for dishonesty[67] remained relatively consistent throughout the period of study.

Table 1: Comparisons Among Informant History and Benefits, by Era

Era	Informing history	Reputation for dishonesty	Benefits received
Pre-Policy	83%	43%	75%
Post-Policy	17%	57%	25%

One way to understand these changes over time (e.g., pre- and post-policy informants continue to have histories of dishonesty, but are less likely to receive benefits for testimony at this juncture) is by considering the process through which Crown Attorneys must implement and employ the new policy. During this process, prosecutors must interpret the policy and negotiate its meaning in practice, which leads to an interaction between the policy and those tasked with executing its purpose. It seems that through this process, prosecutors have effectively defined what they perceived to be the issues associated with in-custody informers. As evident by the reduction in the use of informers with a history of informing, the data suggest that even though the Policy does not prevent the use of informants with histories of informing, it seems that their use has been removed.

[67] Reputation for dishonesty was operationalized to include those individuals with criminal histories for crimes of dishonesty (e.g. fraud convictions) or those believed to have

4.3 In-Custody Informers as Unsavoury Witnesses

Canadian literature has widely focused on the use of the *Vetrovec* warning for curtailing the problems associated with jailhouse informant evidence (Campbell, 2018; Skurka, 2002). As discussed in Chapter Two, a *Vetrovec* warning is required when a witness with an unsavoury character and/or background testifies at a trial. In her M.A. thesis, Beshley (2017) found that 51% of Appellate decisions reviewed made reference to a deficiency in the *Vetrovec* caution provided at the trial level. In this study, 45% (13 of 29) of the appellate decisions raised concerns about the *Vetrovec* warning provided by the trial judge in relation to evidence of an unsavoury witness as one of the grounds of appeal.[68]

The *Vetrovec* caution is considered to be a proper evidentiary safeguard against the inappropriate acceptance of discreditable or unreliable in-custody informant testimony (Dufraimont, 2008). Many cases have been appealed based on problems with the *Vetrovec* warning suggesting that appellate courts accept that in-custody informants can be unreliable and may lack credibility. Even though the trial judge may not have provided an adequate *Vetrovec* warning to the jury, the fact that one was given, *per se*, implies that the evidence of in-custody informants is considered to require special scrutiny in the *Post-Policy* era. Some academics argue that *Vetrovec* warnings may actually be counter-productive and boosts the perceived credibility and reliability of problematic evidence (Roach, 2007; Skurka, 2002). Even though judges are framing jailhouse informants as potentially suspect through the employment of *Vetrovec* warnings, it may be that their definitions are not properly understood by the jury. This discrepancy may be a possible explanation for the continued use of in-custody informers because

[68] *Dhillon; Wells; Brooks; Babinski* 2; *Baltrusaitis* 1; *Simmons; Trudel; Babinski* 3; *Mallory* 1; *Campbell; Chenier* 2; *McFarlane* 1; *Bailey.*

even though their evidence may be connected to wrongful convictions, that relationship is not communicated to the jury directly.

In two cases the trial judge had neglected to provide a *Vetrovec* caution to the jury about the informant evidence and the Court of Appeal for Ontario found that in both cases the trial judge ought to have warned the jury about it.[69] In the remaining 11 cases *Vetrovec* warnings were provided, but considered to be inadequate in some way by the appellant. In several cases in the *Pre-Policy Section* ONCA discussed the deficiencies relating to the *Vetrovec* warning provided by the trial judge. The following are some examples:

> *"This is one of the rare cases in which a Vetrovec warning was mandatory"* (*Simmons,* para. 1).

> *"In some cases the failure to draw a jury's attention to evidence which could support an unsavoury witness's testimony may not be a serious error. In this case, however, where the witness's testimony, if accepted, could amount to important circumstantial evidence, it seems to us that fairness to the prosecution required that the trial judge draw to the attention of the jury 'by way of illustration an item or items of evidence which they may draw upon as confirmation of the witness's evidence'. In the particular circumstances of this case it is our opinion that the failure to do so constituted an error in law"* **(***Babinski* 2, p. 190).

> *"In the present case, it was entirely appropriate for the trial judge to give a Vetrovec warning and to suggest to the jury that, in the absence of corroborating evidence, they should be reluctant to accept the evidence of Ferguson. The trial judge should then point out some, if not all, of the potentially corroborative evidence"* (*Warner,* para. 61).

In the *Post-Policy Section* for this research there were no appeals that suggested that the trial judge had *not* provided some sort of *Vetrovec* caution to the jury about the in-custody informant's evidence. Further, in the *Post-Policy Section* it was found that judges, in absence of

[69] *Wells; Brooks.*

the jury (during *voir dire*), made comments about their intention to warn the jury, using *Vetrovec*, about the evidence of the in-custody informant.[70] The following are some examples of the comments made by trial judges where the jury was not present:

> *"The currency in which Mr. X trades is deceit. He is a person with a substantial and richly detailed history of dishonesty, a witness whose evidence, if given at trial, would attract a Vetrovec caution"* (*Fatima* 2, para. 288).
>
> *"Blackwood is a person of disreputable character; he is a police informant and has a criminal past. There will obviously have to be a strong Vetrovec warning in connection with his evidence"* (*McFarlane* 2, para. 42).
>
> *"The evidence of Mr. WSL will be admitted, subject to the usual warnings to the jury with respect to the frailties inherent in the evidence of jailhouse informer witnesses"* (*Baptiste* 3, para. 58).

These comments show that judges are framing in-custody informants as unsavoury witnesses in the *Post-Policy Section.* By contrast, no such comments were found in the *Pre-Policy Section* by judges, absent the jury. None of the cases in the *Post-Policy Section* contained comments by ONCA about the lack of a *Vetrovec* warning, whereas in the *Pre-Policy Section* there was commentary, similar to the examples above, that suggest no cautions were provided. Although inferences about the differences between judicial warnings in the *Pre-* and *Post-Policy Sections* cannot be directly made, the examples from both sections demonstrate that the employment of the *Vetrovec* caution towards jailhouse informants may be different in the two eras. Specifically, the comments by judges in the *Post-Policy Section* suggest a greater willingness to provide the jury with *Vetrovec* instructions relating to the use they can make of the in-custody informer's

[70] Sometimes during a criminal trial, a legal issue will arise that requires the judge to make a decision as to how the trial should proceed. Commonly referred to as a *voir dire*, judges are asked by the lawyers representing either party to make a ruling about a piece of evidence or a legal procedure in the absence of a jury. The judge's decision may prevent or limit certain evidence from going to the jury. The decision will not be heard by the jury, but the results will be shared with the Crown and the defence.

evidence. While the requirements as to what constitutes a fair and proper *Vetrovec* warning has changed slightly over the years under study, the data demonstrate that trial judges are more likely to provide juries with cautions about the potential limitations in the jailhouse informant's evidence in the *Post-Policy* era.[71]

The tendency of trial judges to bring extra attention to the jailhouse informant's evidence is a by-product of a common law understanding that witnesses who have something to gain by providing evidence against another individual should be approached with caution. However, in the case of *R. v. Brooks,* ONCA provides a seemingly straightforward rationale for the use of *Vetrovec* warnings in relation to in-custody informant testimony:

> *"What underlies the need for a Vetrovec warning is the concern that without it a jury may not appreciate how unreliable jailhouse informant evidence can be. Without an appropriate caution jurors may be far too willing to accept the testimony of jailhouse informants at face value..."* (*Brooks,* para. 118).

While the Supreme Court of Canada ("SCC") ultimately overturned this decision, this comment suggests that concerns over the in-custody informant's reliability necessitate the issuing of the *Vetrovec* warning.[72] These discrepancies are particularly interesting, given that only two of three factors commonly associated with reliability concerns seem to have changed in the *Post-Policy Section*,[73] but the use of *Vetrovec* cautions in jailhouse informant cases have increased, despite no recent case law requirement to provide such warnings. At the same time, one other change has occurred in the *Post-Policy* era that seems to be the most likely cause of the increasing use of *Vetrovec* warnings by trial judges. There appears to be a greater acceptance by

[71] See Chapter One: Review of the Literature for a review of the development of the *Vetrovec* caution as it pertains to in-custody informant evidence.
[72] For more on the Supreme Court of Canada's rulings in *Brooks,* see Chapter One: Review of the Literature.
[73] These three factors are not the only factors that determine the reliability of an unsavoury witness. They are being considered here because they were the most common factors found in the data set.

judges that reliance on jailhouse informant testimony is more clearly associated with wrongful convictions. This relationship between in-custody informers and wrongful convictions seems to be a potential source for the continual and increasing use of the *Vetrovec* caution. While the common law stipulates that the testimony of witnesses of unsavoury character or those with criminal pasts *may* warrant a *Vetrovec* caution from the trial judge to the jury, in cases where in-custody informants testify, it seems that these warnings have become virtually ubiquitous in Ontario criminal courts.

4.4 In-Custody Informer Evidence and Wrongful Convictions

While none of the cases in this study resulted in the wrongful conviction and/or exoneration of an accused persons,[74] commentary of the judges at both the trial and appellate levels suggest that the legal system has accepted that in some circumstances, jailhouse informant testimony can cause wrongful convictions. Because the literature on jailhouse informants widely revolves around their connection with wrongful convictions (Campbell 2018; Genua, 2006), it is no wonder that the Courts, in this modern era, would also make this connection. However, the relationship between in-custody informants and wrongful convictions was not always apparent, and prior to the introduction of Crown Policy this connection was not recognized. This is based on the fact that no cases in the *Pre-Policy Section* even mentioned the words 'wrongful conviction' or 'miscarriage of justice'. Although the focus of this study was on the relationship between in-custody informant evidence and the development of Crown Policy relating to their use in Ontario, it became clear from the data that the conclusions and cautions from two Commissions of Inquiry around two infamous wrongful convictions (that of Guy Paul Morin in

[74] At this point in time, there is no public record of any of these cases formally being considered wrongful convictions and ONCA have not exonerated any of the accused based on these convictions. Due to the length of time it can take for wrongful convictions to be recognized, it is not impossible that eventually some of these convictions may be found to be erroneous.

1998 and Thomas Sophonow in 2001) were important considerations for judges when discussing in-custody informant evidence.[75] Specifically, in 46% of cases in the years following the implementation of Crown Policy, judges discussed the Inquiries findings regarding the role of jailhouse informants in wrongful convictions.[76] In the following example ONCA assessed the jailhouse informant's evidence in light of Kaufman's recommendations:

> *"Indeed, the Commissioner doubted the so called 'good citizen' informer, concluding at p. 604 of his Report that 'most [in custody] informers wish to benefit for their contemplated participation as witnesses for the prosecution.' Balogh's good citizen intentions are further placed in doubt by his admission that he had previously approached the police several times with information implicating other accused charged with murder. However, before this trial he had never been called to testify"* (*Brooks,* para. 104).

In another case, the Court of Appeal reviewed the evidence of a jailhouse informant in relation to the comments made by Justice Cory in the Commission of Inquiry examining the wrongful conviction of Thomas Sophonow:

> *First, the warning about the possibility of Doe learning information from other sources should have been framed as a direction from the trial judge and not simply as a submission made by the defence…*
> *Second, the trial judge should have warned the jury, by way of direction, of the possibility that Doe received innocent information from the appellant and converted it into inculpatory information. To my mind, this is one of the great dangers associated with the testimony of jailhouse informants and in cases where it conceivably exists, the jury should be alerted to it and told to proceed with extreme caution. (For an insightful and comprehensive discussion of the many dangers associated with the testimony of jailhouse informants, see The Honourable Peter Cory, 'Report on the Inquiry Regarding Thomas Sophonow' (2001), at pp. 63-74)…*

[75] Kaufman, F. (1998). *Commission on the proceedings involving Guy Paul Morin* (Executive Summary and Recommendations) Toronto, ON: Ontario Ministry of the Attorney General.
Cory, P. (2001). *The inquiry regarding Thomas Sophonow*: *The investigation, prosecution and consideration of entitlement to compensation* (Full Report). Winnipeg, MB: Manitoba Justice.
[76] *R. v. Chenier,* [2001] O.J. No. 4708 [*Chenier* 4]; *Baltrusaitis* 1; *R. v. Baptiste,* [2000] O.J. No. 528 [*Baptiste* 5]; *R. v. Mallory,* [2000] O.J. No. 954 [*Mallory* 2]; *Brooks*; *R. v. Baksh,* [2015] O.J. No. 7154 [*Baksh*].

> *This case illustrates the point. By way of example, Doe testified that the appellant told him that he disposed of a gun before the police searched his camper. Manifestly, that statement, if made by the appellant, was highly incriminating. But what if the appellant said to Doe – 'the police wrongly believe that I got rid of the murder weapon before they searched my camper?' How easy it would be for Doe to twist that into the inculpatory statement attributed to the appellant...*
> *Another example arises from Doe's testimony about the appellant's plan to implicate Elizabeth McBean as the killer. Suppose the appellant told Doe that there was ample evidence implicating Ms. McBean as the killer and that he planned to rely on that evidence as his primary line of defence. Again, how simple for Doe to twist that into the inculpatory version attributed to the appellant* (*Baltrusaitis* 1*,* paras 65-68).

In both of these examples, the Court of Appeal did not explicitly discuss wrongful convictions, however in referring to the Commissions, the appellate courts implied that they are alive to the possible connection between miscarriages of justice and in-custody informant evidence. In the following trial decisions, judicial comments mirror appellate court concerns, while more directly focusing on the connection between jailhouse informants and wrongful convictions:

> *"The history of jailhouse informants providing evidence that have led to wrongful convictions has caused courts to take extra efforts to scrutinize evidence from witnesses who might be in that category"* (*Baksh*, para. 4).

> *"The dangers associated with relying on the testimony of a jailhouse informant are well-known and all too real. Numerous wrongful convictions have resulted from alleged confessions reported by jailhouse informants – stories which seemed compelling, but which were later proven to be completely false"* (*J.F.*, para. 31).

These comments by trial judges suggest that issues raised by appellate courts about the dangers associated with in-custody informants have been adopted to a certain extent at the trial level as well. It would be inappropriate to postulate that the connection between in-custody informant evidence and wrongful convictions are the only reasons why judges are wary of accepting their evidence. The data show that cases using jailhouse informants continue to be based mostly on circumstantial evidence and the informants themselves continue to have a reputation for

dishonestly. However, the comments made by the judges throughout the study demonstrate different levels of appreciation for the frailties associated with in-custody informant testimony, particularly as it relates to the reliability of evidence and the *Vetrovec* caution. This may be a result of the informant's testimony, which despite concerns about their evidence generally, seems to be reliable in a specific case.

If we consider only the increase in judicial commentary regarding in-custody informants in relation to wrongful convictions, the data show that jailhouse informants have been redefined in the *Post-Policy Section* to be considered a part of the social problem of wrongful convictions. While Crown Policy, specifically in 2005, acknowledges this connection, the Policy only relates to prosecutors, and not judges. One implication is that not only have Crown Attorneys changed how they engage with these types of cases, but so have judges. This increase in cautions through *Vetrovec* warnings on the part of the judiciary may be a result of high-profile wrongful convictions and subsequent Commissions of Inquiry. The findings of public Commissions may have reoriented how the legal system understands in-custody informants as they relate to wrongful convictions. Specifically, the wrongful convictions and Commissions provided a new way of thinking about jailhouse informants, altering the ways in which these informants are defined legally. Judges then are reproducing this definition through their written decisions, which continue to recognize the relationship between in-custody informers and wrongful convictions as a social problem. It also may be, in part, a product of the Innocence Movement, as it has frequently cited jailhouse informants as being a potential cause of the social problem of wrongful convictions. While judges are shown to be increasingly likely to discuss the potential problems associated with jailhouse informants and wrongful convictions, the data do not suggest that wrongful convictions from in-custody informers have occurred over this time period. While it is

beyond this research project to postulate the reasons for this, it is possible that the implementation of the Crown Policy and awareness of judges about the problems associated with this type of evidence has acted as a quasi-defence against the improper acceptance of this type of evidence in Ontario.

4.5 Cases that Use In-Custody Informer Evidence

The majority of the cases reviewed were for serious and violent crimes, however, the nature of the evidence in most of the cases was largely circumstantial. In the 28 cases the crimes included first and second-degree murder, robbery, sexual assault with a weapon, conspiracy to commit murder, possession of explosives with intent to cause death or harm, unlawful discharging of a firearm and mischief under $5000. Only two cases did not include the offence of homicide with the other charges.[77] Throughout the period of study, first-degree murder was the most common offence, found in 20 cases, followed by second-degree murder in five cases. In total, 93% of cases involved homicide, with only two cases proceeding with in-custody informants for other crimes (Table 2).[78] In both the *Pre-Policy* and *Post-Policy Sections*, only one case was tried that did not include a charge of homicide (Table 2).

Table 2: Cases and Crimes, by Era[79]

	Homicide	Other charges	Total cases per era	Percentage of cases per era
Pre-Policy	14	1	15	54%
Post-Policy	12	1	13	46%
TOTAL cases, by conviction	26	2	28	100%
Percentage of cases, by conviction	93%	7%	100%	-

[77] *R. v. Pelland* [1997] O.J. No. 1539 [*Pelland*] (the accused was convicted of three counts of sexual assault with a weapon and one count of robbery); *Rodney* (the accused were convicted of discharging a firearm and mischief under $5000).
[78] In this instance, homicide refers to first-degree murder, second-degree murder, or manslaughter.
[79] Percentages are rounded to the nearest whole number.

Among the cases from both eras, nine mention that the crimes were connected to organized criminal groups or were related to some sort of drug enterprise.[80] One way of understanding this finding is by considering the potential difficulties associated with investigating crimes connected to criminal and drug organizations. The literature recognizes that, particularly in Ontario, informants have been consistently relied upon in large-scale efforts to curtail organized crime groups (Sherrin, 1997b). While traditionally scholars tend to associate informant testimony with organized crime and drug investigations (Natapoff, 2009; Zimmerman, 1994), recent research demonstrates that in-custody informants are most frequently used in homicide cases (Beshley, 2017). Consistent with the literature, the data suggest that in-custody informants usually testify under specific conditions for serious and violent crimes. The data also show that informants are often seen in cases where gaining access to relevant evidence may be more difficult due to the traditional closed nature of criminal organizations. It seems that the introduction of Crown Policy has not altered the types of cases that rely on in-custody informers. This may be because the seriousness of these cases force prosecutors to consider the public and media perceptions on these types of crimes. The Crown Manual specifically encourages prosecutors to consider whether calling an informant is in the public's interest, however the continued seriousness of the cases suggest that this may have always been an important consideration for counsel. Overtime, it appears that Crown counsel tend to only use the evidence of jailhouse informants in extraordinary circumstances; as such, these witnesses are not a part of the "normal" administration of justice, as accomplice evidence once was in the early English system.

[80] *Gray*; *Baptiste* 1; *Trudel; Dhillon*; *Abbey* 2; *Rodney*; *McFarlane* 1; *R. v. Pilgrim,* [1997] O.J. No. 6072 [*Pilgrim* 1]; *Mallory* 1.

In relation to the nature of the evidence presented at trial, the majority of cases were predicated upon circumstantial evidence. The strength of the circumstantial evidence varied, in only six cases the evidence against the accused, absent of the jailhouse informant's testimony, was considered "strong" or "overwhelming".[81] However, in seven cases the Ontario Court of Appeal ("ONCA") specifically commented that the case was "entirely" circumstantial, with the only direct evidence coming from in-custody informants.[82] The ways in which jailhouse informant evidence was used to buttress other evidence in the majority of the cases reviewed in this data is most eloquently summarized in this commentary by the trial judge in the case of *Rodney*: "The Crown concedes that this [eyewitness identification] evidence, standing alone, does not meet the requisite standard of proof. He relies on the testimony of a jailhouse informant to enhance the identification of the assailants".[83]

Given that the use of jailhouse informants in circumstantial cases remained stable over the period of study, the introduction of policies on in-custody informants has not appeared to change the *nature* of the evidence presented at these trials, suggesting their continued use in such cases. This finding appears consistent with assertions from scholars that jailhouse informant evidence tends to be used in cases where the evidence is weak or cases where a conviction based on the available evidence may be more challenging to prove (Botting, 2010). This in turn raises questions about the extent to which convictions in these cases are in fact safe (e.g. legally reliable) and could possibly be contributing to wrongful convictions.

[81] In these instances, the judge used the terms 'strong' or 'overwhelming' to describe the evidence, however it was not always clear how they reached such conclusion: *Gray*; *R. v. Babinski,* [1991] O.J. No. 1510 [*Babinski* 2]; *Tavenor*; *Snow*; *R. v. Baptiste,* [2003] O.J. No. 3714 [*Baptiste* 2]; *McFarlane* 2.
[82] In these cases the judge used the term 'entirely' to describe the circumstantial evidence, however it was not always clear how they reached such conclusion: *R. v. Fatima,* [2006] O.J. No. 3632 [*Fatima* 1]; *Chenier* 2; *McFarlane* 2; *Stark*; *McInnis*; *Mallory* 1; *Baltrusaitis* 1.
[83] *Rodney,* at para. 1.

The result of the Appeals in the data set also seem to confirm the assertion that convictions from trials using jailhouse informants may be less reliable than the average criminal trial. On average overall, criminal appeals are successful in 34% of cases (Court of Appeal for Ontario, 2013, p. 30). By contrast, the data show a 50% success rate *Pre-Policy Section* and a 46% success rate in the *Post-Policy Section*, where cases were appealed.[84] Thus, the data suggest that cases where there have been in-custody informants are more likely than the average criminal appeal to be successful. While numerous factors may have also contributed to this difference, other than the use of jailhouse informant evidence itself, these cases generally seem to contain more problems than the average criminal trial. It is not only that ONCA deems that some sort of error of law occurred, but it is also that the error in law was significant enough to warrant a reversal of the trial verdict. This does not necessarily mean that a miscarriage of justice occurred, however it simply calls into question the reliability or safety of the conviction itself.

The nature of the crimes and the evidence presented at trial are two very important factors guiding criminal trials. The crime that the accused is charged with will determine whether the trial will proceed in front of a jury or a judge alone and the evidence ultimately makes up the case against the accused. The continued use of jailhouse informants in serious and violent cases that are widely predicated upon circumstantial evidence seems to suggest that it is used in cases where the Crown may be under particular pressure to secure a conviction. Because the media tend to focus reporting on sensationalized crimes, such as homicides, this may increase the pressure on police and Crowns to investigate and lay charges quickly (Natapoff, 2009; Raeder, 2007). This media pressure can continue during the trial proceedings, where the Crown may feel

[84] Though the success rate is lower in the *Post-Policy Section,* 19 appeals occurred in the *Pre-Policy Section,* whereas the *Post-Policy Section* only heard 11. Therefore, no direct comparison can be made to differentiate *Pre-* and *Post-Policy* results for these data.

considerable burden to ensure a conviction. Thus, forces outside of the legal system, such as the media, can put pressure on the Crown to secure convictions and in response to such pressures there may be more of a tendency to contemplate the use of jailhouse informant evidence, in cases where informants allege to have received information from the accused.

The framing of social constructions, such as jailhouse informants, can influence how social problems, such as wrongful convictions, are addressed in practice. Considering the results discussed above, it seems that other evidence (not coming from the in-custody informant) and the alleged crimes are not part of the framing of jailhouse informants as a potential cause of wrongful convictions. Rather, it is the informant that has been effectively problematized. However, the way judges have framed the issues relating to in-custody informers seem to problematize their use generally as they relate to wrongful convictions, while at the same time allowing for their use to continue. Reviewing comments raised by the judiciary in the data reveal that at times judges have problematized the nature of the other evidence presented at trial in these cases. The discrepancy between judge's recognizing the limitations of other evidence and the continued use of jailhouse informants in these circumstances is consistent with Burstein's (1991) assertions that policy decisions are seldom guided by judicial decision-making. Burstein (1991) also states that case law can culturally influence how others perceive social phenomena; thus, judicial framing of in-custody informers more effectively redefine the nature of the problem but does not necessarily influence how informants are employed in practice.

4.6 In-Custody Informers and Accomplice Testimony

While the current study was not concerned with the demographics of in-custody informers *per se*, several patterns arose in the data as it relates to their evidence. In most of the cases only one in-custody informant testified against the accused, however in some cases two or

three jailhouse informants were called to testify. It was more likely in the *Pre-Policy Section* to see multiple in-custody informants testify, than in the *Post-Policy Section*. In the *Post-Policy Section,* 15 informants testified over 13 cases, in 85% of cases only one in-custody informant testified (Table 3). By contrast, in the *Pre-Policy Section,* only one jailhouse informant testified in 66% of cases (Table 3).

Table 3: Percentage of In-Custody Informants Testifying, per Case

Era	**1 Informant testifies per case**	**multiple informants testify**
Pre-Policy	66%	33%
Post-Policy	85%	15%

Table 3 suggests that even though Crown policy permits the use of multiple in-custody informants at a given trial, most are likely to use only one jailhouse informant. While, the use of multiple in-custody informants has not been explicitly reviewed by scholars there is a general consensus that jailhouse informant confessions have a cumulative effect, and therefore, the jury should not hear more than one alleged confession (Campbell, 2018; Cory, 2001).

Prior to the creation of Crown Guidelines regarding in-custody informants, Crown counsel exercised discretion on how many in-custody informants would be called at a given trial. Updates to the policy have not precluded the Crown from calling multiple in-custody informants (Campbell, 2018), though the data indicates that this practice has become less popular in recent years. Up until 1997, 21 informants were called in 15 cases, with as many as three in-custody informants being called in one case. After the implementation of the Crown guidelines, 15 in-custody informants testified in 13 cases.[85] This indicates that even though in theory Crown

[85] In the *Policy* era, only *Mallory* 1 and *Chenier* 2, saw informant testimony from multiple in-custody informants. In each case two informants testified. Both cases were completed prior to 2001.

Policy does not explicitly prevent prosecutors from calling multiple jailhouse informers as witnesses, in practice the Crown has not exercised its discretion in this regard.

While the data demonstrate a reluctance to call multiple in-custody informants in the *Post-Policy Section*, it seems that at the same time the Crown has now begun to place a greater reliance on the testimony of accomplices in some cases. In the *Pre-Policy Section*, three accomplices were called to testify in two cases. By contrast, in the *Post-Policy Section* seven accomplices have testified over four trials. Comparing the number of accomplices to in-custody informants over these two periods shows that prior to 1997 three accomplices and 21 jailhouse informants testified over 15 cases, whereas after 1997 seven accomplices and 15 in-custody informers gave evidence over 13 cases. Further, combining the accomplice testimony with the in-custody informant testimony over the two time periods shows 24 unsavoury witnesses testifying in 15 cases (pre-1997) and 22 unsavoury witnesses over 13 cases (1997-2017). Thus, even though there is a decrease in the overall use of jailhouse informant testimony in the *Post-Policy* era, as evidenced by the reduction in the number of in-custody informers called per case, there is an increase in the use of accomplice evidence. Whereas in the *Pre-Policy* era it seems that multiple informers were called, it is now at times supplemented with accomplice evidence. Further, combining accomplice and jailhouse informant evidence shows that the overall use of *cooperating* witness evidence has remained relatively consistent over the period of study. [86]

While the apparent increase in the use of accomplice testimony is not necessarily problematic, recent experimental research indicates that cooperating witnesses have a strong influence on juror conviction rates (Neuschatz et al., 2012). The research also shows that juries tend to interpret accomplice and in-custody informant testimony in a similar manner (Neuschatz

[86] Cooperating witnesses refer to both in-custody informants and accomplices who give testimony at trial. See Chapter One: Review of the Literature.

et al., 2008). While in-custody informants provide evidence about an accused's confession to committing a crime; accomplice testimony provides first-hand knowledge of the crime and the accused's role in the commission of the offence. The evidence provided by cooperating witnesses may be difficult to disprove because of the intimate nature of the testimony and may even be more difficult if the other evidence in the case is circumstantial. In *Trudel* ONCA summarized the problem associated with the testimony of the accomplice Denis Gaudreault:

> *"Gaudreault presented a special problem because his close association with the murders would enable him to provide details of the crime and falsely implicate the accused in order to cover up his own involvement. On his story, he was merely the driver, an unwitting dupe who fully realized what happened only after the fact, perhaps when he described the events of the evening to Declare* [another witness] *who told him that he had just participated in a "hit". Again, it was important that the jury understand that such witnesses can have particular motives to lie"* (para. 80).

In this case, the judge recognized the special position Gaudreault was in, having insider knowledge of the crime. The judge also brought up the fact that Gaudreault's involvement in the crime provided a unique motive to fabricate evidence against the accused. The common law has long recognized the dangers associated with accomplice testimony, and the data show that both accomplice testimony and in-custody informant evidence is likely to yield a strong *Vetrovec* warning from the judge. However, one of the differences now between accomplice testimony and in-custody informant evidence is that accomplice testimony does not go through the same vetting process as jailhouse informant testimony.

The concern with the increasing use of accomplice testimony in these cases is the similarities between in-custody informer and accomplice evidence. This is not to say the similarities with the witnesses themselves, but rather common critiques of in-custody informer evidence may also be true for accomplices. Under the British common law, accomplices were

viewed as potentially problematic because they had much to gain by exchanging information about another accused person. Similar concerns arise out of the use of in-custody informers, who are believed to be motivated by their own self-interest. Accomplices, like jailhouse informants are in unique positions where they are believed to have exclusive or difficult to retrieve information against an accused person, such evidence is unlikely to come to the knowledge of law enforcement in any other way. Their evidence may also be difficult to disprove and compelling to the jury. The similarities between the two types of witnesses calls into question the use of such evidence, however it seems extremely radical to suggest that these witnesses should be barred from testifying. In light of some positive commentary judges have made towards these witnesses it seems that there is a place for such evidence in the current system. Further, the commonalities between the two witnesses ought to be considered in greater detail as the use of accomplice evidence also increases in cases where in-custody informers are called to testify.

The increasing use of accomplice testimony in these cases may be understood as an interaction between the Policy and prosecutors tasked with interpreting and executing its guidelines. The data suggest that Crown counsel are employing new strategies (e.g. use of accomplice testimony) in response to the Policy on the use of in-custody informants, which essentially had fettered their use. Accomplices testifying against a co-accused means that the accomplice has already been convicted or plead guilty to a crime; which in some cases could mean a guilty plea to a lesser offence in exchange for testifying against their co-defendants.[87] While historically accomplice evidence was seen as problematic and warranted special

[87] For example, in the case of *Abbey* 2, two of his accomplices plead guilty to lesser changes in exchange for their testimony against Abbey.

scrutiny,[88] current Crown Policy do not invite the same rigorous pre-trial screening as is required of in-custody informants.

If we consider that the cases that use jailhouse informant evidence are commonly circumstantial cases, often involving organized crime groups, it may be difficult to build a strong case against the accused. While in the past in-custody informants may have come forward in these types of cases, in the *Post-Policy Section* the decrease in the receipt of benefits may mean that informants are less likely to come forward. Instead, in order to bolster their cases against accused persons, Crown Attorneys may place greater reliance on co-defendants who can provide missing pieces of the evidentiary puzzle. In the case of *R. v. Abbey*, the defendant was accused of killing an individual under the false understanding that the victim was a member of a rival gang. In his first trial, *Abbey* was acquitted, however he was ultimately convicted of first-degree murder at his second trial. Though the actual conviction seems to have more to do with the problematic testimony of an expert witness, the circumstances under which two of *Abbey's* accomplices, Sams and Burton, testified against him highlight the benefits they were able to receive in exchange for their testimony:

> *"Sams and Burton did testify for the Crown but only in exchange for immunity from prosecution for numerous serious offences, many arising from a police raid on the Malvern Crew known as Project Impact…*
> *As a result of Project Impact, Sams was charged with a lengthy list of offences, including attempted murder, conspiracy to commit an indictable offence, drug dealing, various firearms offences and participating in a criminal organization. He was also facing prosecution for a separate attempted murder charge. He pleaded guilty to the criminal organization charge and was sentenced to time served. All the other charges against him were stayed…*
> *In May 2004, Burton was out on bail for several offences resulting from a police chase, including dangerous driving and drug and weapon*

[88] See Chapter One: Review of the Literature.

> *offences. He then was arrested in the Project Impact raid and charged with additional offences, including possession of drugs and weapons and participating in a criminal organization. His bail was revoked. Anxious to get out of jail, he agreed to testify against Abbey in exchange for his freedom. Like Sams he pleaded guilty to the criminal organization charge. All other charges against him were withdrawn. So too were the deportation proceedings he was facing. It is hardly surprising that Burton agreed in cross-examination that his arrangement with the Crown was 'a dream come true'"* (*R. v. Abbey,* [2017] O.J. No. 4083 [*Abbey* 1] paras. 28-30).

The benefits Sams and Burton were able to receive in exchange for testifying against *Abbey* were quite extensive, including avoiding jail time and immunity against serious criminal offences. While *Abbey's* conviction was ultimately overturned for other reasons, the evidence provided by Sams and Burton implicating *Abbey* in the murder differed significantly from one another. Furthermore, the jailhouse informant who was called to testify in the case, provided yet another account of the incident that differed from Sams' and Burton's versions. Despite the seeming incongruency between the evidence and the alleged frailties of the Crown's case, *Abbey* was ultimately convicted. While in this case it cannot be said that the evidence of the cooperating witnesses resulted in a wrongful conviction, it suggests that the witness's evidence may be difficult to disprove and that the frailties of their evidence may not be appreciated by the jury. This seems consistent with the findings of Neuschatz, et al. (2008; 2012) whose study suggests that even when the motivations of cooperating witness' were known (e.g. the receipt of benefits) to the jury, conviction rates were not affected.

Another interesting aspect regarding the use of accomplice testimony is the judge's reactions to these types of witness. For example, in the case of *R. v. Chenier,* two co-accused stood trial and were convicted of first-degree murder by a jury; the case against the defendants was widely predicated upon the testimony of a jailhouse informant and the defendant's alleged

accomplices. After the Court of Appeal allowed the appeal a new trial was ordered and conducted; however, this time it was a judge-alone trial and the jailhouse informant did not testify. At this second trial, the defendants were acquitted of all charges after the trial judge determined that the evidence was insufficient to be convinced beyond a reasonable doubt that the defendants committed the alleged crime. In the decision to acquit the accused at their second trial, the judge made the following comments about the accomplices Daniel Moore and André Boisclair:

> *"It is beyond question that both of the key witnesses, Daniel Moore and André Boisclair, given their criminal backgrounds, their lifestyle, drug addiction and their direct involvement in the alleged conspiracy, not to mention the deals they negotiated for their cooperation, were Vetrovec types on whose evidence it would be dangerous to convict unless corroborated in some material way"* (*Chenier* 1, para. 14).

> *"The evidentiary problems that the Crown faced were simply overwhelming. No doubt, there are some pieces of evidence that are more or less corroborative and support the Crown's position. However, considered individually or cumulatively they fall far short of restoring my trust in the evidence of Daniel Moore or more importantly André Boisclair. I find there is not sufficiently clear, unambiguous and meaningful corroborative and confirmatory evidence to enable me to safely act on Boisclair's evidence so as to be convinced beyond a reasonable doubt as to the guilt of Peter Chenier and George Farley on any of the counts in the indictment against them regarding the murder of Earl Joe"* (*Chenier* 1, para. 67).

This commentary by the judge about Boisclair and Moore's evidence suggests that, at least in this case, the trial judge found the accomplice evidence to be completely unreliable, listing numerous factors that contributed to this perception. The judge highlighted factors such as, their involvement with the crime, their criminal history and the 'deals' they received in exchange for their testimony as reasons for approaching their evidence with caution. While jailhouse informant evidence cannot be questioned on the basis of the informant's involvement in the

crime the defendant is charged with, the other factors seem to also be considerations when reviewing in-custody informant evidence. Accomplice testimony may be just as susceptible to reliability concerns as jailhouse informants is, however, the only real difference is how the witness came to know about the accused's role in the crime. In both *Chenier* and *Abbey,* the accomplices had compelling motivations to fabricate evidence against the accused and received benefits in exchange for their testimony. These factors are frequently cited by the literature as rationales for approaching jailhouse informant evidence with caution (Botting, 2010; MacFarlane, 2006).

Perhaps the most discernable difference between accomplice testimony and that of in-custody informers is that accomplice testimony has not been framed in the same way as jailhouse informants have over the period under study. While it is true that the common law has historically been very wary of accomplice testimony, the data seem to suggest that concerns over unsavoury witnesses have shifted to focus more on jailhouse informants. In fact, the data indicate that the legal community has generally accepted that there is a connection between in-custody informer evidence and wrongful convictions. However, accomplices have not undergone a similar framing process as in-custody informants in relation to wrongful convictions as a social problem. As a result of the restraints put on the use of jailhouse informant testimony through the Crown Policy, it seems that accomplice evidence has become a more viable option for circumstantial cases where multiple in-custody informants may have testified in the *Pre-Policy Section*.

This analysis of the data suggests that the Crown policies may not be the only factor effecting the changes seen in the in-custody informant cases reviewed for this study. While certainly decreasing the number of informants who have previously been jailhouse informers

may be understood as a response to policy constraints, it seems that the connection made between jailhouse informant evidence and wrongful convictions has also played an integral role in the changing landscape surrounding in-custody informers. The cases that use in-custody informants continue to be based largely on circumstantial evidence and seem relatively common in cases related to drug enterprises or criminal organizations. Most importantly, the data highlight that despite the connection made between wrongful convictions and in-custody informers, their use as witnesses in criminal trials in Ontario continues.

CHAPTER FIVE: DISCUSSION AND CONCLUSION

This thesis followed Schauer's (2005) recommendations on legal social constructionist endeavours to understand how socially constructed concepts of law, in this case jailhouse informants, changed over time. Written judicial decisions were analyzed to review the processes in play that negotiate meaning of in-custody informers in the legal system over a 30-year period. The data suggest that while how the judiciary is framing jailhouse informers have changed over time generally, it is difficult to succinctly determine the interpretive processes that led to these changes within the data set alone. Commissions of Inquiry and Crown Policy were good indicators of the initial and ongoing framing process that saw in-custody informers framed as potentially suspect witnesses and a possible cause of wrongful convictions. Hagan (2010) argues that how issues are framed in such decisions work to orient how jailhouse informants will be employed and handled in an attempt to solve the social problem they pose. The issues raised in judicial decisions effectively frame (i.e. orient and define) the reality of social phenomena (Sandu, 2010); in the *Post-Policy Section* we see the judiciary frame how the legal community, and eventually broader society, ought to view and perceive in-custody informers. The thesis reviewed how policies, statutes and procedures define the parameters of using jailhouse evidence and how judicial decisions rectify and redefine such constraints in practice (Jenness, 2004). Legal actors rationalize the use of in-custody informers in relation to the specific case at hand, while continuing to problematize their use more generally.

5.1 Understanding Crown Policy through a Social Problems Theory Lens

The Crown Policy Manual is the guide that dictates how and when Crown prosecutors use in-custody informants. Primarily, the Manual addresses the circumstances under which jailhouse informants will be permitted to testify in Ontario. While it allows for informants to

receive rewards or benefits in exchange for testifying against an accused, such circumstances are strict and Crown discretion is quite minimal in this regard. While the Manual cautions Crown counsel to assess the reliability of the informant by considering the informer's reputation and general character, it does not prevent the Crown from using jailhouse informants who have a criminal history, reputation of dishonesty or convictions for certain types of offences. The Policy discourages the use of repeat jailhouse informants, but does not prevent their use outright, nor does it preclude other types of informants from acting as in-custody informers. In employing the guidelines set out in the Crown Manual, prosecutors ultimately redefine jailhouse informants as viable witnesses..

The data from this study reveal a change in how Crown counsel have dealt with informants from the *Pre-* to *Post-* policy eras. For one, it seems that fewer informants are receiving benefits for providing testimony than before the Policy existed. From a social constructionist lens, this could be viewed as a response to managing threats to judicial integrity, at a time when the recognition of wrongful convictions has increased. While it is not prohibited to offer some sort of inducement in exchange for testifying against an accused, it seems less likely to be the practice of Crown Attorneys in Ontario. The Crown Policy considers that benefits may have the potential to effect both the jailhouse informant's motivations and the reliability of their evidence.

Similar to inducements, the Policy also considers the history of the informer as an informant to be equally relevant to assessing their reliability. The Manual considers that the in-custody informer's experience of being a jailhouse informant provides them with knowledge on how to make the alleged confession more convincing and may cause them to be more motivated to fabricate evidence knowing the possible benefits they can receive. Interestingly, the Policy

does not mention the use of jailhouse informants who were informers in other capacities in the past. Regardless of the type of informant, it seems that Crown counsel are less likely to use in-custody informers who have any type of informing history, possibly indicative of a recognition of a connection between an informer's history and their reliability, where this factor was previously not considered.

The literature considers a jailhouse informant's general character and reputation to be a relevant factor in considering the credibility and reliability of their evidence (Genua, 2006; Sherrin, 1997a). This is consistent with credibility and reliability assessments that a jury must conduct on any witness during a criminal trial. Despite this, the data show that reputations for dishonesty have remained relatively consistent, even slightly increased, in the *Post-Policy Section,* where other indicia of reliability have decreased. The Policy makes the connection between reliability and general character in a similar manner as it does with the informer's history. Both are mentioned as part of considering an informant's overall reliability.[89] However, the data suggest that the *Post-Policy* informants are less likely to have a history of informing, whereas most continue to have a reputation for dishonesty. While the Policy similarly addresses these two factors, in practice only the history of informing seems to have been considered problematic and requiring redress. While it is impossible to determine the rationale for this discrepancy, it may be that in attempting to balance expectations, some voices or external factors may be considered more important than others; somewhere along this process of negotiation the informant's history of informing has been considered a significant reliability concern.

While it is impossible to discern the exact reason as to why some aspects of the Policy have changed it may be a product of the Policy itself, it is also equally plausible that there are

[89] See Chapter Three: Methodology for a review of the reliability factors the Crown must consider.

other external factors at play. Given that informants are still used by the Courts, although less so than in the past, including those with histories of dishonesty, the Crown may be demonstrating a greater concern for providing benefits than with the prior dishonesty of the informant. From a social constructionist framework, this may be a product of the Crown managing expectations in the process of employing the new policy on in-custody informants. It may be that within the Crown's office, certain factors (e.g. benefits) are considered to be more closely related to the problems associated with jailhouse informants than others (e.g. dishonest histories). Despite the fact that the policy does not explicitly create a hierarchy of these indicia of reliability, the data suggest that in practice certain factors may be considered more important than others.

5.2 Major Findings Revisited: The Framing of In-Custody Informers

The data suggest that, in most respects, what in-custody informers represent has not changed a great deal over time, however, the judiciary's framing of jailhouse informants has changed in one significant way. Specifically, the review of 28 cases and the respective written judicial decisions demonstrate that over time the judiciary has become increasingly aware of the connection between the use of jailhouse informer evidence and wrongful convictions. At the same time, despite the legal system's framing of in-custody informers as being a possible cause of miscarriages of justice, these witnesses continue to be used in criminal trials. As mentioned, 15 cases make up the *Pre-Policy Section* from approximately 1987 to 1997 whereas there were 13 cases where in-custody informants were used between 1997 and 2017 in the *Post-Policy Section*. It appears that the cases in the *Pre-Policy Section* occurred within a shorter time frame (approximately 10 years), than the *Post-Policy Section* (20 years), thus indicative of a decrease in

their use.[90] While the actual frequency of in-custody informants cannot be determined, it is not incorrect to assume that jailhouse informants are not used as often in the *Post-Policy Section*.

5.2.1 Judicial Framing of In-Custody Informers

Best (2013) states that how social problems are interpreted and understood can change overtime, following the claims-making process itself as the social problem becomes addressed in practice. The data suggest that jailhouse informants are likely associated with the social problem of wrongful convictions, in the *Post-Policy* era, where this way of framing these witnesses did not previously exist. This was most succinctly demonstrated by judicial comments in the *Post-Policy Section* that conveyed that there is a connection between wrongful convictions and jailhouse informants. In this section, judges discussed the frailties believed to be associated with jailhouse informant evidence, such as the possibility of inducements or extensive criminal histories of informants. Though most of the time judicial concerns related to the reliability of the evidence presented by these witnesses, in more recent year's judges made connections between the factors that made the informant less reliable and credible and the historical relationship of these witnesses with wrongful convictions. The connections made by judges regarding reliability and wrongful convictions relates to the trustworthiness of the evidence and therefore the conviction itself. The use of the *Vetrovec* warning in relation to these witnesses seeks to highlight the strengths and weaknesses of the evidence. The fact that the *Vetrovec* caution reviews the evidence in detail with the jury, and the increasing use of the caution for jailhouse informants' testimony suggests that there is greater appreciation for the significance of such evidence.

[90] See Chapter Four: Results and Analysis.

The written judicial decisions, which constitute legal texts, provide one way of understanding how the legal system frames jailhouse informants and their evidence. The language used in these decisions and their focus negotiate the meaning that the judiciary believe ought to be associated with such evidence. In this regard, judges are interacting with the conceptions of in-custody informants as framed during the wrongful conviction claims-making campaign that occurred during the late 1990s in Canada. The data reviewed in the Chapter Four: Results and Analysis demonstrate that judicial concerns over this type of evidence centre around the informant's background, inducements and the nature of the evidence in the case (i.e. direct or circumstantial). While judicial decisions must follow a general structure, including summarizing the case, the reasons for their decision and relevant case law, there are no exact requirements on the content. The data show the judiciary frequently commenting on certain characteristics of the jailhouse informer (e.g. their criminal background) and the nature of the evidence of the case (e.g. circumstantial evidence). Their commentary on these aspects, suggest a general concern over certain factors; judges are framing in-custody informants as inherently suspect witnesses. They frequently cite other evidentiary problems in these types of cases, suggesting that these cases may face other frailties, outside of the jailhouse evidence. Via the judges' comments, the jailhouse informant is framed as an unsavoury witness, whose testimony must be thoroughly reviewed before accepting it as part of the evidence. While the cases that use these witnesses seem to come with their own evidentiary weaknesses, in bringing the frailties of the evidence to the attention of the legal community, through text, the judiciary is effectively providing warnings to the legal profession of the problems associated with this evidence. These frames are then disseminated through the legal profession and reproduced by other sources, resulting in the wider understanding of jailhouse informant testimony as being potentially problematic evidence

possibly leading to miscarriages of justice. Ultimately, the jailhouse informant and the cases that use them are framed by the judiciary to be problematic.

The framing of in-custody informants and their cases as problematic is socio-historically embedded and a product of the wider wrongful conviction claims-making campaign that sees miscarriages of justice conceived as a social problem. One point of concern in the judiciary's framing of jailhouse informants, and to a wider extent the Crown Policy governing their use, is the continued use of language that perpetuates traditional (and outdated) ways of thinking about crime and criminality. Particularly, these witnesses are increasingly being framed as having an unsavoury character, as evident by the increasing use of the *Vetrovec* warning. This seems to go against the very essence of the intention of the *Vetrovec* warning that rejected the idea that individuals in conflict with the law are inherently untrustworthy. Indeed, the data suggest that these witnesses are framed as problematic by virtue of their past criminal behaviour. Though some judges remarked when an informant had made changes in their life that suggest they are no longer engaging in criminal activity, the Policy and the majority of judges may in fact be perpetuating stereotypes about criminalized individuals.

Further confounding this issue is the relationship that has been established between in-custody informers and wrongful convictions. This thesis is cognizant of the fact that certain high-profile wrongful convictions have established the connection between these witnesses and erroneous convictions, however the data suggest that in instances where questions arose regarding the reliability of convictions on the basis of such evidence, the Courts were able to rectify this at later trials (e.g. *R. v. Chenier*). In the vast majority of cases it would seem that despite commentary by the judges regarding the limitations of using jailhouse informant evidence, these convictions may in fact be legally sound and reasonable. On the basis of the data

alone, it would seem that issues traditionally associated with jailhouse informants have largely been rectified by the implementation and continued development of Crown Policy and judicial diligence on the matter. However, a recent case that could not be included in the data set raises concerns about this finding.[91]

5.2.2 The Continued Use of In-Custody Informer Evidence in Ontario

The overall decrease in the use of in-custody informers in Ontario seems to be indicative of the success of the original claims-making campaign in which in-custody informants were linked to wrongful convictions. Recent Supreme Court of Canada ("SCC") decisions confirm that the principles of common law permit the use of in-custody informant evidence and jailhouse informants continue to provide viable pieces of evidence in some cases, though there are some limitations.[92] Even though the use of these witnesses may have decreased, cross-examination and the *Vetrovec* caution are viewed as appropriate procedural safeguards against false in-custody informant testimony and wrongful convictions (Dufraimont, 2008).[93] It is possible that external and political influences may alter how frames about in-custody informers are generated, employed and interacted with (Malloy, 2010).

5.3 The Research Project's Limitations

The research project faced some limitations regarding the generalizability of its findings. The cases reviewed do not make up your 'typical' criminal charges, as the majority of criminal cases in Ontario do not ultimately result in a trial proceeding. Further constraints surround the availability of the data itself, as it is difficult to quantify the exact percentage of cases that are ultimately published at the trial level. Because most of the cases in the data had Appellate Court

[91] See section 5.3.2 of the current section.
[92] See: *R. v. Brooks,* [2000] 1 S.C.R. 237; *R. v. Hurley,* [2010] 1 S.C.R. 637.
[93] See Chapter One: Review of the Literature for a review of the SCC's decisions relating to *Vetrovec* and the use of in-custody informant evidence.

decisions available, this helped to increase the generalizability of these findings, though they remain limited. The legal system has its own set of values, and typically the law itself is considered a theory within legal circles. However, a master's thesis of this nature requires the use of an established theoretical or conceptual framework. Social constructionism was chosen for its focus on knowledge, discourse and rhetoric.

5.3.1 Conceptual Limitations

The objective of this thesis was to understand the data from the cases using social constructionism as a conceptual framework. Social constructionism helped formulate an understanding of the data, such as the frames being presented by the judges and the way in-custody informants were being framed over time. The thesis was ultimately a chronological study that reviewed the progression or changes to attitudes and opinions about a social construct over time. However, because the data was not reviewing a typical claims-making platform (e.g. through the media), the theory was not practically useful to the overall analysis. The theory was helpful in that it allowed for an examination of different areas of the data, that previous research had not done. For example, the use of accomplice testimony in jailhouse informant cases was previously not considered in relation to wrongful conviction research in Canada. The conceptual framework allowed for a connection to be made between accomplice evidence and in-custody informer testimony, where one might not have previously been appreciated. While, that is not a direct product of social constructionism, the framework encouraged my project to look at taken-for-granted truths, which could explain why this finding is unique to this project. Given the data set and other constraints, the results of this study are limited and not generalizable. However, what the research has revealed is that there have been some changes to the use of in-custody informants over time and that the culture, specifically the judicial culture, surrounding their use

has changed. From a wrongful conviction advocacy perspective, these changes are for the better, however from a criminological standpoint concerned with definitions of criminality it seems that notions about criminality may continue to be framed in more positivistic and deterministic ways.

5.3.2 Methodological Limitations

There are significant limitations to using judicial decisions as data, however in this area and for this study judicial decisions are one of the only documents publicly available for researchers. In the Canadian criminal justice system, it is estimated that only about 5% of cases are contested and make it to the trial stage, the rest are determined through the plea bargaining system.[94] On average, between 2013 and 2018, only 4.6% of all criminal cases in Ontario criminal went to trial; crimes against the person only went to trial in 1.6% of all cases (Ontario Court of Justice, 2019).[95] Most criminal matters that are brought through the justice system are for less serious offences. Homicide cases, which represent the majority of this data set, represent less than 0.001% of crimes in Ontario from 2013 to 2018 (Statistics Canada, 2019).[96] From 2013 to 2018 the number of homicide cases ranged from 73 to 95, with guilty verdicts rendered in anywhere between 18 and 33% of cases. In contrast, from 2013 and 2018, *Criminal Code* violations (excluding traffic offences) ranged anywhere from 89,544 to 103,090 offences, with guilty verdicts rendered in 50 to 53% of cases (Statistics Canada, 2019).[97] Thus, the cases in this data set are exceptional, and are by no means representative of the average criminal proceeding.

[94] In the United States it is reported that 97% of federal cases and 94% of state cases result in a plea agreement (Goode, 2012). Although Ericson & Baranek's (1982) study of Toronto courts found that only 69% of criminal defendants plead guilty, more recent studies suggest this number has increased significantly; Ireland's (2015) study of Manitoba courtrooms found that 92% were resolved through a plea agreement.
[95] These include homicide, attempted murder, robbery, sexual assault, other sexual offences, major assault, common assault, uttering threats, criminal harassment, and other crimes against the person.
[96] The 2019 Statistics were not available at the time of this research project. This figure was generated by comparing the total decisions on *Criminal Code* violations (excluding traffic violations) with total decisions on homicide cases.
[97] This number represents *Criminal Code* violations, excluding traffic violations, from 2013 to 2018.

The Crown Manual stipulates that in-custody informers should only be used in exceptional cases, thus in-custody informers seem to be extraordinary and are infrequently found in Ontario criminal court cases. While the data set is by no means representative of current crime trends or criminal proceedings it is possibly reflective of the use of in-custody informers in criminal trials in Ontario.

In regard to the publishing of judicial decisions it is important to note that there is no way to quantify the rate at which criminal decisions are made publicly available in Canada. In attempts to ascertain this information it was postulated by legal professionals that anywhere between 40 and 60% of cases (at the trial level) are published on legal databases like LexisNexis.[98] Using the data available from the Ontario Court of Justice in 2018 compared with LexisNexis cases from that same year, it seems that reporting rates may be closer to 20% (Ontario Court of Justice, 2018).[99] By contrast, at the appellant level the reporting rates are much higher, though no specific estimate was provided by ONCA.[100] The vast majority of Court of Appeal decisions, both successful and unsuccessful appeals, are published because these judicial decisions are legally binding and may impact how the criminal law functions in its jurisdiction.[101] The only cases that are not published by ONCA are unsuccessful inmate appeals;

[98] In conversations with members of the Ontario Bar, it was estimated that approximately 40 to 60% of cases are published on legal databases. This estimate is anecdotal and was based on their experience as lawyers and legal researchers.

[99] The researcher contacted LexisNexis to try to get an estimate regarding how many cases actually get reported and was informed that they do not have access to such information. LexisNexis is simply provided with cases to publish. Using the Ontario Court of Justice statistics, it was reported that in 2018 8,399 cases were disposed following a trial. This amount also includes cases at the Superior Court of Justice that were committed for trial. Searching LexisNexis for only Ontario Court of Justice and Ontario Superior Court of Justice cases from January to December 2018, on criminal matters, 384 unique cases were available. Therefore, it is likely that a very small proportion of cases actually are published.

[100] The researcher contacted the Ontario Court of Appeal office of the Attorney General in an attempt to ascertain their reporting rates. After multiple conversations with analysts at the court they were unable to provide specific details as the research conducted in this area by the Court is not yet available. However, the Court published an annual report up until 2013, which outlines the different types of cases heard and the number of decisions rendered each year.

[101] In contrast, judicial decisions at the trial level may be instructive, but not legally binding.

these are appeals in which sentenced inmates file appeals without representation from legal counsel (Court of Appeal for Ontario, 2013).[102] Unfortunately, while no accurate estimates are available, it is likely that reporting rates at ONCA are significantly higher than reporting rates at the trial level.[103] It should be noted that this limitation is significant in terms of understanding the accuracy of the number of cases reported and ultimately examined for this study.

The research project rejected the idea of only using appellate cases because trial level judicial decisions can be very informative. Trial level decisions often provide more details on the nature of the offence, and the in-custody informer and their evidence. In four cases at trial, judges ultimately rendered the verdict, not a jury, in which case the judge was acting as the trier of fact and provided reasons for their judgments.[104] In these decisions, it was clear what parts of the evidence the trial judge accepted and rejected, their commentary on the in-custody informant was invaluable and would not be available if only reviewing appellate decisions. Appellate courts differ from trial courts in their mandate and only review questions of law, except in exceptional circumstances. While appellate decisions are legally binding, trial decisions can be practically instructive for legal professionals, and seem to be even more helpful for research inquiries such as this one. Only reviewing appeal decisions would ignore case outcomes that were not appealed or have yet to be appealed, eliminating four cases in the data.

Due to the complexities of the legal system and the use of legal jargon, studies using judicial decisions as data may be challenging. Time and resource constraints increased the possibility that cases may be missed because they do not appear in search terms or the cases do

[102] From 2004 to 2013 inmate appeals represented anywhere between 20 to 25% of cases heard by the Court, whereas criminal appeals represented between 30 and 32% of all appeals heard over the same time period.
[103] In the results section, a discussion will postulate that the arguments brought up at the Court of Appeal in the data set demonstrate that the nature of cases that see in-custody informants make it likely that appeals will be heard.
[104] *R. v. Pelland,* [1997] O.J. No. 1539 [*Pelland*]; *R. v. Chenier,* [2008] O.J. No. 4735 [*Chenier* 1]; *R. v. Dell,* [2001] O.J. No. 718 [*Dell*]; *R. v. Rodney,* [2016] O.J. No. 6593 [*Rodney*].

not provide enough information to be of use. The nature of using judicial decisions as data inherently means that the research outcomes will not be generalizable, as accessibility is clearly limited in the legal field. This is a significant limitation to this study, but it is the problem faced by the majority of legal researchers investigating legal proceedings. Regardless of the limitations, this study's focus on Ontario criminal courts will provide a meaningful and practical look at the use of in-custody informant evidence. This systematic review of jailhouse informant cases in Ontario seeks to contribute to an area of wrongful conviction literature that requires attention in the Canadian context.

5.3.3 Research Findings Limitations

Despite changing judicial attitudes on jailhouse informants over the time period under study, the actual cases and informants themselves have remained relatively stable. This discrepancy is both intriguing and disturbing. The data suggest that there may be other influences or factors that play a role in the ways in which in-custody informers are employed, outside of the Crown policy itself. Although the data did not provide an explanation for this, *per se*, a recent case, *R. v. King* (2019) suggests one possible alternative explanation.[105] Mr. King was a Crown witness and was convicted of perjury in relation to his testimony at a preliminary inquiry in which he suggested that he had never been an informant before. The defence counsel challenged this assertion in their cross-examination of Mr. King at the preliminary inquiry, and it was discovered that Mr. King had previously testified as an in-custody informant in multiple criminal trials in Ontario that occurred before the creation of the In-Custody Informant Registry. However, after the inception of the Registry Mr. King testified again as a jailhouse informant at two additional preliminary inquiries. At the preliminary inquiry of *R. v. Chouart and Marshall*

[105] *R. v. King* [2019] O.J. No. 377.

(unreported) King testified that the defendant was the first person to ever confess to him, therefore he had never been a jailhouse informant before.

It is unclear whether the police or Crown would have been able to determine whether or not Mr. King was lying. However, the Crown Policy at the time of the preliminary inquiry only required the approval of the Director of Crown Operations or Director of the Crown Law Office-Criminal division, and not the In-Custody Informer Committee, before a jailhouse informant could testify. It seems that other than that specific direction, the Policy did not specify what steps must be taken before calling an in-custody informer at a preliminary inquiry. It does seem a bit suspect that seemingly no inquiry into Mr. King's past was conducted by the Crown, or the police. What is most concerning is that the defence was able to determine that Mr. King had testified previously as a jailhouse informant. Further convoluting the Crown's seeming negligence is the fact that Mr. King was the in-custody informant that testified in the infamous case of *R. v. Brooks,* which ultimately made its way to the SCC.

Although the *King* case may be an anomaly, it comes out of Ontario's largest jurisdiction, Toronto, and raises significant concerns regarding the real attitudes of the Crown and police in relation to jailhouse informants. The matter demonstrates that Crown and police culture may be shaping the ways in which jailhouse informers are employed. Specifically, the case indicates that the shortcomings of the Crown Manual may be abused and the actual perceptions or attitudes towards in-custody informants have remained. It may be simply that the policy has limited the Crown's discretion and ability to use their evidence. Though *King's* trial occurred in 2019, the charge relates to his dealings with the police and Crown as far back as 2015. In 2017, the Crown released another update to its policy on in-custody informants.[106] *King*'s case highlights a

[106] See *Appendix D.*

significant frailty in the Crown Policy, namely, that records pertaining to the use of jailhouse informants at preliminary inquiries were not being maintained and their evidence was not being vetted by the In-Custody Informer Committee. The 2017 Manual attempts to address the shortfalls of previous policies in order to ensure that what happened in the case of Mr. King does not occur again. Though the immediate action of the Attorney General's office to address the problems in the Policy on jailhouse informants is commendable, what underlies the problems in the *King* case is the actions of the police and the Crown, rather than the Policy itself.

Despite a recent recognition that in-custody informants may contribute to wrongful convictions, the Crown and police in the *King* matter did not adequately investigate this jailhouse informer's background. Further complicating the matter, the defence's ability to find information on Mr. King's informing history suggests that the Crown and police did not even attempt to look into his history; worse, if the Crown and police did know Mr. King's past and ignored it for the purpose of ensuring a case would be committed to trial, this borders on misconduct. This is concerning because it suggests that attitudes towards in-custody informants may not have changed at all, at least insofar as the prosecutors and police are concerned. Crown counsel and police may not employ the same meaning-making process regarding this type of evidence. The *King* case demonstrates that although the way the judiciary frames in-custody informers have changed over this time, the legal community may not have accepted the ways in which these witnesses are being framed by the Courts.

5.4 Directions for Future Research

Overall, the data conceive jailhouse informants as suspect, but accepted witnesses, whose motivations and past are questionable, but have viable information against the accused. In the *Post-Policy* era the practice outlined in the Crown Policy has been accepted as the proper

channel for review of in-custody informer evidence before reaching trial. The evidence of in-custody informers is compared against other forms of evidence at trial and is judged in relation to their reliability and credibility, as well as their ability to confirm other evidence. A major finding of this research project was the use of accomplice testimony in cases that use in-custody informant evidence; this connection has not been explicitly addressed in similar research studies. The fact that accomplice testimony is treated differently, and is less heavily scrutinized, when compared to in-custody informer evidence suggests that the two phenomena have been framed differently. That is, the two types of witnesses are not being similarly perceived and are treated differently by the Courts. Though historically accomplice testimony was problematized, it seems that the legal system is now more concerned with the problems associated with jailhouse informers.

In 2011, the Better Government Association and the Center on Wrongful Convictions reviewed 85 wrongful convictions in the state of Illinois over a 20-year period (Anyaso, 2011). The investigation determined that in 30 of the 85 cases a contributing factor in the wrongful conviction was 'incentivized witness testimony'. The finding suggesting the increasing use of accomplice testimony in cases where jailhouse informers are testifying is an area that has not been previously considered in Canadian wrongful conviction research. Future research should consider conducting a similar study but expanding the data to include accomplice evidence to better understand the types of cases where such evidence is presented and how it is treated by the Courts. This research could compare the framing of in-custody informer evidence to that of accomplice testimony to better understand how the judiciary frame the two types of witness evidence in practice. This research could encourage the review of incentivized witness testimony

(or cooperating witnesses) more broadly and their potential relationship with miscarriages of justice.

Future research may also consider undertaking a media analysis to review how the media as claims-makers have framed in-custody informers, and how that may have changed over time. Research must continue to review known causes and factors that contribute to wrongful convictions. Even in matters such as these where it seems that the problem (e.g in-custody informants causing wrongful convictions) has been addressed, there is no real way of knowing that the Policy is being implemented and properly followed without adequate evaluation. The work of Innocence organizations in Ontario, Canada, and abroad have demonstrated that erroneous convictions occur, and their impact can severely affect individuals, their families and wider communities. It is important to recognize that wrongful convictions and miscarriages of justice also affect the public's perceptions of the legitimacy of the legal system as a whole; erroneous convictions may weaken the perceived legitimacy of the system. The public's confidence in the system suffers every time an innocent person is found to have been wrongly convicted. Most importantly, research must continue to shed light on wrongful convictions and facilitate work within the legal system to limit the occurrence of this devastating phenomenon.

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APPENDIX A: ONTARIO CROWN MANUAL ON IN-CUSTODY INFORMERS, 1997

PROVINCE OF ONTARIO

MINISTRY OF THE ATTORNEY GENERAL

CROWN POLICY MANUAL

Policy # I-2	Original Date November 13, 1997	Update
In-Custody Informers	CROSS REFERENCE: Disclosure	

Introduction

This Policy is intended to provide Crown counsel with guidance respecting the use of evidence from witnesses who are characterised as *In-Custody Informers*, sometimes called "jailhouse informers". For the purpose of this policy, an *In-Custody Informer* is someone who

(a) receives one or more statements from an accused,
(b) while both are in custody,
(c) where the statements relate to offences that occurred *outside* of the custodial institution.

The informer initially may wish to remain anonymous or may be prepared to testify. Excluded from this definition are informers who have direct knowledge of the offence independent of the statements of the accused (even if a portion of their evidence includes a statement made by the accused).

This policy is not intended to address the use of undercover operatives outside the custodial setting, nor to limit the use of the evidence of in-custody informers to advance police investigations. As well, even if Crown counsel decides not to adduce the evidence of an in-custody informer, that evidence may be considered by the Crown in exercising his or her discretion in respect of whether it is in the public interest to proceed with the case.

Issued or revised November 13, 1997

Whether to Present the Evidence of a In-Custody Informer

The evidence of an in-custody informer is admissible in court and can properly form part of the case for the Crown. Such evidence is, however, subject to a number of frailties, and these frailties should normally cause counsel to examine carefully whether, in the circumstances of the particular case, such evidence ought to be presented to the Court. In making such a determination Crown counsel should have in mind that by definition in-custody informers are detained by authorities, either awaiting trial or serving a sentence of imprisonment. Their circumstances are such that they may seek, and in rare cases will receive, some benefit for their participation in the Crown's case. The danger of an unscrupulous witness manufacturing evidence for personal benefit cannot be overlooked, and this possibility should inform a prosecutor's exercise of discretion respecting the presentation of such evidence.

In deciding whether to present the evidence of an in-custody informer to the court, Crown counsel should, at a minimum, consider the following matters:

1. 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.

2. It is unlikely to be in the public interest to initiate or continue a prosecution based *only* on the unconfirmed evidence of a In-Custody Informer. Confirmation of evidence is not the same as corroboration. In the context of evidence from an In-Custody Informer, confirmation is evidence or information available to the Crown which contradicts a suggestion that the inculpatory aspects of the proposed evidence of the informer was fabricated. 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

3. Crown counsel are reminded that an in-custody informer, like any other informer, may enjoy the protection of 'informer privilege' (see *R. v. Leipert* (1997), 112 C.C.C.(3d) 193 (S.C.C.)). Before disclosing information tending to identify an informer, or calling their evidence, Crown counsel *must* determine that the in-custody informer has either not claimed, or has given an informed waiver of, that privilege.

Issued or revised November 13, 1997

4. Police should not recruit an inmate to act as their agent to solicit a statement from another inmate except in accordance with the safeguards set out in *R. v. Broyles* (1991) 68 C.C.C.(3d) 308 (S.C.C.).

Crown counsel assessing the reliability of an informer's report of a statement by an accused may take into account the following matters:

1. whether the informer made some written or other record of the words spoken by the accused, and if so, whether the record was made contemporaneous to the statement of the accused, or is otherwise a reliable record;
2. the circumstances under which the informer's report of the statement was taken (e.g., report made immediately after the statement was made, report made to more than one officer, the informer's prior knowledge of offence or accused)
3. the reliability of an informer's report of an in-custody statement will generally be enhanced if it is given under oath and recorded on audio or video tape. (In this respect, the police should be encouraged to follow the guidelines set down in *KGB.*)
4. the manner in which the report of the statement is taken by the police (e.g., use of non-leading questions, thorough report of words spoken by accused, thorough investigation of circumstances which might suggest opportunity (or lack of opportunity) to fabricate a statement)
5. an awareness of any 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;
6. the extent to which the statement is confirmed in the sense set out in 1.4, above;
7. the informer's general character including his or her criminal record;
8. any request the informer has made for benefits or special treatment and any promises which may have been made by a person in authority in connection with the provision of the statement or an agreement to testify; and
9. whether the informer has in the past given reliable information to the authorities.
10. Whether the informer has previously claimed to have received statements while in custody

In this respect counsel should ensure that the background of the informer has been appropriately investigated. Part of this police investigation should include a review of any available registry of informers who have testified in circumstances such as those described in this policy.

Issued or revised November 13, 1997

Limits on Dealing with In-Custody Informers

Crown counsel must be sensitive to the distinction between a "true informer" who comes forward to the police with existing information and an "agent of the state", as defined by *R. v. Broyles* (1991) 68 C.C.C.(3d) 308 (S.C.C.), who is placed in contact with the accused for the specific purpose of obtaining a statement from the accused. An agent of the state must not compromise the right of the accused to remain silent. The test set out in *R. v. Broyles* is "*Would the exchange between the accused and the informer have taken place in the form and manner in which it did take place, but for the intervention of the state or its agent*".

In dealing with in-custody informers prior to trial it is important for Crown counsel to keep in mind that any direct contact they have with an informer may become the subject of some future *voir dire* or other proceeding. Counsel dealing with an informer should not, therefore, ordinarily, be counsel ultimately expected to conduct of the prosecution.

In many cases In-Custody Informers will have counsel to assist them in respect of charges they face or related matters and in such cases it is appropriate for the Crown and police to deal with the witness through counsel (to the extent that this is reflective of the informed desires of the witness). In any case where an In-Custody Informer has sought the benefit of informer privilege Crown counsel should act to facilitate the availability of independent counsel for the witness. This may be done through the Ontario Legal Aid Plan, funding available from some police agencies, or through some special arrangement. In any case where it is proposed that counsel be available to the witness other than through OLAP or a conventional private retainer, Crown counsel should consult with the Director of Crown Operations for the region in which the prosecution is to take place.

Disclosure

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 following is a list of items for disclosure that Crown counsel should review to ensure disclosure is both full and fair:

1. the criminal record of the in-custody informer including, where available, the synopsis 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);

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 as consideration for their co-operation with authorities, including (but not limited to):

   - financial benefits;
   - beneficial treatment while in custody;
   - early consideration for parole;
   - outstanding charges reduced, stayed or withdrawn;
   - a reduced sentence on outstanding charges,
   - promises of 'best efforts' respecting any of the above, or
   - any form of future indemnity;

5. where possible, any arrangements providing for a benefit (as set out above) to a witness should be recorded on audio or video tape or reduced to writing and approved by a Director of the Criminal Law Division and disclosed to defence *prior to* receiving the testimony of the witness;

6. copies of the notes of all police officers, corrections authorities or Crown counsel who made any promises of benefits or negotiated a benefit with a in-custody informer;

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

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

While complete disclosure must always be made when calling a in-custody informer as a witness, the ***timing*** of that disclosure must be carefully considered and is a matter that remains within the sound discretion of prosecuting counsel.

Issued or revised November 13, 1997

The safety of the in-custody informer can be endangered if disclosure is made before authorities can attend to providing for the personal security of the informer. It will be appropriate to confer with police and correctional authorities prior to making disclosure. (The Disclosure guideline D-1 should be reviewed to gain advice and assistance on procedures to be followed when disclosure is delayed.)

Informer Privilege

The obligations respecting disclosure as set out above are triggered when the informer consents to be a witness. If the in-custody informer does not intend to give testimony or make their statement known to the public, then they may be entitled to an informer's privilege. Prior to making disclosure, the informer should be told he/she may have a privilege. If an informer does not waive the privilege then Crown counsel is not permitted to disclose information tending to identify the informer.

Issued or revised November 13, 1997

APPENDIX B: ONTARIO CROWN MANUAL ON IN-CUSTODY INFORMERS, 2005

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

Date: March 21, 2005

IN-CUSTODY INFORMERS

PRINCIPLES:

Experience has demonstrated substantial risks to the proper administration of justice may arise from the use of in-custody informers as witnesses. Crown counsel must be aware of the dangers of calling in-custody informers as witnesses. An in-custody informer can only be called as a witness at a preliminary inquiry with the permission of a Regional Director of Crown Operations. An in-custody informer can only be called as a witness at trial with approval of an In-Custody Informer Committee.

In all cases, the guiding principle is that in custody informers will only be tendered as prosecution witnesses where this evidence is justified by a compelling public interest, founded on an objective assessment of reliability.

In-custody informer evidence requires a rigorous, objective assessment of the informer's account of the accused person's alleged statement, the circumstances in which that account was provided to the authorities and the in-custody informer's general reliability.

A principal purpose of this policy is to help prevent miscarriages of justice, which can occur when in-custody informers falsely implicate accused persons.

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PM [2006] No. 2

PRACTICE MEMORANDUM
To Counsel, Criminal Law Division

Date: March 31, 2006

Subject: **In-Custody Informers**

Synopsis: This practice memorandum calls the attention of Crown counsel to the dangers of using in-custody informers. It sets out the procedure to follow when Crown counsel proposes to call an in-custody informer as a witness at trial and also outlines the role and responsibilities of the In-Custody Informer Committee.

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Opinion/Advice:

1. Introduction

Experience has demonstrated that substantial risks to the proper administration of justice may arise from the use of in-custody informers as witnesses. This practice memorandum calls to the attention of Crown counsel the dangers in the use of in-custody informers. **In-custody informers can only be used at preliminary inquiries with the permission of the relevant Director of Crown Operations or the Director of the Crown Law Office-Criminal, as the case may be. They can only be used at trial with the approval of an In-Custody Informer Committee. In all cases, the guiding principle is that in-custody informers will only be tendered as prosecution witnesses where a compelling public interest, founded on an objective assessment of reliability, justifies it**. A registry of In-Custody Informers assists police and prosecutors to make informed choices about the use of in-custody informers.

2. Definitions

For the purposes of this practice memorandum, "in-custody informer," "confirmation" and "consideration" are defined as follows:

a. An "in-custody informer" is someone who:

i. allegedly receives one or more statements from an accused person,
ii. while both are in custody,
iii. where the statements relate to offences that occurred outside of the custodial institution.

The accused person need not be in custody for, or charged with, the offences to which the statements relate.

Excluded from this definition are informers who allegedly have direct knowledge of the offence independent of the alleged statements of the accused person (even if a portion of their evidence includes a statement made by the accused person). This practice memorandum is not intended to address the use of undercover operatives outside of the custodial setting, nor to limit the use of in-custody informers to advance police investigations.

Crown counsel should be sensitive to the distinction between a "true in-custody informer", (to which this practice memorandum is directed) who approaches the police with existing information and an "agent of the state", as defined in *R. v. Broyles* [1] who is placed in contact with the accused person for the specific purpose of obtaining a statement. An agent of the state must not compromise the right of the accused person to remain silent. The test set out in *R. v. Broyles* is: "*Would the exchange between the accused and the informer have taken place in the form and manner in which it did take place, but for the intervention of the state or its agent*".

b. "Confirmation" of evidence is not synonymous with corroboration. In the context of evidence from an in-custody informer, confirmation is credible evidence or information available to the Crown, independent of the in-custody informer, which significantly supports the position that the in-custody informer is telling the truth regarding the inculpatory aspects of the proposed evidence.

c. "Consideration" includes a promise, conferral or undertaking to make "best efforts" regarding any of the following in return for, or in connection with, the in-custody informer's testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness:

- bail;
- reduction or modification of sentence or charge;
- stay, withdrawal, or dismissal of charges;
- financial assistance or reward;
- amelioration of current or future conditions of incarceration;
- any other leniency or benefit;
- the extension of any of the above to any person connected with the in-custody informer.

Consideration does not include measures taken to ensure the safety or security of the in-custody informer or any person connected with the in-custody informer. Crown counsel should, however, be aware of the potential impact of any safety measures taken on the reliability of the in-custody informer.

3. The Decision Process in Cases Where Crown Counsel Proposes to Call an In-Custody Informer

[1] (1991), 68 C.C.C. (3d) 308 (S.C.C.)

The exercise of the discretion to rely on the evidence of an in-custody informer depends on an assessment of whether there is a compelling public interest in doing so. The compelling public interest standard is equally applicable to decisions in favour of, or against, adducing the evidence of an in-custody informer. The determination at any stage in the proceedings that there is or is not a compelling public interest in tendering the testimony of an in-custody informer depends on a consideration of the general principles set out in Part 4 and the reliability assessment set out in Part 5 of this memorandum.

If Crown counsel forms the opinion that there is a compelling public interest in relying on the evidence of an in-custody informer at trial, he or she must refer the case to the In-Custody Informer Committee. The Committee will consider the materials submitted by Crown counsel (see part 7 (c) below), and will, unless precluded by exigent circumstances, meet with Crown counsel to discuss the case before making its decision. Crown counsel may not rely on the in-custody informer's testimony without the Committee's approval.

Counsel intending to rely on the evidence of an in-custody informer at a preliminary inquiry must bring the matter to the attention of his or her Director of Crown Operations or the Director of the Crown Law Office-Criminal, as the case may be, who will determine whether the matter should be referred to the Committee for review. This process should take place before the start of the preliminary inquiry. The Committee will reassess the use of the in-custody informer after the preliminary inquiry.

A prosecution based solely on the unconfirmed evidence of an in-custody informer will be in the public interest in only the most exceptional of cases. A prosecution on that basis requires the prior approval of both the Committee and the Assistant Deputy Attorney General.

4. Principles to be Considered in Determining Whether There Is a Compelling Public Interest in Relying on the Evidence of the In-Custody Informer

In determining whether such a compelling public interest exists in particular cases, Crown counsel and the Committee must consider the principles set out below.

a. In the past, this kind of evidence has, been shown to be untruthful and has resulted in miscarriages of justice. Some informers have shown great ingenuity in securing information thought to be inaccessible to them. Others have converted details communicated by the accused person in the context of an exculpatory statement into details which purport to prove the making of an inculpatory statement.

b. By definition, in-custody informers are detained by authorities, either awaiting trial or serving a sentence of imprisonment. As a result, they will often seek some consideration for their participation in the Crown's case. The danger of an unscrupulous witness manufacturing evidence for personal benefit is a significant one. Crown counsel should therefore request that the police provide a written record itemizing any consideration that they have promised to or conferred upon the informer, and any consideration known to them

to have been sought by the in-custody informer or promised or conferred by other persons in authority, such as correctional authorities.

c. In assessing any consideration offered or conferred upon an in-custody informer, Crown counsel should be mindful of the potential temptation to enhance or manufacture evidence that necessarily arises whenever testimony is exchanged for benefit. These dangers are relevant both to individual cases and the administration of justice generally.

d. The varying circumstances of individual in-custody informers make it impossible to quantify objectively or rank the value of different forms of consideration. Nevertheless, Crown counsel should address the possibility that the hazards associated with in-custody informer evidence may increase with the value of the consideration offered or conferred. The in-custody informer's reliability will not necessarily be enhanced by the fact that he or she does not appear to have sought, or been offered, any consideration, since the in-custody informer may be motivated by any number of factors, such as a contemplated future request for consideration, that will not be immediately apparent to Crown counsel.

e. A primary concern in assessing whether there is a compelling public interest in adducing the evidence of an in-custody informer in any case will be the *indicia* of reliability underlying the in-custody informer's statement. In evaluating reliability, the factors set out in section 5, *"Assessing the Reliability of In-Custody Informers as Witnesses"*, should be considered. Crown counsel should encourage police to address all of the matters relating to the assessment of reliability of the informer at the earliest opportunity. Crown counsel should be satisfied that the background of the informer has been appropriately investigated by police, depending on the circumstances of the case. "Appropriate" police investigation will generally include those factors listed as crucial to the assessment of the reliability of an in-custody informer as a witness and a review of the In-Custody informer Registry.

f. Crown counsel may consult with the police concerning the feasibility and appropriateness of requesting that the in-custody informer consent to a section 184.2 wiretap of further conversation with the accused person. Crown counsel should bear in mind that, in taking this step, the informer will become a state agent.

g. The seriousness of the offence allegedly committed by the accused person is generally an important factor to consider in assessing public interest. Gravity alone will not, however, provide sufficient justification for introducing an in-custody informer's evidence. Indeed, the pressures created in serious cases or cases which attract a great deal of public attention may call for heightened scrutiny and increased caution. For example, high profile cases may provide in-custody informers with increased motivation to manufacture evidence, as well as easier access to information about the offence.

h. There is a risk that in-custody informers who have received consideration in the past and are reincarcerated in connection with subsequent offences may be motivated to fabricate evidence in exchange for consideration. Crown counsel should bear this risk in mind in assessing the in-custody informer's reliability. To discourage this practice, it is advisable to avoid the repeated use of in-custody informers.

i. As a result of providing information or evidence to the authorities, the personal safety of an in-custody informer is potentially at great risk. This potential for increased risk is relevant in assessing whether there is a compelling public interest in adducing an in-custody informer's evidence.

5. Assessing the Reliability of In-Custody Informers as Witnesses

Assessing the evidence of an in-custody informer requires a rigorous, objective assessment of the informer's account of the accused person's alleged statement, the circumstances in which that account was provided to the authorities, and the in-custody informer's general reliability. The factors listed below must be considered by Crown counsel and by the In-Custody Informer Committee as part of their assessments of "compelling public interest".

Crown counsel considering the use of an in-custody informer should ask police to gather information and document each of the items set out below, for the assistance of counsel, for submission to the Committee, if appropriate, and for submission to the Registry. In applying these criteria, Crown counsel and the Committee should not only assess each item individually, but also consider the collective impact of the entire list of factors as a comprehensive group.

a. **Confirmation of the statement:** Counsel should consider the extent to which the in-custody informer's statement is confirmed in the sense set out in the definition section. The statement of one in-custody informer generally should not to be considered as confirmatory of the statement of another in-custody informer.
b. **The detail contained in the alleged statement:** The statement's reliability will be bolstered or decreased depending on the degree to which it contains particular or unusual details relating to the offence. The reliability of the statement will also be enhanced where it leads to the discovery of evidence known only to the perpetrator.
c. **The circumstances under which the alleged statement was made by the accused person to the in-custody informer.**
d. **The circumstances under which the informer's report of the alleged statement was taken:** Examples of relevant circumstances would include whether the report was made immediately after the alleged statement, and whether the in-custody informer has made more than one effort to exchange the particular statement for consideration.
e. **The access the informer may have had to external sources of information** about the offence, such as media reports or the accused person's copy of the Crown disclosure materials.
f. **Record made by the in-custody informer:** The existence, nature, timing and availability of any written or other record made by the in-custody informer of the accused person's words should be documented and considered.
g. **Any request the informer has made for consideration**, whether agreed to or not**,** in connection with provision of the statement or an agreement to testify.
h. **Safety measures** known to Crown counsel that have been requested, offered to or received by the informer in connection with his or her testimony

i. **Consideration** offered to or conferred upon the informer by the authorities. Generally, consideration will be offered or conferred by Crown counsel or the police. Sometimes it will come from other persons in authority, such as corrections officials. It is important that there be a written record itemizing any consideration solicited, offered or conferred respecting an in-custody informer. Any such consideration should be taken into account in assessing reliability.
j. **The in-custody informer's general character.** The informer's character may be evidenced by a criminal record or a history of disreputable, dishonest conduct. Conversely, any evidence of good character will also be relevant to the informer's reliability;
k. **Medical or psychiatric reports** concerning the in-custody informer contained in court records or obtained in the course of the investigation of the in-custody informer.
l. **Previous efforts to obtain consideration**: Any information known to police or Crown counsel concerning previous efforts by the in-custody informer to trade testimony for consideration, whether documented in the In-Custody Informer Registry or not.
m. **Previous reliability as an informant:** Information should be compiled showing whether the in-custody informer has in the past given reliable information to the police or the Crown.
n. **Previous testimony:** Counsel and the Committee should consider the in-custody informer's previous experience as a witness, both on his own behalf and otherwise. Judicial findings concerning the informer's accuracy and reliability are relevant in assessing reliability.
o. **Previous claims:** Any previous claim to have received statements while in custody should be considered, as should the results of a search of the In-Custody Informer Registry.
p. **Any other known evidence** that may attest to or diminish the credibility of the informer, including the presence or absence of any relationship or association between the accused person and the informer.

6. Restrictions in Dealing with In-Custody Informers

a. *Informer privilege*

The Supreme Court of Canada has affirmed the mandatory nature of informer privilege and its fundamental importance to the due administration of justice.[2] In the course of all dealings with in-custody informers, Crown counsel must be mindful of the privilege and determine its operation in the context of each prosecution.

If an in-custody informer does not intend to testify or refuses to consent to make his or her statement known to the public, then the statement is protected by informer privilege. Crown counsel must consider the constraints created by this privilege in contemplating the disclosure of any information that could expressly or implicitly reveal the informer's identity.

While, technically, informer privilege belongs to the Crown, the Crown cannot waive the privilege without the informer's consent. The privilege is absolute and cannot be weighed

[2] *Regina v. Leipert* (1997), 112 C.C.C. (3d) 385 (S.C.C.)

against other competing interests. Once established, neither the police nor the court possess the discretion to encroach upon the privilege.[3]

The only exception to the absolute nature of the privilege is the "innocence at stake exception." In order for this exception to apply, there must be a basis in the evidence for concluding that disclosure of the informer's identity is necessary to prove the innocence of the accused person.[4]

There is also authority for the position that, if the in-custody informer waives privilege and testifies, he or she cannot be compelled to answer questions regarding other involvement with the police, as an informant, unless privilege is waived regarding that activity.[5]

Before disclosing or seeking a waiver in respect of an in-custody informer's statement, Crown counsel should advise the informer that he or she may have a privilege and encourage the informer to obtain legal advice. Absent an in-custody informer's consent, and subject to the "innocence at stake" exceptions, Crown counsel may not disclose an in-custody informer's statement. In such circumstances, Crown counsel should consider carefully the effect that this may have on the viability of the prosecution.

b. ***Legal advice for in-custody informers***

Crown counsel should ensure that the in-custody informer is aware of the advisability of seeking legal advice with respect to the operation and waiver of informer privilege. In many cases in-custody informers will have counsel to assist them with charges they face, or related matters. In such cases it is appropriate for the Crown and police to deal with the informer through counsel (to the extent that this is consistent with the informer's wishes). If the in-custody informer does not already have counsel, Crown counsel, with the informer's consent, should try to facilitate access to counsel**,** either through Legal Aid Ontario or a conventional private retainer. Where it is proposed that counsel be available to the witness by some special arrangement, Crown counsel should consult with the Director of Crown Operations for the region in which the prosecution is to take place.

c. ***Safety/security issues***

An in-custody informer may face increased safety risks. There may be cases where the risk to the safety of an in-custody informer or an individual connected with the in-custody informer is acute enough that the public interest weighs against adducing the informer's evidence.

d. ***Consideration promised or conferred***

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[3] *supra*, at 392-393

[4] *supra* at 394-395

[5] *Regina v. Bisaillon v. Keable* (1983), 7 C.C.C. (3d) 385 (S.C.C.); *R. .v. Jack Heyden and William Vanderheyden*, (September 15, 1997), unreported (Ont.Ct.Gen.Div.); *R. v. Newsome* (November 29, 1996), 33 W.C.B. (2d) 120, [1996] Alta.D.Crim.Conv. 5436-01

In assessing or agreeing to any promise, or conferral, of consideration, Crown counsel should be mindful of the potential corrupting effect of exchanging testimony for any sort of benefit. The nature of the consideration sought, promised or conferred will inevitably reflect upon the reliability of the in-custody informer and the ultimate determination of whether there is a compelling public interest in adducing his or her evidence.

No consideration should be offered in relation to future or, as of yet, undiscovered criminality. Negotiations with in-custody informers should make this fact clear. Where an agreement has been reached, any requests for additional consideration, either during or after the in-custody informer's testimony at trial, should be refused, except for those necessarily incidental to consideration already promised or conferred.

Where the informer is charged with an additional criminal offence prior to the completion of his or her testimony, Crown counsel should reassess the use of the in-custody informer as a witness, whether or not the informer seeks any new consideration. The commission of additional criminal offences may, in fact, disentitle the in-custody informer to any consideration previously agreed upon but not yet conferred. **Where the in-custody informer is charged with additional criminal offences and/or seeks additional consideration, Crown counsel must notify his or her Director of Crown Operations who will determine whether or not the In-Custody Informer Committee ought to reconsider the matter.**

If, in the course of proceedings relating to new criminal charges, the in-custody informer seeks additional consideration from the court for past co-operation, Crown counsel should advise the court that the informer was made aware that he or she could not expect additional consideration in relation to future or undiscovered criminality when the original agreement was reached. The presumption against mitigating future sentences in recognition of past cooperation for which the informer has already received consideration is subject to any measures connected with or deemed necessary to protect the in-custody informer's safety.

Under no circumstances shall conferring consideration on an in-custody informer be conditional upon the conviction of the accused person.

e. ***Negotiating with in-custody informers***

In negotiating with in-custody informers prior to trial it is important for Crown counsel to bear in mind that any direct contact with an informer may become the subject of some future *voir dire* or other proceeding. Therefore, counsel dealing with an informer should not, ordinarily, be counsel ultimately expected to conduct the prosecution.

f. ***Documenting agreements with in-custody informers***

Any agreements made with in-custody informers relating to consideration in exchange for information or evidence must, absent exceptional circumstances, be reduced to writing and signed by a prosecutor, the informer and counsel (if represented). An oral

agreement, fully recorded, may substitute for a written agreement. While a videotape recording is preferable, other types of record, such as audiotape or affidavit, may suffice. Any such agreements respecting consideration shall be approved by a Director of Crown Operations.

7. In-Custody Informer Committee

a. *Role of the Committee*

The role of the Committee is to provide guidance and approval to Crown counsel by determining whether there is a compelling public interest in relying on the evidence of an in-custody informer in trial matters. The Committee is also responsible for the maintenance of the In-Custody Informer Registry.

b. *Composition of the Committee*

The Assistant Deputy Attorney General designates a senior Crown counsel as Chair of the Committee for a fixed term. The Chair will determine whether the Committee will consist of three or five members, depending on the circumstances of each individual case. The Chair may, at his or her discretion, expand the Committee to include five members at any point during the review process.

A three-member Committee is to be comprised as follows:

i. The Chair;
ii. The Local Crown Attorney or the Deputy Director, Crown Law Office – Criminal, as the case may be, (Or the Crown Attorney from a neighbouring jurisdiction if the local Crown Attorney is involved in prosecuting the case or negotiating consideration to be conferred upon the informer);
iii. An experienced appellate counsel or Crown counsel from another region.

A five-member Committee will also include:

i. The Director of Crown Operations of the region responsible for the prosecution of the case or his or her designate; and
ii. A second appellate counsel or Crown counsel from another region.

c. *Materials to be submitted to and considered by the Committee*

Crown counsel should provide the following written materials to the Committee: (In rare cases, exigent circumstances may prevent Crown counsel from providing the Committee with this information. Where those circumstances exist, Crown counsel should bring the matter to the attention the Chair of the Committee who will determine the appropriate nature of the review.)

i. A detailed synopsis of the allegations;
ii. A summary of the anticipated evidence of the in-custody informer;
iii. A summary of all the evidence the Crown proposes to rely upon at trial, to assist the Committee in detemining the significance of the in-custody informer's evidence to the Crown's case;
iv. An analysis of the informer's reliability, addressing the reliability *indicia* set out above, including any confirmatory evidence.
v. Any requests for consideration made by the in-custody informer and any consideration promised or conferred by the authorities in exchange for information or testimony pertaining to the offence; (This would include any written agreement, if already in existence.)
vi. Antecedents of the informer, including, but not limited to:
- the informer's criminal record
- medical or psychiatric reports, where relevant and in possession or control of the Crown
- prior history of reliability in dealing with the police and/or the courts, if known
- results of search of the In-Custody Informer Registry

vii. Any other information that Crown counsel believes is relevant to the Committee's review of the case or any further materials requested by the Committee.

d. ***The decision of the Committee***

Prosecutorial discretion may only be exercised in favour of adducing the evidence at trial of the in-custody informer where the Committee has determined that there is a compelling public interest in doing so. The deliberations of the Committee underlying that exercise of prosecutorial discretion in individual cases will not be disclosed.

e. ***Providing follow-up information to the committee:***

Trial and appellate counsel should forward to the Committee any relevant follow-up information to allow the committee to assess its decision-making process and for the guidance of police, counsel and the committee in the event that they evaluate the same in-custody informer in the future. Follow-up information should include:

- Whether the in-custody informer was used as a witness, and if not, why not;
- Counsel's assessment of the strengths and weaknesses of the in-custody informer's evidence as given at trial;
- Judicial remarks or findings regarding the credibility of the in-custody informer, with transcripts where possible.

f. ***Recantations***

If the in-custody informer recants following a decision by the In-Custody Informer Committee and Crown counsel still wishes to call the witness, the matter must be referred back to the In-Custody Informer Committee.

8. Disclosure Respecting In-Custody Informers as Witnesses

The dangers of using in-custody informers in a prosecution give rise to a heavy onus on Crown counsel to make complete disclosure. Complete disclosure is, of course, subject to informer privilege and safety considerations, as set out above. Accordingly, the timing of disclosure is a matter that remains within the sound discretion of prosecuting counsel and requires careful consideration. The safety of an in-custody informer can be endangered if disclosure is made before authorities can provided for his or her personal security. It will therefore be necessary to confer, as appropriate, with police and correctional authorities prior to making disclosure. Counsel may also wish to seek the input of the Chair of the Committee. (The Policy and Practice Memoranda relating to Disclosure should be reviewed to gain advice and assistance on procedures to be followed when disclosure is delayed.)

Without limiting the extent of the Crown's disclosure obligation, the following is a list of items that Crown counsel should review to ensure disclosure is both full and fair:

a. the criminal record of the in-custody informer including, where reasonably accessible to the police or Crown, the factual synopses relating to any convictions;

b. information concerning any new or additional criminal charges laid against the in-custody informer prior to the completion of his or her testimony at trial;

c. any medical or psychiatric reports concerning the in-custody informer, where relevant and in possession or control of the Crown;

d. any information in the Crown's possession or control respecting the circumstances in which the informer may have previously testified as a Crown witness, including, at a minimum, the date, location and court where the previous testimony was given;

e. any information in the Crown's possession or control, including copies of the notes of all police officers, corrections authorities or Crown counsel who participated in, or were present during, any negotiations respecting the following:

    i. consideration sought by the informer or any person associated with the informer in exchange for the information or evidence at issue in the present case;

    ii. any offers or promises made by the police or Crown counsel to the informer or any person associated with the informer in exchange for the information or evidence at issue in the present case;

iii. any consideration already conferred upon the informer or person associated with the informer in exchange for the information or evidence at issue in the present case;

iv. any further consideration requested, offered, promised or received that is necessarily incidental to consideration already promised or conferred;

v. any additional consideration sought, promised or conferred beyond the scope of the original agreement to provide information or testimony;

f. safety measures requested, offered or promised to the in-custody informer on his or her own behalf or on behalf of another individual, with appropriate precautions taken to ensure that disclosure of the information will not itself jeopardize the safety of the in-custody informer;

g. any written or other record of an agreement respecting consideration for information or evidence of the in-custody informer in the present case;

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

i. if the informer will not be called as a Crown witness, a disclosure obligation still exists, subject to the informer's privilege. In most cases, Crown counsel, after having first sought police input, will be able to at least disclose the fact that the information exists.

9. Prosecution of Informer for Giving False Statements

A principal purpose of this Practice Memorandum is to help prevent miscarriages of justice, which can occur when in-custody informers falsely implicate accused persons. Therefore, where Crown counsel becomes aware of an in-custody informer, with intent to mislead, making a false statement with respect to a material fact, he or she must refer the case to the local Crown Attorney. If the local Crown Attorney is prosecuting counsel, then the case must be referred to the Director of Crown Operations. The case will then be referred to an outside police agency for investigation. If that investigation leads to the laying of a charge, the matter should be referred to outside Crown counsel for advice and prosecution. The purpose of prosecuting in-custody informers who attempt (even unsuccessfully) to falsely implicate an accused person is, among other things, to deter like-minded members of the prison population.

10. The In-Custody Informer Registry

The Ministry of the Attorney General has established an in-custody informer registry designed to make available to prosecutors, defence counsel and police, information concerning prior testimonial involvement of in-custody informers.

The registry contains information concerning in-custody informers who:

- have testified since January 1, 1999 or who
- since the establishment of the In-Custody Informer Committee, have expressly waived informer privilege in contemplation of testifying

The registry itself contains in secure electronic form:

- The names of the in-custody informers
- The FPS number and photograph of each of those in-custody informers
- The names of key prosecutors and key police contacts who have dealt with each listed informer and their successors

It is the responsibility of Crown counsel to obtain and forward to the Registry photographs and FPS numbers of any informers who have waived their police informer privilege as a prelude to possibly testifying.

Attachment: None

Contact Person: Criminal Law Policy Branch
416-314-2955

Signed by:

Paul Lindsay
Assistant Deputy Attorney General
Criminal Law Division

Practice Memoranda are not considered to be confidential and may be given to defence counsel or other interested persons, upon request.

MANDATORY LANGUAGE:

In-custody informers can only be used at preliminary inquiries with the permission of the relevant Director of Crown Operations or the Director of Crown Law Office – Criminal, as the case may be. They can only be used at trial with the approval of an In-Custody Informer Committee. In all cases, the guiding principle is that in custody informers will only be tendered as prosecution witnesses where a compelling public interest, founded on an objective assessment of reliability, justifies it.

If Crown counsel forms the opinion that there is a compelling public interest in relying on the evidence of an in-custody informer at trial, he or she must refer the case to the In-Custody Informer Committee. The Committee will consider the materials submitted by Crown counsel (see part 7 (c)), and will, unless precluded by exigent circumstances, meet with

Crown counsel to discuss the case before making its decision. Crown counsel may not rely on the in-custody informer's testimony without the Committee's approval.

Counsel intending to rely on the evidence of an in-custody informer at a preliminary inquiry must bring the matter to the attention of his or her Director of Crown Operations, who will determine whether the matter should be referred to the Committee for review. This process should take place before the start of the preliminary inquiry. The Committee will reassess the use of the in-custody informer after the preliminary inquiry.

A Prosecution based solely on the unconfirmed evidence of an in-custody informer will be in the public interest in only the most exceptional of cases. A prosecution on that basis requires the prior approval of both the Committee and the Assistant Deputy Attorney General.

In determining whether such a compelling public interest exists in particular cases, Crown counsel and the Committee must consider the principles set out in this memorandum.

Assessing the evidence of an in-custody informer requires a rigorous, objective assessment of the informer's account of the accused person's alleged statement, the circumstances in which that account was provided to the authorities, and the in-custody informer's general reliability. The factors listed in this memorandum must be considered by Crown counsel and by the In-Custody Informer Committee as part of their assessments of "compelling public interest".

If an in-custody informer does not intend to testify or refuses to consent to make his or her statement known to the public, then the statement is protected by informer privilege. Crown counsel must consider the constraints created by this privilege in contemplating the disclosure of any information that could expressly or implicitly reveal the informer's identity.

Where the in-custody informer is charged with additional criminal offences and/or seeks additional consideration, Crown counsel must notify his or her Director of Crown Operations who will determine whether or not the In-Custody Informer Committee ought to reconsider the matter.

Under no circumstances shall conferring consideration on an in-custody informer be conditional upon the conviction of the accused person.

Any agreements made with in-custody informers relating to consideration in exchange for information or evidence must, absent exceptional circumstances, be reduced to writing and signed by a prosecutor, the informer and counsel (if represented). An oral agreement, fully recorded, may substitute for a written agreement. While a videotape recording is preferable, other types of record, such as audiotape or affidavit, may suffice. Any such agreements respecting consideration shall be approved by a Director of Crown Operations.

Prosecutorial discretion may only be exercised in favour of adducing the evidence at trial of the in-custody informer where the Committee has determined that there is a compelling public interest in doing so. The deliberations of the Committee underlying that exercise of prosecutorial discretion in individual cases will not be disclosed.

If the in-custody informer recants following a decision by the In-Custody Informer Committee and Crown counsel still wishes to call the witness, the matter must be referred back to the In-Custody Informer Committee.

A principal purpose of this Practice Memorandum is to help prevent miscarriages of justice, which can occur when in-custody informers falsely implicate accused persons. Therefore, where Crown counsel becomes aware of an in-custody informer, with intent to mislead, making a false statement with respect to a material fact, he or she must refer the case to the Crown Attorney. If the Crown Attorney is prosecuting counsel, then the case must be referred to the Director of Crown Operations. The case will then be referred to an outside police agency for investigation.

APPENDIX C: SAMPLE CODING SHEETS

Coding Sheet Part 1- Example (case information)

Case Citation Case summary	Judgment type	Relevant Dates	Appeal decision	Judge-alone or Jury trial	Charges/ conviction	Grounds of appeal	Comment on the nature of evidence	Other wrongful conviction factors present?
R. v. Wells [2001] O.J. No. 81 Accused found to have strangled his girlfriend when she resisted his sexual advances, then went on to sexually assault a women, killing her and her two sons	ONCA[107] decision	DOO[108]: June 15, 1990 V[109]: October 24, 1991 S[110]: November 12, 1991 AH[111]: November 2-3, 2000 AJ[112]: January 17, 2001	Dismissed	Jury trial	Convicted: 1st degree murder x2 2nd degree murder x2	6 grounds of appeal 1. TJ[113] erred in finding no breach of s 8 &. 10b re: statement to police & seizure of bodily samples 2. TJ charge to jury on reasonable doubt was inadequate 3. TJ should have severed the counts 4. incompetence of counsel resulted in s. 7 & 11d violations 5. TJ erred in not charging the jury to similar fact evidence 6. TJ failed to give Vetrovec warning re: ICI[114] evidence	Direct evidence, DNA evidence	n/a

Coding Sheet Part 2 - Example (in-custody informant information)

[107] Ontario Court of Appeal
[108] Date of offence
[109] Date verdict rendered
[110] Date of sentencing decision
[111] Date appeal heard
[112] Date of appeal judgement released
[113] Trial judge
[114] In-custody informant

Case Citation	Name(s)	age	HISTORY: 1.Criminal 2.informing 3.psychiatric 4.drug	BENEFITS 1.sought 2.offered 3.received	Reason for informing	Time-lapsed prior to informing	Relation to accused	Did other unsavoury witnesses testify?
R. v. Trudel, [2004] O.J. No. 248	Scott Emmerson	26	1. "lengthy" criminal record" 4. substance abuse problems	1. entrance into drug treatment program 2. Witness Protection Program (WPP), drug treatment 3. WPP, drug rehabilitation clinic, leniency from the courts recommended	Initially claimed to have some knowledge of murders, police offered him WPP; contacted police one month later after being charged with new offences	2 years after alleged confession	Family friend of co-accused (*Mallory*)	Denis Gaudreault: accomplice Jacques Trudel: Defendant's brother, associate in drug business, history of providing information to the police in exchange for leniency

Coding Sheet Part 3 – Example (judicial commentary on in-custody informant)

Case	Commentary on ICI evidence	Commentary on state of case law/ legislation relating to ICI testimony	attempts to exclude or limit ICI evidence?	Commentary on other evidence
R. v. Gray [1991] O.J. No. 1084	Mr. Smith (fictious name) (para 8) In custody since June 1987 on robbery charges (para 11) Same range as appellant (para 11) Fall 1987 assisting Special Enforcement Unit (organized crime) (para 13) Offered information about Gray to police during interview on another matter (para 14) Long-time criminal (para 23) Reviewed the preliminary inquiry transcripts with the appellant (para 23)	Trial judge's reasons for admitting Smith's evidence: I do not have to review the facts in any great detail. It happened that the inmate mentioned to a police officer, who was not directly involved with the investigation of this charge, that he might be in the position to give some information that might be helpful to the Crown in respect to the accused who, at that time, was a prisoner in the same jail. The officer related the conversation to the Crown attorney who said to tell the inmate that, in effect, any information would be welcome. From then on the officer gave no instructions to the inmate as to how he should conduct any discussions with the accused. No trick was used by the police. No suggestion was made by the police to the inmate that he should use any trick to lead the accused to talk to him. Apparently the inmate formed the opinion that the accused was a talkative person, as indeed, according to the inmate, he probably is.	Attempt to exclude evidence on the basis of sec. 7 (right to silence)	n/a

		While obviously there are cases in which the use of agents provocateur, informants or trickery could constitute a violation of section 7 or section 10(b) of the Charter, I am completely satisfied that this is not one of them. Frankly, had the police turned down the offer of the inmate to pass on information to them, I think they would be subject to question as to whether they had properly performed their duties. Gangland executions are not pleasant matters. Investigations of them are difficult and I see nothing wrong with the Crown agreeing to accept information that may be provided by a cellmate or other inmate, who has access to the accused. It seems to me that a judge in Manitoba was correct when he said that the Charter is the protector of the rights of citizens; it is not their nanny. If people accused of offences want to blab in the jails, they have no right to expect that people will not repeat what they hear. In my opinion there is no violation whatsoever of any of the accused's rights in respect to the statement or statements made by the accused to the inmate. If I did find there to have been some technical violation of his Charter rights, I would have admitted the evidence, because I am satisfied that its admission would not bring the administration of justice into disrepute. Indeed, in my opinion, if I were to reject this evidence, I would bring the administration into disrepute (para 24).		

APPENDIX D: ONTARIO CROWN MANUAL ON IN-CUSTODY INFORMERS, 2017

Type of document: Prosecution Directive	**Effective date:** November 14, 2017

In-Custody Informers

Experience has shown that the use of in-custody informers may pose a substantial risk to the proper administration of justice. Prosecutors must be aware of the dangers of calling in-custody informers as witnesses. Policies are in place to prevent an injustice that occurs when an in-custody informer falsely implicates another person.

An in-custody informer is someone who claims to have received one or more statements from an accused person while both are in custody about offences that occurred outside the custodial institution. The accused person need not be in custody for, or charged with, the offences to which the statements relate. Excluded from this definition are informers who claim to have direct knowledge of an offence independent of the statements provided by the accused person.

Because of the potential risks posed by reliance upon evidence of an in-custody informer, there must be a compelling public interest to tender evidence from an in-custody informer. A decision to seek to tender this evidence must be the product of a rigorous, objective assessment of the in-custody informer's account of the accused person's alleged statement, the circumstances in which that account was provided to the authorities and the in-custody informer's general reliability.

In circumstances where the Prosecutor becomes aware that an in-custody informer has the intent to mislead and make a false statement with respect to an accused person, the case must be directed to the Crown Attorney. The case will then be investigated.

Calling an in-custody informer as a witness

Depending on the nature of the proceedings, a Prosecutor who seeks to tender the evidence of an in-custody informer must obtain the approval of the Crown Attorney, the Director, the In-Custody Informer Committee and/or the Assistant Deputy Attorney General - Criminal Law Division.

Preliminary inquiry

If the Prosecutor seeks to tender the evidence of an in-custody informer at a preliminary inquiry, the Prosecutor must bring the matter to the attention of her Director.

The Director must determine whether the in-custody informer's evidence can be used at the preliminary inquiry or if the case should be referred to the In-Custody Informer Committee for a decision.

An in-custody informer can only be called as a witness at a preliminary inquiry with the approval of a Director or the In-Custody Informer Committee.

Trial

A Prosecutor who forms the opinion that there is a compelling public interest in relying on the evidence of an in-custody informer at trial must refer the case to the In-Custody Informer Committee.

The Committee will consider the materials submitted by the Prosecutor, and absent exceptional circumstances, will meet with the Prosecutor to discuss the case before making its decision.

An in-custody informer can only be called as a witness at a trial with the approval of the In-Custody Informer Committee.

The deliberations of the Committee are privileged and will not be disclosed.

The existence of a public interest in proceeding with a prosecution based solely on the unconfirmed evidence of an in-custody informer is exceptional. In these circumstances, approval to tender the evidence must be approved by the Assistant Deputy Attorney General – Criminal Law Division as well as the In-Custody Informer Committee.

Agreements to testify

An in-custody informer must never be given consideration that is conditional upon the accused's conviction.

Any agreements made with in-custody informers relating to consideration in exchange for information or evidence must, absent exceptional circumstances, be reduced to writing and signed by a Prosecutor (other than the Prosecutor assigned to the case), the informer and counsel (if represented). An oral agreement, fully recorded, may substitute for a written agreement. A videotape recording or other type of record, such as audiotape or affidavit, may also suffice.

A Director must approve any agreements respecting consideration and the agreement must be provided to the In-custody Informer Committee.

Restrictions

If the in-custody informer recants their evidence following a decision by the In-Custody Informer Committee and the Prosecutor determines that the evidence of the in-custody informer should be tendered, the matter must be referred back to the Committee and the Director.

Where the in-custody informer is charged with additional criminal offences and/or seeks additional consideration, the Prosecutor must notify her Director who reviewed the original file, who will then determine whether the In-Custody Informer Committee ought to reconsider the matter.

The In-custody Informer Registry

The Ministry of the Attorney General has established an In-custody Informer Registry. The Chair of the In-custody Informer Committee is responsible for updating the registry with information provided by Prosecutors and the police.

Prosecutors who become aware of individuals coming forward to act as in-custody informers must forward to the Committee the name of the potential in-custody informer and the result of any investigation into the statement of the informant regardless of whether the Prosecutor seeks to use the informant's evidence. These names and this information will be included in the In-Custody Informer Registry.

The Prosecutor must forward to the Committee the outcome of a prosecution where an in-custody informer was permitted to testify at a preliminary inquiry or trial. These results will be noted in the In-Custody Informer Registry.