

# **PRISON INFORMANTS: LEARNING THE LESSONS OF THE JAILHOUSE INFORMANT**

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## **INTRODUCTION**

By definition, a jailhouse informant is an inmate, usually awaiting trial or sentencing, who claims to have been the recipient of an admission made by another prisoner awaiting trial, and who agrees to testify against that prisoner in a court of law, usually in exchange for some benefit.<sup>1</sup> Most scholars and jurists recognize that informants are necessary for effective law enforcement,<sup>2</sup> and it is generally agreed that a jailhouse informant provides a valuable tool for the effective apprehension of violent criminals.<sup>3</sup> Despite their apparent utility, the horrific miscarriages of justice visited upon Guy Paul Morin and Thomas Sophonow, and the Inquiries conducted by Mr. Justice Kaufman and Mr. Justice Cory respectively into those affairs, have uncovered the reality that the use of jailhouse informants by Crown counsel is problematic and fraught with danger. It has become apparent that the repute of our justice system is often undermined by the introduction of this type of evidence in Canadian criminal courts. As a result, both Inquiries produced a series of recommendations aimed at alleviating some of the difficulties associated with the employment of jailhouse informants. These recommendations have led to some valuable changes in the use and treatment of this type of evidence, including the introduction of specific provisions in the *Crown Policy Manuals* and *Policy Directives* of the Attorney Generals of Ontario and Manitoba, addressing the issue of jailhouse informants and their use in furtherance of the prosecution of criminal charges.

A prison informant, in contrast to the jailhouse informant, is an inmate in a penitentiary who provides, sometimes anonymously, confidential information to prison authorities regarding the alleged activities of fellow inmates who may consequently be subjected to administrative segregation, involuntary transfer, or some other form of sanction on the basis of that information. Within the walls of the Canadian penitentiary, the use of prison informants has become commonplace by the authorities charged with administering this most dreary of institutions. As with jailhouse informants, there is a general acknowledgement that prison informants are useful, if not necessary, in the administration of a prison. The *Corrections and Conditional Release Act* (“CCRA”) and *CCR Regulations* establish, and the Courts have recognized, that the difficult and unique institutional demands or operational requirements of a penitentiary necessitate that prison authorities be permitted to make decisions which effect the liberty interests of an inmate on the basis of such confidential information. Yet, some would assert that like jailhouse informants, the

use of the prison informant is also problematic and fraught with danger. Where jailhouse and prison informants differ, however, is in the manner in which the government has responded to the difficulties associated with their use. While the Attorney Generals of Ontario and Manitoba have taken serious proactive steps to deal with the problem of jailhouse informants, the Solicitor General and the Correctional Service of Canada unfortunately have not responded in a similar fashion to the difficulties surrounding prison informants. The question is: What is to be done?

In response, the aim of this paper is threefold. First, it is to demonstrate that the use of information emanating from prison informants poses significant challenges to prison officials seeking to make fair decisions. Secondly, it is to explain that as it stands today, the decision-making apparatus of the penitentiary is devoid of any mechanisms that can ensure a minimum level of fairness when decisions are made substantially or solely on the basis of confidential informant information. Third, it is to persuade the reader that there exist viable reforms to the handling of prison informants and the use of the information that they provide which, if instituted, would achieve a more appropriate balance between the operational requirements of correctional decision-making and the need to provide inmates who face further restrictions upon their residual liberty with a sufficient level of procedural fairness.

In order to achieve its stipulated goals, this paper shall be organized into three main parts: 1) A comparison of the problems inherent in the use of jailhouse informants with the difficulties associated with prison informants; 2) A discussion of the recent reforms to the handling of jailhouse informants; and 3) Proposals for change in the use of prison informants.

## **PART I - PROBLEMS WITH THE USE OF JAILHOUSE AND PRISON INFORMANTS**

### ***A. JAILHOUSE INFORMANTS***

#### **1. Credibility and Reliability**

In the context of a criminal trial there are no cut and dry rules that give a trier of fact a fail-proof means of assessing the credibility of a witness. With that said, the academic literature available does provide us with a large number of factors that touch upon the credibility of a witness and the reliability of their evidence.<sup>4</sup> These factors include, but are not limited to, appearance, manner, the presence of a criminal record, general reputation in the community for untruthfulness, interest in the matter, and motive.

A jailhouse informant is someone who has run afoul of the law, and at the very least are persons who have been charged with a criminal offense. Many already have existing criminal

convictions and it is safe to say that the general reputation in the community of a jailhouse informant is rarely one of integrity and upright truthfulness. The motives of a jailhouse informant are generally acknowledged to be highly suspect. They usually only provide evidence against other inmates when they are promised or hope to receive some reward for doing so.<sup>5</sup> These rewards include monetary payments, reductions in sentence and the dismissal of pending charges.<sup>6</sup> The prospect of receiving rewards provides jailhouse informants with a strong motivation to lie. Evan Haglund asserts that “every informant, from the rookie to the professional, has a motive to lie. The immunized informant trades information for liberty. When an informant does not have any information to trade, she may be tempted to fabricate ‘information’ in order to obtain her liberty. As the Fifth Circuit [in *United States v Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987)] has recently stated, ‘it is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence.’”<sup>7</sup>

The high courts of several nations have considered on many an occasion the problems associated with evidence emanating from jailhouse informants.<sup>8</sup> In Canada, the most recent and the most scathing discussion of the use of jailhouse informants within our justice system was delivered by Mr. Justice Cory in his report of the *The Inquiry Regarding Thomas Sophonow*:

“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 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 innocent 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. They must be recognized as a very great danger to our trial system. Steps must be taken to rid the courts of this cancerous corruption of the administration of justice... Jailhouse informants are a festering sore. They constitute a malignant infection that renders a fair trial impossible. They should, as far as it is possible, be excised and removed from our trial process.”<sup>9</sup>

In his final recommendations Mr. Justice Cory took the position that jailhouse informants should generally be prohibited from testifying. Under this rule, an exception would come about only in such rare instances where the information provided by the alleged confession is reliable on its face, such as a kidnapping scenario where the whereabouts of the victim are revealed. Even then, procedural safeguards should exist to ensure that such information could not have been obtained from any source other than from the accused.<sup>10</sup>

No doubt the courts have been aware that jailhouse informants have serious credibility problems. The concerns expressed regarding the reliability of jailhouse confessions would not be so much of a problem if it could be shown that triers of fact consistently decline to give substantial weight to the evidence provided by jailhouse informants. However, the record shows

that there are several examples of defendants being convicted substantially on the basis of jailhouse informant testimony.<sup>11</sup> For example, in *R v Bevan*<sup>12</sup> the Supreme Court of Canada described the evidence of two jailhouse informants as “crucial to the Crown’s case.” In the case *R v Babinski*,<sup>13</sup> the accused was charged with first degree murder and the case against him was circumstantial. Key to the Crown’s case was evidence provided by a jailhouse informant, who had been a fellow inmate. In *R v Brooks*,<sup>14</sup> the Supreme Court asserted that although not essential to the Crown’s case against the accused, a very important part thereof was the testimony of two jailhouse informants. Mr. Justice Binnie stated: “It will be rare, I think, that an alleged jailhouse confession would not be regarded as *important* evidence against the accused.”<sup>15</sup>

Despite the general procedural safeguards of full disclosure and cross-examination underlying the trial process, there are a number of reasons that may very well effect, and ultimately skew, an assessment of credibility and thus lead to the acceptance by a trier of fact, particularly juries, of jailhouse informant evidence.<sup>16</sup> To begin with, juries “generally identify informants with the prosecution and the truth-seeking process.”<sup>17</sup> A jury may find a jailhouse informant to be more credible based on the assumption that a crown attorney, whose supposed to be non-partisan and only interested in finding out the truth, would never call such a witness to the stand if they believed the witness to be lying. Also, as the Sophonow Inquiry concluded, jurors give great weight to these alleged confessions. American studies on the subject indicate “that, to the average juror, there is not much difference between the manner in which they receive and weigh a confession given to a police officer and a confession given to a jailhouse informant.”<sup>18</sup>

Moreover, some jailhouse informants are very good witnesses due to the fact that they may have had considerable experience testifying as a defendant or as informant in the past.<sup>19</sup> They are certainly highly motivated, have few scruples about perjuring themselves, and know how to make their story appear convincing even if it is false.<sup>20</sup> Mr. Justice Cory asserts that perhaps the greatest danger of jailhouse informant testimony flows from their ability to testify falsely in a remarkably convincing manner. The Sophonow Inquiry revealed how an experienced detective thought that Mr. Martin, a very frequent jailhouse informant with a conviction for perjury, was a credible witness.<sup>21</sup> It may very well be difficult for a jury to ‘read’ the jailhouse informant when testifying as their experience and motivation allows them to keep a tight control over their demeanor and body language.

Finally, there is reason to believe that jailhouse informants are quite capable of ‘producing’ corroboration of an alleged confession. To put it in another way, these informants have displayed an ability to obtain the necessary information about another prisoner’s pending charges in order to fabricate a confession.<sup>22</sup> One of the most notorious jailhouse informants in the

United States, Leslie Vernon White, explained and demonstrated the process to authorities in the late 1980s. In their book *Actual Innocence*, Scheck, Neufeld and Dwyer discuss White's amazing ability to fabricate a convincing confession:

“ A deputy provided White with the name of another inmate, the fact that he was a murder suspect, and a telephone. In twenty minutes, White showed his stuff. He made five phone calls and collected enough inside information about the other inmate to claim with credibility that the man had confessed. Posing as a bail bondsman, White called the inmate reception center; as an assistant district attorney, he called the D.A.'s record room, then the D.A.'s witness coordinator, the sheriff's homicide office, and the actual D.A. handling the case. He rang the coroner's office, in the guise of a cop, and learned about mortal injuries to the victim.

With the facts he gathered during these chats, White knew enough about the murder to make up a confession on behalf of an inmate whom he had neither seen nor spoken to. Only amateurs would see that as a handicap. With the sheriff's deputy still watching in amazement, he then called the court bailiff, and asked that the suspect be brought to the holding tank in the courthouse so there would be a written record that White and the man were once in the same room.”<sup>23</sup>

There are several other techniques, perhaps less glamorous but just as effective, that informants have been known to employ in obtaining the particulars of an accused's case. These include simply reading newspaper or other reports in the media. Sneaking into the accused's cell in order to peruse their legal documents left unsecured - documents such as police reports, Crown briefs and preliminary inquiry transcripts. Sending friends or relatives to attend the preliminary inquiry of the accused is also not unheard of.<sup>24</sup> It is understandable that juries may find it difficult to accept that an “informant could gather so much information about a defendant or his alleged crime from some means other than a conversation with him.”<sup>25</sup> Not only is it the case that jailhouse informants are able to fabricate confessions with convincing corroboration, but it is also difficult for a defendant to refute the alleged confession. These alleged interactions take place in a jail cell away from other witnesses. The defendant will therefore be denied the opportunity to corroborate his denial of the confession, and it may often be the case that the trier of fact will be left to decide the issue on the basis of a swearing match between the two prisoners.<sup>26</sup> In the end, all these factors combine to create a situation where the triers of fact, particularly juries, are inclined to give considerable weight to an informer's testimony despite the fact that their disreputable character and suspect motives make them inherently unreliable.

Given that the Kaufman Commission and the Sophonow Inquiry have made clear for the legal profession and the public at large that the use of jailhouse informants poses a great danger to the integrity of our justice system, one would assume that the courts would make some changes in order to deal with the problem. After all, these public inquiries have produced a body of literature discussing in depth a wide range of potential reforms to the handling of jailhouse informant evidence.<sup>27</sup> On one end of the spectrum there are changes that would bolster or

strengthen existing trial procedures and evidentiary rules aimed at accurate fact-finding. These include removing the traditional discretion afforded to trial judges to caution juries by making jury warnings mandatory in the case of jailhouse informant testimony. As well, the courts could establish a comprehensive and explicit disclosure requirement for jailhouse confessions that goes beyond the already existing general disclosure rights established in cases such as *R v O'Connor*,<sup>28</sup> *R v Stinchcombe*,<sup>29</sup> and *R v Dixon*.<sup>30</sup> At the other end of the scale there exist reforms that would significantly alter the rules of evidence but that would also empower trial judges to deal with the problem in a more effective manner. The primary example in this category is the establishment of a reliability threshold test to be conducted at a *voir dire*. Trial judges would have the authority to exclude from evidence the testimony of a jailhouse informant if a threshold level of reliability is not satisfied. As we shall see in the following paragraphs, one American court attempted to establish all three of these reforms in a single decision.

Although inquiries have been held and reforms discussed, the Supreme Court of Canada failed to demonstrate strong leadership on the issue when presented with the opportunity in the *Brooks* case. One of the more frequently cited options for reform is to require trial judges to give a warning to juries in any case involving jailhouse informants regarding the dangers involved in relying upon this type of testimony. Mr. Justice Kaufman endorsed this position in his final *Report*. Recommendation 67 states:

“The evidence at this Inquiry demonstrates the inherent unreliability of in-custody informer testimony, its contribution to miscarriages of justice and the substantial risk that the dangers may not be fully appreciated by the jury. In my view, the present law has developed to the point that a cautionary instruction is virtually mandated in cases where the in-custody informer’s testimony is contested.”<sup>31</sup>

Despite Justice Kaufman’s conclusions, the Supreme Court declined to move away from the discretionary caution frequently known as a *Vetrovec*<sup>32</sup> warning. Rendering judgment on February 17, 2000, in *Brooks*, the Supreme Court split three ways in determining whether the trial judge properly decided that no warning to the jury was necessary in respect to the evidence of two jailhouse informants. Despite the fact that the Court could not agree as to the proper exercise of judicial discretion in that case, they nevertheless were unanimous in refusing to establish a mandatory jury caution when jailhouse informants are called to testify. The *Brooks* decision was a disappointing response by the Supreme Court to the grave problems associated with jailhouse informants. It was as though the Kaufman Inquiry never happened. This is a view shared by Mr. Justice Cory, who being recently retired from that same Court, wrote in his report into the Sophonow affair: “I therefore most earnestly and respectfully express the hope that the occasion will arise for the Supreme Court of Canada to consider again the issue raised in *R v Brooks*.”<sup>33</sup>

While the highest Canadian court has taken a decidedly conservative approach, American courts have displayed a greater willingness to address the issue. Several jurisdictions have recently moved towards mandatory jury cautions in respect to jailhouse informants. The *California Penal Code*, s. 1127 a (b), requires courts in that state to give juries cautionary instructions upon the formal request of either party.<sup>34</sup> In 1999, the Montana Supreme Court ruled upon the issue in the case of *State v Grimes*.<sup>35</sup> The Court asserted that judges are to give juries a special cautionary instruction, telling jurors that they must examine the informant's testimony with special care, if a jailhouse informant testifies for personal gain rather than an independent law enforcement purpose. If, after being asked to do so and if the informant's testimony was crucial to the government's case, a court fails to give such instructions then the defendant's conviction must be overturned.<sup>36</sup>

Perhaps the most ambitious attempt by a court to alleviate the dangers of jailhouse informants came in 1999 when the Oklahoma Court of Criminal Appeals handed down its ruling in *Dodd v State*.<sup>37</sup> In that single decision, the Oklahoma Court instituted three significant changes to the handling of jailhouse informant evidence.<sup>38</sup> The Court ruled that in all cases in which jailhouse informant testimony is offered, the trial judge is required to give a detailed warning to the jury. As well, the Court imposed an obligation on the state to disclose a specific list of items so that as to ensure there is no confusion over what the right to disclosure means in the case of jailhouse informant testimony:

“At least ten days before trial, the state is required to disclose in discovery: (1) the complete criminal history of the informant; (2) any deal, promise, inducement, or benefit that the offering party has made or may make *in the future* to the informant (emphasis added); (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; (5) whether at any time the informant recanted that testimony or statement, and if so, a transcript or copy of such recantation; and (6) any other information relevant to the informant's credibility.”<sup>39</sup>

Finally, trial judges were required to conduct a reliability hearing where a jailhouse informant's testimony would only be admissible in evidence if it were found to be probably true. Inevitably, such a progressive decision engendered a fair amount of negative reaction and the Oklahoma Court of Criminal Appeals granted the state's petition for a rehearing and vacated its earlier decision.<sup>40</sup> The Court then issued a new opinion in *Dodd v State*<sup>41</sup> that retained the mandatory jury warning and heightened disclosure requirements, but rescinded the reliability hearing.

The *Brooks* decision betrayed the reluctance of the Supreme Court of Canada to quickly move forward with much needed changes to the use of jailhouse informants. Such a conservative

approach reflects the fact that the introduction of many of these reforms would necessarily entail a departure from established legal principles. For instance, requiring a mandatory caution to the jury for the jailhouse informant as a class of witness is contrary to the principles laid out in *Vetrovec*. Although a prior precedent should not completely restrain the Supreme Court from moving in a new direction, it may provide part of the explanation as to why it has taken the traditional stance.

In fairness to the Court, some of the reforms, particularly the one seen to carry the most punch - a reliability hearing conducted at *voir dire*, may in fact undermine the very spirit and development of our legal system. Indeed, the common law in England and Canada has evolved in a direction where the rules of evidence have generally shifted “to allow more and more evidence to go to the jury.”<sup>42</sup> Such an evolution underscores a resolute confidence in the jury system. In *R v Corbett*,<sup>43</sup> Chief Justice Dickson asserted an unequivocal faith in the jury:

“In my view, it would be quite wrong to make too much of the risk that the jury *might* use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense.”<sup>44</sup>

David Paciocco has pointed out that it is “the sober and reasoned assessment of evidence by the trier of fact” which constitutes the “primary safeguard against inaccurate factual determinations” in the Canadian trial system.<sup>45</sup>

The faith in the jury system is so strong that Paciocco has observed that in Canada the accused has no constitutional right to have inherently unreliable evidence excluded from the trier of fact.<sup>46</sup> In *R v Buric*,<sup>47</sup> Justice Laskin of the Ontario Court of Appeal, while in dissent, agreed with the *Buric* majority on the point that “the quality of the evidence – its inherent reliability or unreliability – is a question of weight, not admissibility. Manifest unreliability, standing by itself, is not a sufficient reason to keep evidence from the jury.”<sup>48</sup> In *Mezzo v The Queen*<sup>49</sup> the Supreme Court of Canada ruled that the question of weight is a question to be determined by the jury following proper instruction by the trial judge. Justice McIntyre stated that:

“Questions of credibility and the weight that should be given to evidence are peculiarly the province of the jury. The term ‘quality,’ as applied by Lord Widgery [in *R v Turnbull*, [1976] 3 All E.R. 549], is really nothing more than a synonym for ‘weight.’ To consider it, the trial judge exceeds his function.”<sup>50</sup>

It is clear that removing relevant evidence from the jury solely on the basis of its inherent unreliability would be something contrary to the philosophical underpinnings of our system and would certainly cause the Supreme Court to think twice before sanctioning it.



In light of the above discussion, the faith that our system has in a jury to properly weigh the evidence put before it is contingent upon the effectiveness of the procedural safeguards found within the structure of a trial. Absent those safeguards no jury would be capable of properly making an assessment of the evidence put before it. Where evidence cannot be properly assessed by the jury there may very well be a constitutional right to have it excluded on the basis of fairness. Paciocco calls this the “principle of protection.”<sup>51</sup> It is on this point that Justice Laskin distinguishes himself from the majority in *Buric*, a case where shoddy police procedure most likely tainted a witnesses’ testimony. Justice Laskin writes:

“For the trial process to be fair it must provide proper safeguards against the misuse of inaccurate or unreliable evidence... Ordinarily, the trial process also provides several safeguards against the jury’s potential misuse of unreliable evidence... They include the Crown’s duty to provide full and timely disclosure, the defence’s right to explore credibility and reliability through cross-examination and the trial judge’s obligation to warn the jury of a witness’s suspect credibility. Because of these safeguards in the trial process, most evidence – including evidence that is apparently unreliable – goes to the jury. We have confidence that juries will be able to sort through the evidence, assess its reliability and, if appropriate, reject it.

But where, as in this case, improper police conduct has undermined these safeguards in the trial process with the result that the jury is unlikely to be able to fairly assess the credibility and reliability of a suspect witness, then it seems to me that the trial judge is entitled to exclude the witness’s evidence to ensure a fair trial. Again quoting Professor Paciocco at p.359: ‘It is where the trier of fact is unlikely to be in a position to adequately assess the reliability of evidence that exclusion plays its largest role.’

Paciocco lists... several examples of evidentiary rules that exclude evidence because of concerns related to assessability. These include rules imposing threshold tests of testimonial competence and the hearsay rule. Of the hearsay rule, Paciocco states... ‘hearsay evidence is not excluded because it is prone to be false. It is excluded because there will often be no available means of assessing its truth, rendering its acceptance by the trier of fact arbitrary and therefore unacceptable.’ The main safeguard against arbitrary acceptance by the trier of fact that is absent in the case of hearsay is the right of the defence to cross-examine the declarant. Without cross-examination, the jury cannot assess the reliability of the proffered evidence in an informed way. On the other hand, where there is a sufficient guarantee of reliability (and necessity) hearsay evidence should be admissible for its truth [principled approach].”<sup>52</sup>

Justice Laskin’s conclusion that a trial judge would be constitutionally authorized to exclude evidence that is incapable of being properly assessed by a trier of fact, even when subjected to the traditional safeguards built into the trial system, opens up the possibility that jailhouse informant evidence is subject to exclusion. To achieve that end it would be necessary to persuade a court that jailhouse informant testimony is somehow by nature incapable of being properly assessed by a jury. Presently, this would be a long shot at best.

Ultimately, the creation of a judicially administered reliability hearing for jailhouse informant testimony would amount to a tacit admission that either juries are incapable of properly assessing and weighing unreliable evidence, or that the nature of jailhouse informant testimony is such that the adversarial system (along with all of its traditional procedural safeguards such as

full disclosure and cross-examination) is unable to provide juries with the proper opportunity to assess this type of evidence and draw the right conclusions. The former, as we have seen from Justice Dickson's comments in *Corbett*, could undermine our system. The latter would entail fine line drawing between jailhouse informant testimony and other types of evidence often considered unreliable (such as eyewitness identification testimony), or inevitably open up the proverbial 'can of worms.' Moreover, it would be an unbearable shock to admit that the adversarial system, with cross-examination as its powerful engine, has met its match in the seedy jailhouse informant. Either way, it is understandable why the Supreme Court, or Parliament for that matter, would be seriously reluctant to invoke such reforms upon the formal rules of evidence, regardless of the high return in fairness to persons who find themselves in the unfortunate positions that Mr. Morin and Mr. Sophonow once did.

Despite the Supreme Court's unwillingness or inability to make serious changes to the way jailhouse informant testimony is treated by the rules of evidence, all was not lost in the aftermath of the Kaufman Commission and Sophonow Inquiry. The danger posed to the integrity of the justice system was so great and the potential liability to the government so substantial that the Attorney Generals of Ontario and Manitoba have introduced guidelines within their respective internal policy manuals or directives aimed specifically at addressing the pressing concerns over jailhouse informants. It is no coincidence that these two provinces are the jurisdictions where the travesties of Mr. Morin and Mr. Sophonow occurred. Although not law these guidelines embody several procedural mechanisms, under the rubric of prosecutorial discretion, that effectively supplement the traditional safeguards underlying the formal rules of evidence and trial structure. As we shall see in Part II of this paper, the substance of these mechanisms are essentially centred upon the reforms to the handling of jailhouse informants that the Courts, for the reasons discussed earlier, have been reluctant to introduce within the formal rules of evidence. Before proceeding to a substantive analysis of these Crown policy guidelines and a discussion as to how they might serve as a useful guide to the handling of prison informants, it is necessary to turn to the problems inherent in the use of prison informants within the correctional setting.

## **B. PRISON INFORMANTS**

The difficulties associated with the use of prison informants are, in some ways, consistent with those plaguing the use of jailhouse informants. Yet, since the information emanating from the prison informant is utilized within the correctional context, and the testimony of the jailhouse

informant pertains to the setting of the criminal trial, the problems with the use of prison informants manifest themselves in different ways. The two central areas of contention surrounding the use of the prison informants relate to the issues of reliability and disclosure.

### 1. Credibility and Reliability

Like the testimony of the jailhouse informant, information emanating from a prison informant can be said to be inherently unreliable. To begin with, the prison informant naturally suffers from serious credibility issues. These informants are by definition persons who have already been tried and convicted of a criminal offense. To the extent that a criminal record reflects a lack of honesty, prison informants as a class are of a disreputable character. At the very least, it is safe to say that inmates who inform on each other do not generally maintain within the overall community a reputation of integrity and upright truthfulness. Secondly, the motives of the prison informant are just as suspect as those of the jailhouse informant. Prison informants may be tempted to pass on false information to prison authorities in exchange for rewards or in order to pursue a personal vendetta.<sup>53</sup> We have seen how the Kaufman Commission and the Sophonow Inquiry have revealed the jailhouse informant to be a highly convincing witness, whose deception can fool very experienced detectives and withstand rigorous cross-examination in a trial setting. One can easily conclude that prison informants share the same dubious honour. They can be, no doubt, smooth and convincing liars when they conclude that their interests will be furthered by accusations of wrongdoing against other inmates.

Finally, even where the prison informant may be credible in that he or she honestly believes that the information they are providing is true, their report of any specific situation may still be unreliable because of difficulties in perception. Experts on the inner workings of the prison, and inmates themselves, have asserted that the environment of the penitentiary is such that it is difficult for any one person (inmate or administrator) to fully and accurately perceive what exactly is happening at any given time at any given place.<sup>54</sup> The assertion that a credible source may provide unreliable information due to misperception is not unknown to the criminal justice system, as eyewitness testimony is known generally to be unreliable. Unreliable information often emanates from a credible source.

As in the case of jailhouse informants, the essence of the problem is not that information relayed by prison informants is unreliable per se. The central difficulty is that there are grossly insufficient, almost non-existent, procedural safeguards built into the decision-making process aimed at facilitating an assessment of the reliability of prison informant information. As Professor Jackson writes:

“In many of the cases I reviewed, the allegations against prisoners were based on ‘information received from a reliable source.’ Very rarely were reasons given for finding this information compelling or credible. Under the present procedures, surrounding both segregation and involuntary transfer, there is no legally anchored, independent determination of whether information is sufficiently reliable to justify interference with a prisoner’s liberty.”<sup>55</sup>

With jailhouse informant testimony, the normally potent procedural safeguards afforded to the accused in the rules of evidence and the trial structure have been shown to be inadequate when dealing with that specific type of evidence. With prison informant information there are no such procedural safeguards at all.

There is no disputing that the courts have established that an inmate accused of wrongdoing by prison authorities is not entitled under the law to have the “full panoply of rights due an accused in a criminal proceeding.”<sup>56</sup> With that said, however, it is also clear that decisions which effect a liberty interest, such as an involuntary transfer or administrative segregation, are subject to scrutiny under both the common law principle of procedural fairness and Section 7 of the *Charter*.<sup>57</sup> Thus, while an inmate facing an involuntary transfer or administrative segregation cannot expect to have the right to confrontation, cross-examination and full disclosure, he or she nonetheless is entitled to at least some level of due process. The question thus arises: Where is the due process line drawn when considering the correctional decision makers’ duty to assess the reliability of evidence provided by confidential informants?

Interestingly, the specific sections of the *CCRA* dealing with involuntary transfer and segregation implicitly embody the principle that such decisions by the correctional decision-maker are to be made on the basis of information satisfying a certain level of reliability. On the ‘Placement and Transfer of Inmates,’ Section 28 reads:

28. Where a person is, or is to be, confined in a penitentiary, the Service ***shall take all reasonable steps to ensure*** that the penitentiary in which the person is confined is one that provides the least restrictive environment for that person, taking into account... [emphasis added]

With regards to ‘Administrative Segregation,’ Section 31 (3) reads:

31. (3) The institutional head may order that an inmate be confined in administrative segregation if the institutional head ***believes on reasonable grounds***... [emphasis added]

The Federal Court of Appeal has defined “reasonable grounds” as “a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes a *bona fide* belief in a serious possibility based on credible evidence.”<sup>58</sup> In utilizing language such as ‘all reasonable steps’ and ‘reasonable grounds’ it is clear that legislators have intended to ensure that decisions regarding involuntary transfer and administrative segregation are made on the basis of credible and reliable evidence. Despite the fact that the governing legislation mandates decision-making

on the basis of credible evidence, the fact is that the present decision-making structure is not set up or executed in such a way as to provide any alternative means of assessing the reliability of confidential informant information satisfying a minimal level of procedural fairness.

The Canadian courts have tentatively waded into this line-drawing exercise. In *Gallant v Canada (Deputy Commissioner, Pacific Region, Correctional Service of Canada)*<sup>59</sup> the Federal Court of Appeal considered the legality of an involuntary transfer. The inmate received a ‘Notification of Recommendation for Transfer’ signed by the warden simply stating that: “information has been received that reliably indicates...”<sup>60</sup> Madame Justice Desjardins wrote in a dissenting opinion that despite this claim, there did not exist in the record any explanation as to why the information obtained by prison authorities was thought to be reliable.<sup>61</sup> The facts in the *Gallant* case highlight the observation made by Professor Jackson that in his experience, prison authorities often justify their decisions on the basis of “reliable” information without giving reasons as to why they believe it is so. For Madame Justice Desjardins, a bare claim by correctional authorities that they have acted upon reliable information does not satisfy the requirements of procedural fairness. Madame Justice Desjardins writes:

“when confidential information is relied on by prison authorities so as to justify a disciplinary measure, the record must contain some underlying factual information from which the authorities can reasonably conclude that the informer was credible or the information reliable. Where cross-examination, confrontation or adequate information are not available to sift out the truth, some measures must exist so as to ensure that the investigation is a genuine fact-finding procedure verifying the truth of wrongdoing and that the informers are not engaged in private vendetta.”<sup>62</sup>

Unfortunately Madame Justice Desjardins wrote a dissenting opinion. Stronger mechanisms to ensure reliability were called for but the Correctional Service of Canada has yet to make any procedural changes to alleviate the concerns.

In *Storry v William Head Institution*,<sup>63</sup> Mr. Justice Wetston of the Federal Court, Trial Division held that it was patently unreasonable for a warden to rely upon confidential informant information on the basis that it was simply believed to be reliable where evidence contradicting the veracity of that information exists. The warden provided absolutely no explanation as to why he considered the information reliable, except for the fact that the RCMP also determined it to be reliable.<sup>64</sup> The Court asserted that in such a scenario, the mere statement that the information was felt to be reliable without indicating why was insufficient. Given that the details of the alleged plan of wrongdoing in this case could not have been carried out, and in light of the fact that the informant had earlier recanted a story respecting another inmate, Mr. Justice Wetston ruled that “it would not have been unreasonable to expect that some further independent investigation of the facts would have been undertaken to validate her [the informant] story.”<sup>65</sup> In the final analysis, it

can be argued that this case stands for the proposition that the correctional decision-maker must go beyond a mere statement of reliability and explain on record the reasons why the information relied upon is believed to be reliable. Moreover, it would seem that the Federal Court is intimating that the reliability of informant information must be “determined by an independent investigation or by any corroborating information from any independent sources”<sup>66</sup> before it may be properly relied upon by correctional decision-makers.

American courts have dealt with the question of a prisoner’s due process rights in regards to the deprivation of a liberty interest on the basis of confidential informant evidence. An examination of a few of the cases arising out of that jurisdiction during the era of the 1970s to the early 1980s, when they approached the issue in a much more civilized and progressive manner, is useful in an attempt to flesh out the appropriate balance to be drawn between correctional imperatives and the inmate’s right to procedural fairness under the common law and *Charter*. Although the following American cases play out within the context of prison disciplinary hearings, it is safe to assert that the principles laid out would apply to any correctional decision made on the basis of confidential informant information that seriously effects a liberty interest, such as administrative segregation or involuntary transfer.

In the 1974 case *Wolff v McDonnell*,<sup>67</sup> the Supreme Court of the United States ruled that even though a prisoner’s “rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime.”<sup>68</sup> For the Supreme Court, the “mutual accommodation between institutional needs and objectives and the provisions of the constitution”<sup>69</sup> required a delicate balancing. The Court ruled that in striking such a balance, the right to confrontation and cross-examination of adverse witnesses was not required because it was felt that “adequate bases for decision” could be established through the use of other procedures.<sup>70</sup> Although the Supreme Court did not elaborate upon the other procedures that might be constitutionally necessary as a check on the credibility of informants relied upon by prison authorities, it is clear that “preventing arbitrary determinations... is the major thrust of *Wolff*.”<sup>71</sup>

In the 1981 decision of *Helms v Hewitt*,<sup>72</sup> the Third Circuit, U.S. Court of Appeals, recognized that “under the tensions and strains of prison living fraught with intense personal antagonisms, determination of guilt solely on an investigating officer’s secondary report of what an unidentified informant advised him, albeit by affidavit, invites disciplinary sanctions on the basis of trumped up charges.”<sup>73</sup> For this Court, it is an unacceptable practice to determine a prisoner culpable solely on the basis of such a report without any primary evidence of guilt or any form of corroborative evidence.<sup>74</sup> In *Helms*, the Third Circuit held that “when a prison tribunal’s

determination is derived from an unidentified informant, the procedures approved in *Gomes v Trivisono* must be followed to provide minimum due process.”<sup>75</sup> Those procedures are:

“(1) The record must contain some underlying factual information from which the (tribunal) can reasonably conclude that the informant was credible or his information reliable; (2) the record must contain the informant’s statement (written or as reported) in language that is factual rather than conclusionary and must establish by its specificity that the informant spoke with personal knowledge of the matters contained in such statement.”<sup>76</sup>

The Third Circuit, in *Helms*, gave some life to the principles set out in *Wolff*.

In 1982, the Eleventh Circuit, U.S. Court of Appeals, handed down its decision in the case *Kyle v Hanberry*.<sup>77</sup> *Kyle* picked up where *Helms* left off. The Eleventh Circuit repeated the warning about relying blindly upon confidential informant evidence and went as far as mandating some form of a substantive assessment of the reliability of that evidence. The Court proclaimed:

“Consequently, to make decision based on the factual evidence presented, part of a disciplinary committee’s task must be to make a bona fide evaluation of the credibility and reliability of that evidence. In a prison environment, where authorities must depend heavily upon informers to report violations of regulations, an inmate can seek to harm a disliked fellow inmate by accusing that inmate of wrongdoing. Since the accuser is usually protected by a veil of confidentiality that will not be pierced through confrontation and cross-examination, an accuser may easily concoct the allegations of wrongdoing. Without a bona fide evaluation of the credibility and reliability of the evidence presented, a prison committee’s hearing would thus be reduced to a sham which would improperly subject an inmate accused of wrongdoing to an arbitrary determination.”<sup>78</sup>

Having established the requirement of a bona fide evaluation of reliability, the Court then asserts that it is not sufficient for the authorities to simply state that they considered their sources reliable. It was suggested that, at a minimum, the record show an explanation as to why or how they came to that conclusion.<sup>79</sup>

Moreover, the obligation of the decision-maker extends into a good faith analysis of the evidence used to support a claim of reliability. For instance, where corroborating evidence is purported to support the reliability of an informant’s allegation, it is expected that the prison decision-maker will engage in a weighing of that evidence:

“The inquiry by the IDC [decision-maker] into the reliability of informers may be diminished (or even satisfied) where there is corroborating physical evidence of the information provided. Sometimes the corroborating evidence should be given little weight and would not relieve the IDC of a reliability determination. For example, a weapon might be found where an informant indicates it will be, but if the area where the weapon is found is a public place, the importance of the corroboration would be diminished since the weapon could have been planted. In other situations, though, the corroborating evidence may be so strong as to sufficiently substantiate the informer.”<sup>80</sup>

In essence, the Court established that due process required inmate disciplinary committees to make independent investigations into the credibility and reliability of informants if they relied on the informant to take disciplinary action against an inmate.

What the American decisions of the 1970s and early 1980s, and what the Canadian Courts have touched upon, is that an inmate's entitlement to a minimal level of due process entails that at the very least it is not enough for the authorities to simply claim that their decision is based on 'reliable sources' without indicating why. Underlying these various court rulings is the notion that where an inmate is denied the traditional safeguards of confrontation and cross-examination, decision-makers are obligated to conduct a bon fide assessment of the reliability of the information that they rely upon in making decisions concerning a liberty interest.

As it stands today, Canadian prison authorities continue to reach conclusions on the basis of confidential informant information. It is not uncommon for them to justify their decisions by simply stating on the record that 'we have reliable information' or 'we have information from reliable sources' without indicating why they feel that it is reliable or how they have gone about testing that assumed reliability. Independent investigations into the reliability of informant allegations are not considered to be the 'standard operating procedure,' and as a result, it is too often the case that informant allegations are considered reliable and acted upon even in direct opposition to evidence, on record, corroborating a denial of the wrongdoing. Correctional decision making processes regarding involuntary transfers and administrative segregation have revealed themselves to be devoid of any procedural safeguards providing a minimal level of assurance in the reliability of informant information. Since the decision-maker is not required to properly test and assess the reliability of the proffered information, any subsequent acceptance of that information by the decision maker is arbitrary and cannot be seen to satisfy his or her duty to act fairly and in accordance with the principles of fundamental justice.

## 2. Disclosure

In the context of a criminal trial where a jailhouse informant is expected to testify, it is safe to say that both the Defence and Crown would agree that justice is best served where an accused is provided with as much disclosure as possible. Cases like *O'Conner*, *Stinchcombe*, and *Dixon* demonstrate that where disagreements arise, the Courts have not hesitated to intervene in favour of greater disclosure requirements. Both the Kaufman Commission and the Sophonow Inquiry concluded that jailhouse informants are so dangerous that full and complete disclosure is essential in order for the safeguard of cross-examination to have any chance of properly testing the informant's testimony. Indeed, we have seen how the jurisdiction of Oklahoma has gone to the extent of mandating a specific list of disclosure items when jailhouse informants are used. We shall see in Part II of this paper how the provinces of Ontario and Manitoba have established internal Crown policies that go beyond the relatively strict general disclosure requirements



ensuring that Crown counsel disclose a very comprehensive array of items. With regards to the testimony of jailhouse informants, full and complete disclosure serves the interests of all parties concerned.

In the prison context, however, the dynamic is quite different and the issue of disclosure is the source of constant controversy. This is primarily due to a tension between two legitimate, yet directly opposed, interests. On one hand, disclosure is crucial for an inmate's real ability to provide a defence against any allegations of wrongdoing that may affect a liberty interest. On the other hand, correctional authorities must have the ability to maintain confidentiality and deny the disclosure of information that would put the security of another person, such as an informant, at risk. The right to disclosure, as important as it is in the criminal trial, is of the outmost significance to an inmate facing administrative segregation or involuntary transfer since he or she is not afforded any of the other traditional safeguards such as confrontation and cross-examination. The disclosure provided to the inmate by the authorities is all that that inmate has in an attempt to answer or rebut any allegations made against them. It is thus clear that: "The achievement of a fair balance between the claims of prisoners to disclosure of information and the competing claims of the prison administration to the confidentiality of that information is another measure of a just decision-making process."<sup>81</sup>

The question over where to draw the line in this crucial balancing act has been litigated in the courts over the years. In the seminal case of *Demaria v Regional Classification Board and Payne*,<sup>82</sup> Mr. Justice Hugessen of the Federal Court of Appeal ruled that: "The burden is always on the authorities to demonstrate that they have withheld only such information as is strictly necessary for that purpose [protecting the identity of the informant]... In the final analysis, the test must be not whether there exist good grounds for withholding information but rather whether enough information has been revealed to allow the person concerned to answer the case against him."<sup>83</sup> The principles set out in *Demaria* have, by and large, been adopted into the language of Section 27 of the *CCRA*, and set out in various chapters of the *Commissioner's Directives* and *Standard Operating Practices*, most notably C.D. 540 and (SOP 700-15) dealing with involuntary transfers, and C.D. 095 and (SOP 700-01) regarding information sharing with offenders and disclosure.

While it would seem equitable that the test set out in *Demaria* and incorporated into the legislation and the *Directives/SOPs* establishes a strict test for non-disclosure, "the fault-line in these provisions is that decisions relating to non-disclosure continue to be made by correctional administrators."<sup>84</sup> The absence of any formal mechanism that allows for an independent review of decisions regarding confidentiality and non-disclosure was discussed in the Federal Court,

Trial Division case of *Gough v Canada (National Parole Board)*.<sup>85</sup> In *Gough*, Madame Justice Reed considered the provisions in the *Parole Act* and *Regulations* [since repealed and replaced with the *CCRA* and *Regulations*] that essentially authorized the Parole Board not to disclose (to an inmate or paroled inmate) information on which it is basing its decision when, in the Board's opinion, disclosure of that information could reasonably be expected to put at risk the safety of individuals or be injurious to the conduct of lawful investigations etc.<sup>86</sup>

The final result of *Gough* was the issuance of an order quashing the Parole Board's decision on the basis of a violation of the applicant's Section 7 *Charter* rights. While stopping short of striking down the impugned provisions, Madame Justice Reed asserted in obiter that the absence in the legislation of a mechanism for independent review of claims of non-disclosure of information relied upon in decisions affecting a liberty interest would not withstand a *Charter* challenge. Madame Justice Reed writes:

“para. 17(5)(e) [of the *Parole Regulations*] is so broad that it seems to authorize non-disclosure merely because the information was received in confidence. This can never be a justification for limiting the guarantees of fundamental justice as was clearly set out in the *Demaria* case... In addition, I am not convinced that a system which puts in the hands of the same body both the decision on the merits (the applicant's parole revocation) and the decision as to how much of the information which is before it will be disclosed to the applicant, is one which can meet the requirements of s. 1 of the *Charter*.”<sup>87</sup>

In replacing both the *Parole Act* and the *Penitentiary Act*, the *CCRA* does nothing to cure the inherent problem that Madame Justice Reed alluded to in *Gough*, and to this day decisions respecting the level of disclosure in any given case remains solely with prison authorities.

In their submissions to the Court in *Gough*, the government asserted that permitting counsel for the applicant or even a judge of the Federal Court to scrutinize, albeit *in camera*, documents of a confidential nature in order to review a claim of non-disclosure by the authorities “would have a very serious and adverse effect on the process of gathering of information by the Correctional Service of Canada and therefore be injurious to the capacity of the National Parole Board to assess risk.”<sup>88</sup> Moreover, the government attempted to justify the non-disclosure of the information on the basis that “the accuracy of the information is carefully checked before it is relied upon by the Board.”<sup>89</sup>

In response, Madame Justice Reed first stipulated that it may be true that the information has been carefully vetted, but to assert that the information is therefore accurate is self-serving and “is no answer to the applicant's perception that he is being dealt with arbitrarily and capriciously. The process of restricting an individual's liberty without being required to give details of the accusations against him is not rescued from invalidity by the decision maker's assertion that the information is true.”<sup>90</sup> As for the claim that it would be injurious to the working

of the system if judges were to be given a reviewing function anytime a claim of non-disclosure was made by the authorities, Madame Justice Reed replies quite graciously that that “is simply not credible.”<sup>91</sup> She highlights that the Federal Court performs a reviewing function under several other Federal Acts, including the *Access to Information Act* and the *Privacy Act*, that also have to balance the right to disclosure with the government’s legitimate claim to the confidentiality of “sensitive information.” Madame Justice Reed suggests a hint of irony in the fact that codified independent review procedures exist in the *Privacy Act* and *Access to Information Act*, where the access sought is often for no more serious a reason than idle curiosity, and are absent in the more grave circumstances under the *Parole Act* in which the liberty of an individual is at stake.<sup>92</sup>

Of particular note for Madame Justice Reed is the jurisdiction given to the Court under the *Canada Evidence Act* to decide whether national defence or security would be jeopardized by the public disclosure of certain information in a court. Section 37 of the *Canada Evidence Act* authorizes the Court to review and determine whether information that a Minister believes should not be disclosed “in the public interest” is rightly characterized as so.<sup>93</sup> It is clear that Madame Justice Reed makes a strong point. If the Federal Court can be rightly trusted to review government decisions over non-disclosure of information of the outmost gravity – national defence and security, then it is irrefutable that granting the Court the same reviewing function in the correctional context would not produce the adverse consequences alleged by the government.

The review measures of these various Acts consistently establish provisions aimed at facilitating review by the Courts while maintaining the integrity of the confidential nature of the information in question until a decision on disclosure has been made. All three Acts make available the use of *in camera* hearings where representations are made *ex parte*. The *Access to Information Act* and the *Privacy Act* contain specific sections giving the Courts complete access to any document,<sup>94</sup> and establish that the burden of proof lies with the government who seeks to uphold non-disclosure.<sup>95</sup>

The correctional context, in comparison, is marked by the absence of a legally entrenched set of provisions specifically authorizing the Courts to exercise a review function over the issue of a government’s objection to disclosure. Unlike the *Access to Information Act*, *Privacy Act*, and *Canada Evidence Act*, the *CCRA* has no elaborate structure authorizing court review with the necessary precautionary *in camera* and *ex parte* elements. Interestingly, in the first round of the *Gough*<sup>96</sup> decision, Madame Justice Reed attempted to cure this very malady by imposing, through a Section 24(1) *Charter* remedy, a preliminary *in camera* hearing where the government would be required to substantiate its reasons for non-disclosure with more specificity. Madame Justice

Reed gave the Parole Board the option to engage in such a hearing, but making it clear that refusal to do so would result in the quashing of their order. Fearing most the establishment of a precedent the government quickly appealed.<sup>97</sup> The Federal Court of Appeal weighed in, and although they sympathized with the trial judge, they held that forcing the government to submit to an *in camera* hearing where the government would produce to the Court the information in question is not a remedy authorized by Section 24(1), and sent the matter back to Madame Justice Reed for reconsideration.<sup>98</sup> The Federal Court of Appeal did, however, allow Madame Justice Reed to quash the order if the government refused to demonstrate through an *in camera* hearing that the non-disclosure was justified. The *Gough* series of litigation suggests that it is best left to the Legislature and not the Courts to create such a review procedure. The problem with the *CCRA* is that it fails to do just that.

Some would argue that there is no need to amend the *CCRA* in such a way as to include these specific types of review measures since technically, they are available through any judicial review application to the Federal Court. The introduction of Sections 317 and 318 of the *Federal Court Rules 1998* grant the Court the prerogative to handle how it sees fit any objection to disclosure on the part of government. Rules 317 and 318 provide the following:

**317. (1)** A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

(2) An applicant may include a request under subsection (1) in its notice of application.

**318. (1)** Within 20 days after service of a request under rule 317, the tribunal shall transmit

(a) a certified copy of the requested material to the Registry and to the party making the request; or

(b) where the material cannot be reproduced, the original material to the Registry.

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

Under Subsection 318(3) the Federal Court would be entitled to establish, if it felt it were appropriate, hearings *in camera* and *ex parte* in order to deal with an objection to disclosure

advanced by the government on the basis of Section 27 of the *CCRA* or in conjunction with Section 37 of the *Canada Evidence Act*. Any doubt as to whether the Court could insist on a hearing *in camera* in order to review the government's claim by examining the information in question has now been settled with the introduction of these rules.

The claim, however, that judicial review as practiced is sufficient to deal with the issue of confidentiality and non-disclosure in the correctional context remains problematic for a number of reasons. First, although the Federal Court is authorized to proceed by way of an *in camera* and *ex parte* hearing where they may inspect the information in dispute in order to determine whether non-disclosure is justified, the rules nevertheless do not mandate that they do just that. Judicial discretion in this regard is an underlying feature of Section 37 of the *Canada Evidence Act*, and is the weak link in judicial review of this issue in correctional decisions.

The Courts have employed the approach developed for the resolution of claims for non-disclosure in the context of a Section 37 application within the correctional context. In the correctional case *Hiebert v Canada (Correctional Service)*,<sup>99</sup> Mr. Justice Pelletier of the Federal Court, Trial Division adopted the two-stage approach set out by the Federal Court of Appeal in *Goguen and Albert v Gibson*.<sup>100</sup> Mr. Justice Pelletier explains the approach this way: "In the first stage, the Court considers the competing claims for disclosure and non-disclosure on the basis of the affidavit evidence before it, but without reviewing the documents themselves. Only if the Court cannot resolve the issue at that stage does the Court advance to the second stage which is the review of the documents."<sup>101</sup> The second stage would entail the *in camera* hearing, where representations would be made *ex parte*.

In applying the test to the facts of *Hiebert*, Mr. Justice Pelletier decided to proceed past the first stage and into the second where he reviewed the documents themselves even though the issue could have been resolved by way of affidavit evidence only. Mr. Justice Pelletier's stated reasons for doing so demonstrates the importance of inspecting the actual documents. Mr. Justice Pelletier writes:

"I would have, in this case, come to the conclusion which I did without examining the documents since my decision is based upon the nature of the inquiry itself i.e. an inquiry into the identity of incompatibles. However, I did examine the documents for the purpose of dealing with the issue of bad faith raised in Mr. Hiebert's affidavit, even if it is not explicitly pleaded. I did so because I believe it important to balance the very broad protection from disclosure in such cases with some objective assessment that the power thereby conferred upon Corrections officials is exercised for its intended purpose. This involves nothing more than an assessment of whether there is a rational basis for the position taken by the Corrections authorities. It is not for this Court to attempt to make risk assessments. If the material has a rational connection to the stated objective, then no more need or should be done. If the material lacks a rational connection to the stated objective, then the Court would have to consider the remedies available to it, having regard that the application before it is one dealing with disclosure, and not the merits of the claim."<sup>102</sup>

Hence, although Mr. Hiebert's application was dismissed, the essential point of this case is that Mr. Justice Pelletier felt it important to inspect the documents, if for no other reason than to grant the inmate applicant an assurance that he or she is not the victim of bad faith or capricious decision making.

If all Federal Court justices were to take the same view as Mr. Justice Pelletier in *Hiebert*, then granting judicial discretion on the question of whether to inspect the documents rather than simply relying on affidavit evidence through a two-stage approach would not be a problem. Of course there exist instances where the Court has insisted that prison authorities produce the documents for *in camera* inspection. We have seen this position taken by Madame Justice Reed in *Gough*. In *Lee v Canada (Correctional Service)*,<sup>103</sup> while Mr. Justice Rothstein of the Federal Court, Trial Division allowed the inmate's application for separate reasons, he did acknowledge that in the appropriate case there is merit to the argument that all the information upon which non-disclosure decisions are based should be reviewed by the Court to see what more could have been given to the applicants.<sup>104</sup> In the second round of *Lee v Canada (Correctional Service)*,<sup>105</sup> Madame Justice Reed pushed once more for the need of strict judicial oversight of correctional decision-making in respect to non-disclosure. Madame Justice Reed writes:

“Given the many difficulties with this case, it is clear that the decision taken cannot stand without further review. I agree that if the decision were not to be quashed outright that it would be an appropriate case for the court to require the respondent to provide his justification for not disclosing more information to the inmates, a justification which would include disclosure to the court (in camera and without disclosure to the applicants or their counsel) of the information which formed the basis of the decision, its sources and why more information could not have been provided to the applicants. I emphasize that the court's job is not to second guess the decision of the Deputy Commissioner or Commissioner. The court is entitled however to require the Deputy Commissioner or Commissioner to persuade it that the information which has not been disclosed falls within the categories described by Mr. Justice Hugessen in the *Demaria* case (supra) and subs. 27(3) of the Act.”<sup>106</sup>

While the decisions of Madame Justice Reed demonstrate that she believed it essential that the Courts inspect the decision-maker's documents in order to resolve a dispute over non-disclosure, she unfortunately does not represent the majority on this issue.

The record shows that all too often the Federal Court dismisses an application challenging non-disclosure on the basis of an examination of affidavit evidence only.<sup>107</sup> The case of *Ayotte v Canada (Attorney General)*<sup>108</sup> is a clear example of this sort of exercise in judicial discretion. In *Ayotte*, the inmate applicant argued that the disclosure provided to him by prison authorities regarding an alleged escape plot, which the Court acknowledged was the trigger for the decision to transfer,<sup>109</sup> was insufficient for him to be able to present a proper answer. The

affidavit evidence before Mr. Justice Dubé provided that the only information disclosed to the inmate in respect to the alleged escape plan was the following:

“On 1999-09-14, we received information from a police source (SPCUM) that Gilles Ayotte was planning to escape. The source is considered very reliable.”<sup>110</sup>

Without any further inspection of the information in order to determine whether the authorities have disclosed everything except what is strictly necessary, Mr. Justice Dubé essentially concluded that the inmate was provided with sufficient information about the alleged escape plan to make his answer and dismissed the application. If *Ayotte* was not an appropriate case in which to order an *in camera* and *ex parte* hearing to facilitate further inspection, it is difficult to imagine what would be.

In considering the issue of inspection in a case of competing interests over disclosure, the Supreme Court of Canada cited Lord Edmund-Davies of the House of Lords and suggested in *Carey v Ontario*<sup>111</sup> that “No judge can profitably embark on such [public interest] balancing exercise without himself seeing the disputed documents.”<sup>112</sup> The Supreme Court went on to consider appropriate the language of a New Zealand Court of Appeal case, *Fletcher Timber Ltd. v Attorney-General*, where Woodhouse P. wrote:

“where the judge has been left uncertain, it is difficult to understand how his own inspection could effect in any way the confidentiality which might deserve protection. And in that situation I think it would be wrong to put aside such a direct and practical means of resolving the difficulty. Indeed if it were to happen the primary responsibility of the Courts to provide informed and just answers would often depend on processes of sheer speculation, leaving the Judge himself grasping at air. That cannot be sensible nor is it necessary when by the simple act of judicial reconnaissance a reasonably confident decision could be given one way or the other.”<sup>113</sup>

The principles set out in *Carey* apply to the correctional context. In order to quell the perception of capricious or arbitrary treatment and to ensure that their own decision is not marked by speculation, it is necessary that judges inspect the actual information when confidentiality is claimed and disclosure refused. Concluding that prison authorities have satisfied in good faith the requirements set out in *Demaria* and Section 27 of the *CCRA* cannot be achieved by simply relying upon affidavit evidence provided by prison authorities. Where affidavit evidence alone does not lead the Court to rule in favour of an inmate, the close inspection of information through the *in camera* and *ex parte* hearing should not be left to judicial discretion and must be considered necessary.

There is one Federal Act which not only authorizes the Federal Court to exercise a reviewing function where the government refuses to disclose “sensitive information,” but which also mandates the inspection of the information in question. That Act is the *Immigration Act* and Subsection 82.1(10) reads as follows:

82.1...

(10) With respect to any application for judicial review of a decision by a visa officer to refuse to issue a visa to a person on the grounds that the person is a person described in any of paragraphs 19(1)(c.1) to (g), (k) and (l),

(a) the Minister may make an application to the Federal Court -- Trial Division, *in camera*, and in the absence of the person and any counsel representing the person, for the non-disclosure to the person of information obtained in confidence from the government or an institution of a foreign state or from an international organization of states or an institution thereof;

(b) the Court shall, *in camera*, and in the absence of the person and any counsel representing the person,

(i) examine the information, and

(ii) provide counsel representing the Minister with a reasonable opportunity to be heard as to whether the information should not be disclosed to the person on the grounds that the disclosure would be injurious to national security or to the safety of persons;

(c) the information shall be returned to counsel representing the Minister and shall not be considered by the Court in making its determination on the judicial review if, in the opinion of the Court, the disclosure of the information to the person would not be injurious to national security or to the safety of persons; and

(d) if the Court determines that the information should not be disclosed to the person on the grounds that the disclosure would be injurious to national security or to the safety of persons, the information shall not be disclosed but may be considered by the Court in making its determination.

These provisions of the *Immigration Act* demonstrate that it possible to create a legally anchored means of striking an appropriate balance between the legitimate claims of government authorities to non-disclosure of potentially damaging information and the right of a person to be free, at the very least, from the perception of arbitrary decision-making by providing for an independent review of the government's claim.

In the name of fairness to the individual, the burden is on the government to demonstrate the necessity of non-disclosure and of course, the ultimate decision is made by a judge of the Federal Court and not by Immigration Canada. As well, the review of the claim of non-disclosure is conducted separately and prior to the actual judicial review of the administrative decision maker's decision on the merits of the case. Most importantly, Subsection 82.1(10)(b) imposes a duty on the Court to examine or inspect the information itself. Unlike Section 318 of the *Federal Court Rules 1998* and the *Canada Evidence Act*, the *Immigration Act* does not grant a judge the discretion to decide the issue of non-disclosure simply on the basis of affidavit evidence. In order to ensure that the government's interests are protected, confidentiality and non-disclosure is maintained until the preliminary review decision is rendered by conducting a hearing that is *in*



*camera* and *ex parte*. In addition, if the court determines as a result of its preliminary review that the government is not justified in its claim to non-disclosure, then the information is returned to the government agency and the Court is prohibited from taking that information into account in its judicial review of the merits. Such a provision leaves with the government the choice to disclose or not, yet protecting the rights of the complainant by ensuring that the substantive decision, or a review of it, cannot rely upon that information if non-disclosure is unwarranted.

The second major difficulty with judicial review stems from practical problems. To begin with, there are severe limitations on legal aid. In addition, “even a successful challenge takes an inordinate amount of time, particularly when measured from a segregation cell or a maximum security institution.”<sup>114</sup> In *Marachelian v Canada (Attorney General)*,<sup>115</sup> Mr. Justice Pelletier cited the Federal Court, Trial Division decisions of *Fortin v Établissement de Donnacona (Directeur)*,<sup>116</sup> and *Giesbrecht v Canada et al.*<sup>117</sup> which established that in general, the internal grievance procedure provided by the *CCRA* is an adequate alternate remedy which must be exhausted before initiating proceedings in the Federal Court. Mr. Justice Pelletier added that: “The underlying rationale is that the statutory remedy is deprived of any relevance if it can simply be bypassed in favour of the Federal Court. One might add that judicial resources should not be occupied dealing with problems for which another forum is provided.”<sup>118</sup> Exhausting the internal grievance procedure can take several months,<sup>119</sup> while reaching the Federal Court may take up to more than one year.

While the rationale underlying the notion that internal remedies should be exhausted before the Courts step in is sound, the same cannot be said about the assertion that the internal grievance procedure of the *CCRA* is an “adequate remedy.” The fact is that right through the three levels of grievance (institutional head, head of the region, and Commissioner) there is no provision for an independent review of the decision. In theory, the administrative decision maker at each level of grievance has a duty to act fairly pursuant to Sections 90 and 91 of the *CCRA*. In reality, the three levels of grievance represent nothing more than a series of bureaucratic rubber-stamping. As Madame Justice Reed put it in *Gough*, one is left wondering how it is possible under Section 1 of the *Charter* that the same body is entrusted to make the decision on the merits as well as the decision regarding whether the standard of non-disclosure is met. As such, the *CCRA* is markedly different from the approach taken, for instance, in both the *Access to Information Act* and the *Privacy Act*, which provide for an element of independent review within their respective structures before the Federal Court is called upon to step in to the fray.

While the provisions of the *Access to Information Act* and the *Privacy Act* are not internal remedies per se, they nevertheless are mechanisms an individual must turn to before reaching the

Federal Court where a government body has refused disclosure of information, and where the enabling statute of that government body does not provide its own internal provisions for the handling of disclosure issues. What is significant about these two Acts is that they provide for an arms length and arguably independent review structure under the auspices of an Information Commissioner or Privacy Commissioner respectively. Under these two Acts, an individual is entitled to apply for review by the Federal Court only after they have submitted an official complaint to the Commissioner.<sup>120</sup> The Governor in Council appoints Commissioners “after approval of the appointment by resolution of the Senate and House of Commons.” They hold office during good behavior for a term of seven years, but may be removed at anytime on address of the Senate and House of Commons. These Commissioners have the same rank and powers as a deputy head of a department and are not allowed to hold any other government position or any other form of employment. Their salary is to be equal to that of a judge of the Federal Court, and they are entitled to be paid reasonable living and travel expenses. They are also provided with a pension and other benefits.<sup>121</sup> It is clear that Parliament intended the positions of Information Commissioner and Privacy Commissioner to be, and be perceived as, independent from the governmental institution that is a party to the dispute.

The Commissioners are given a broad range of significant powers to investigate a complaint of non-disclosure by a government agency. As way of example, Subsections 36(1) and (2) of the *Access to Information Act* read as follows:

**36.** (1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power

(a) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;

(b) to administer oaths;

(c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;

(d) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;

(e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and

(f) to examine or obtain copies of or extracts from books or other records found in any

premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

While the Commissioners have extensive powers of investigation and inspection, they nevertheless do not have the authority to compel the government agency to disclose the information in question. However, where their investigation leads to a conclusion that the complaint is well founded, the Commissioner will file a report containing findings and recommendations to the head of the government agency.<sup>122</sup>

If the head of the government agency continues to insist on non-disclosure in the face of a recommendation that such a position is unwarranted, the Commissioner will then notify the individual seeking disclosure of their right to pursue review by the Federal Court. The Commissioners are also statutorily authorized to appear before the Court on behalf of any person who applied for a review, and may apply to the Court themselves for a review with consent of the person who requested access to the information. They may also, with leave of the Court, appear as a party to a review.<sup>123</sup> The *Access to Information Act* and *Privacy Act* have, through the position of a Commissioner, embodied an independent investigation and inspection process that an individual can rely upon to address non-disclosure by a government agency before deciding to go to the Federal Court. This is so even despite the fact that situations arising in this context may certainly be of great importance to the applicant but nevertheless do not usually have a liberty interest at stake. The *CCRA*'s grievance structure, in contrast, suffers from a visible absence of this sort of independent review prior to reaching the court system.

## **PART II - RECENT REFORMS TO THE HANDLING OF JAILHOUSE INFORMANTS**

As a direct response to the miscarriages of justice visited upon Guy Paul Morin and Thomas Sophonow, the Attorney Generals of Ontario and Manitoba have established internal mechanisms in order to deal with the problems associated with jailhouse informants. Both provinces have drafted official policy guidelines that are implemented whenever the Crown Attorney's office is considering the use of a jailhouse informant, officially called "In-Custody Informers." In Ontario, the In-Custody Informer chapter of the Justice Department's *Crown Policy Manual*<sup>124</sup> was introduced on November 13, 1997, during the time period in which the Kaufman Inquiry was being conducted. Mr. Justice Kaufman had ample opportunity to assess the

content of the new policy and several of his final recommendations are aimed at revising or improving these guidelines. Mr. Justice Kaufman recognized that this initiative is “a laudable first step in addressing these difficult policy issues.”<sup>125</sup> The Manitoba *Policy Directive, Guideline No. 2: INF: 1*<sup>126</sup> was issued on July 12, 2000, while the Inquiry Regarding Thomas Sophonow was taking place. Although Mr. Justice Cory did not make specific reference to the *Policy Directive* in his final recommendations, he does state in his *Report* that the Manitoba guidelines may lead the country in this respect. According to Mr. Justice Cory, “it is very clear that Manitoba has commendably taken giant steps forward with regard to significantly restricting the use of jailhouse informants.”<sup>127</sup> What follows next is a discussion of the substance of these self-imposed, internal Crown policy guidelines.

#### **A. ONTARIO’S CROWN POLICY MANUAL # I-2**

The *Crown Policy Manual* of the A.G. of Ontario includes Policy # I-2 entitled “In-Custody Informers.” This chapter consists of five basic parts: ‘Introduction,’ ‘Whether to Present the Evidence of an In-Custody Informer,’ ‘Limits on Dealing with In-Custody Informers,’ ‘Disclosure,’ and ‘Informer Privilege.’ The Introduction simply sets out the definition of an In-Custody Informer (a.k.a. jailhouse informant) and limits the scope of the policy to this specific type of informant.

The second section, entitled ‘Whether to Present the Evidence of an In-Custody Informer,’ essentially establishes a reliability threshold test in order to determine whether the informant gets to appear at trial as a witness. It begins with an admonishment to Crown counsel that this type of evidence is “subject to a number of frailties.” As well, counsel are warned that “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.”

Next comes the substance of the test. The manual stipulates that the use of an In-Custody Informer as a witness should only be considered in cases where there is a “compelling public interest” in the presentation of their evidence. In order to determine whether a compelling public interest exists, the jailhouse informant must appear before an In-Custody Informer Committee composed of persons appointed by the Attorney General (most likely senior prosecutors). A central part of the threshold test is based upon a determination of whether the evidence of the informant is ‘confirmed.’ The *Manual* reads:

It is unlikely to be in the public interest to initiate or continue a prosecution based *only* on the unconfirmed evidence of an In-Custody Informer. 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.

In addition to the necessary condition of ‘confirmation,’ the Prosecutor and the Committee shall assess the reliability of a jailhouse informant’s report of a statement by an accused according to 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 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 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;
9. whether the informer has in the past given reliable information to the authorities; and
10. whether the informer has previously claimed to have received statements while in custody.

This test is the basis of a screening mechanism that requires the Crown to assess the reliability of the informant’s statement according to a clear set of factors.

In his report Mr. Justice Kaufman highlights several concerns he has with aspects of the Crown’s policy. He asserts, in Recommendation 39,<sup>128</sup> that the definition of ‘confirmation’ set out by the Crown is not sufficient to achieve its intended purpose. Mr. Justice Kaufman would prefer to see ‘confirmation’ defined as “*credible* evidence or information, available to the Crown, *independent of the in-custody informer*, which *significantly supports* the position that the inculpatory aspects of the proposed evidence were not fabricated.” Also, Recommendation 41<sup>129</sup>

reveals that Mr. Justice Kaufman does not view the list of items the Crown is to take in to consideration when assessing reliability as adequate. Some notable additions that he puts forth:

- 1) The specificity of the alleged statement. For example, a claim that the accused said ‘I killed A.B.’ is easy to make but extremely difficult for any accused to disprove.
- 2) The extent to which the statement contains details or leads to the discovery of evidence known only to the perpetrator.
- 3) The extent to which the statement contains details which could reasonably be accessed by the in-custody informer, other than through inculpatory statements by the accused.

This consideration need involve an assessment of the information reasonably accessible to the in-custody informer, through media reports, availability of the accused’s Crown brief in jail, etc. According to Justice Kaufman Crown counsel should be mindful that, historically, some informers have shown great ingenuity in securing information thought to be inaccessible to them. Furthermore, some informers have converted details communicated by the accused in the context of an exculpatory statement into details which purport to prove the making of an inculpatory statement.

In assessing the substance of this reliability threshold test, it is obvious that the Crown has demonstrated a serious intent in curbing the dangers associated with jailhouse informants. “Unconfirmed” evidence of an in-custody informer will not go before the trier of fact. The guidelines have established a very detailed and comprehensive list of factors to be considered in determining reliability. Having the final decision rest with a committee is very important in that it removes to a degree potential bias or tunnel vision that a single prosecutor may have, particularly if he or she is the person trying the case. The Committee acts as a body of sober second thought. It should be noted that the Committee provision has been adopted to replace the original scheme where the final decision lay with the prosecutor and his or her Supervising Director. Even though Mr. Justice Kaufman would add some significant factors, the list constitutes a solid threshold test for reliability.

The third section of the Crown’s policy entitled ‘Limits on Dealing with In-Custody Informers’ reminds counsel of the “agent of the state” test set out in *R v Broyles*.<sup>130</sup> The section begins with a warning to counsel that “an agent of the state must not compromise the right of the accused to remain silent.” The *Manual* advises:

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 the prosecution.

What is potentially troubling about this passage is that it seems to be coaching Crown counsel on techniques in avoiding a state agent characterization for their informants. On the other hand, its

intent may be simply to establish a cautious and prudent routine so that there can be no misunderstanding that the jailhouse informant's actions were completely independent of the state.

The fourth section of the Crown's policy entitled 'Disclosure' begins with the assertion that "the dangers of using in-custody informers in a prosecution give rise to a heavy onus on Crown counsel to make complete disclosure." A list of items is then provided for counsel in order to ensure disclosure is both full and fair. Crown counsel should review its disclosure to ensure the following, at a minimum, is included:

1. the criminal record of the in-custody informer including, where available, the synopsis relating to any convictions;
2. any information in the prosecutor's possession or control respecting the circumstances in which the informer may have previously testified for the Crown as 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 an in-custody informer
7. the circumstances under which the in-custody informer and his or her information came to the attention of the authorities
8. if the informer will not be called as a Crown witness a disclosure obligation still exists subject to the informer's privilege

According to Justice Kaufman the Disclosure section is generally commendable.<sup>131</sup> This view is not disputed. The opening caution is quite forceful and the list of items to be disclosed is comprehensive. It is safe to say that, at least on paper, the Ontario *Crown Policy Manual* establishes a strong obligation to disclose several relevant matters to the defence when utilizing a

jailhouse informant. The final section of Crown policy is entitled ‘Informer Privilege’ and it simply reminds counsel that if an 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.

**B. MANITOBA’S POLICY DIRECTIVE, GUIDELINE NO. 2: INF: 1**

The *In-Custody Informer Policy Directive* set out in the *Guidelines* of the Department of Justice of the Province of Manitoba is similar in its substance and structure to Ontario’s *Crown Policy Manual*. It begins with a forceful discussion of the dangers inherent in the use of this type of evidence. The *Guidelines* then set out a list of “Criteria” or factors to be taken in to consideration when assessing reliability of the informer and the truthfulness of the proposed evidence. First and foremost is “The extent to which the statement is confirmed by independent evidence.” For the most part, these criteria mirror those set out in Ontario’s guidelines and discussed in the Kaufman *Report*, with the exception that in Manitoba, those assessing the informant’s credibility are to also take into account “any relevant information contained in the Manitoba Justice In-Custody Informer Registry,” and “any medical or psychiatric reports concerning the in-custody informer where relevant.” Furthermore, the *Guidelines* stipulate that “under no circumstances shall Crown counsel call an in-custody informer who has a previous conviction for perjury, or any other conviction for dishonesty under oath or affirmation, unless the admission sought to be tendered was audio or video recorded, and authenticity of the recording can be verified, or the statements attributed to the accused are corroborated in a material way. (For instance, where the informer claims that the accused admitted he killed someone and disposed of the body at a particular location, and the police investigation locates the body at the location and under the circumstances described by the informer.) Nor, in general, shall counsel proceed to trial where the testimony of the in-custody informer is the sole evidence linking the accused to the offence.”

Next, an In-Custody Informer Assessment Committee (“ICIAC”) is established in order to decide whether to call the evidence of a jailhouse informant. The ICIAC is composed of the following: the Assistant Deputy Attorney General (as chair); Director of Prosecutions; the Senior Crown Attorney in charge; General Counsel, and the Prosecutor having conduct of the case. The *Guidelines* then give the ICIAC the following instructions:

Wherever possible, the Chair should arrange for the police to conduct an investigation that will assist in making a decision on the suitability of calling the in-custody informer as a witness. The Committee should have a broad range of material and information available to inform its decision,



including: previous police reports dealing with the informer; a waiver of confidentiality concerning his (or her) prison files; disposition of charges previously laid against the informer, transcripts of previous testimony provided by the informer, including any findings of credibility made by the trial judge; aliases that may previously have been used, and information on whether the proposed witness has previously been turned down as an informant/witness. Any material received should be discussed with the informant before a decision is made. Before making a final assessment, the in-custody informant must provide a videotaped statement in accordance with the decision of the Supreme Court of Canada in *R v K.G.B.* (1993), 79 C.C.C. (3d) 257 (S.C.C.)

Like Ontario, Manitoba has taken the position that the vetting of a jailhouse informant's testimony is best left to a committee rather than the individual attorney prosecuting the case, or his or her supervisor. Although it cannot be viewed as a completely independent body, these reviewing committees do provide a relative arms length assessment of an informant's level of reliability.

There is also a formal reminder to Crown counsel of the obligation of disclosure along with a list of materials and information that, at a minimum, is to be handed over to defence counsel. The disclosure requirement is not limited to but includes: the criminal record of the informer; the Manitoba Registry record of the informer, if any; particulars respecting any benefits, promises or understandings between the in-custody informer and the crown, police or correctional authorities, including any written agreements to testify; and other known evidence that may attest to or diminish the credibility of the informer, including any relevant medical or psychological reports accessible to the Crown, and all of the materials originally placed before the Assessment Committee providing it is lawful to disclose them. Once again, these provisions give further testament to the fact that full and complete disclosure is essential in order to achieve a fair process.

The Manitoba *Guidelines* contain certain provisions that are not found in the Ontario version. First, there is a requirement upon the office of the Deputy Attorney General to maintain a publicly accessible In-Custody Informer Registry, where all decisions taken by the Assessment Committee are to be documented. Secondly, where the Assessment Committee has approved the proposed testimony of an in-custody informer, the Department must enter into a written agreement with the informer to testify, in which all of the understandings, terms and conditions of that testimony are agreed upon. Finally, the *Guidelines* explicitly mandate the prosecution of a jailhouse informant for giving false statements and if convicted of perjury or a similar offence, Crown counsel shall ask for a significant consecutive prison term.

In the end, having reviewed the substance of the policy directives implemented by Ontario and Manitoba, it cannot be disputed that these Provinces have taken serious steps towards alleviating the inherent dangers associated with jailhouse informants. At least on paper, it seems

that only the most 'reliable' of jailhouse informants will make it through the Crown's own filter. Even where a jailhouse informant has passed the test and is called by the Crown to give evidence, the detailed disclosure requirements ensure that the defence will have been afforded a fair opportunity to test the informant's veracity in cross-examination.

### **PART III - PROPOSALS FOR CHANGE IN THE USE OF PRISON INFORMANTS**

The Kaufman and Sophonow Inquiries have spurred the Attorney Generals of Ontario and Manitoba to implement mechanisms aimed at seriously reducing the chance of future miscarriages of justice at the hands of jailhouse informants. The time has come for Parliament and the CSC to curb the injustices perpetrated at the hands of prison informants by introducing similar measures within the *CCRA* and *CCR Regulations*. Doing so would ensure that information emanating from the prison informant is utilized by correctional authorities in a manner consistent with the duty to act fairly and in accordance with the principles of fundamental justice. The jailhouse informant *Guidelines* and *Policy Directives* set out by Manitoba and Ontario provide an appropriate model upon which to base a substantial amount of the changes required in the use of prison informants within the correctional context. Where the difficulties associated with prison informants diverge from the jailhouse informant experience, for example with regards to the issue of disclosure, the focus should shift to other areas of law where the same sort of problem has been dealt with successfully. What follows next is an attempt to put forth proposals for reform that aim to achieve a more appropriate balance between the operational requirements of correctional decision-making and the need to provide inmates who face further restrictions upon their residual liberty with a sufficient level of procedural fairness.

#### **A. REVIEW OF NON-DISCLOSURE DECISIONS BY AN INDEPENDENT ADJUDICATOR**

As we saw in Part I of this paper, the issue of disclosure looms large in decisions of involuntary transfer and administrative segregation. The problem with the way it is handled currently stems from the fact that the internal grievance structure does not provide an independent review of decisions to refuse disclosure. Judicial review is an option that few inmates can afford. For those who have the means, by the time they get to the Federal Court it is far too late to undo the real damage. Moreover, the fact that the Federal Court has discretion to review the matter on the basis of affidavit evidence rather than being statutorily obligated to inspect the actual information in question creates a situation where the inmate's perception that he or she is being

treated capriciously or in bad faith is left unresolved. As a consequence, any reforms to the way the disclosure issue is handled in the correctional setting must be predicated on three fundamental principles. First, there must be a fully independent review structure. Second, the review mechanism must be located at the front end of the process. Third, there must be an explicit duty imposed upon the reviewer to inspect and examine all of the information that the correctional authorities have refused to disclose.

These principles for reform can be realistically embodied within the *Regulations* without compromising in any way the institution's real need to maintain strict confidentiality over the information in question right up until a final decision is made in respect to non-disclosure. It is suggested here that independent adjudication would be the most appropriate and effective means to achieve this end. Sections 24 to 41 of the *Regulations* cover the topic of "Inmate Discipline" where an Independent Chairperson is appointed by the Minister to oversee and administer hearings into disciplinary offences categorized as "serious." This same Independent Chairperson should be statutorily authorized to review and make a final decision upon an inmate's objection to a claim of non-disclosure by correctional authorities. In this way, inmates who seek further disclosure than what has been provided in order to answer or rebut an allegation of wrongdoing that has led to administrative segregation or a recommendation for involuntary transfer are not left with a deep sense of being treated arbitrarily and unfairly in the sense spoken of by Madame Justice Reed in *Gough*.

In reviewing disputes over non-disclosure, the *Regulations* must be structured in such a way that a duty to inspect and review the actual information in question is imposed upon the Independent Chairperson. We saw this principle embodied in Subsection 82.1(10) of the *Immigration Act*. This is a crucial component of any future review procedure as it is the only way to make certain that the authorities are holding back only what is "strictly necessary." To do otherwise would be to undermine the principles laid out in *Demaria* and Section 27 of the *CCRA*, and to make the Independent Chairperson's job virtually impossible by casting his or her decision to the winds of speculation. The Independent Chairperson's decision cannot be based solely on a review of affidavit evidence provided by correctional authorities. In order to ensure full compliance, the *Regulations* should contain a provision explicitly granting the Independent Chairperson access to all documents and information in the hands of the authorities. Furthermore, the *Regulations* should repeat the notion, established in *Demaria*, that the burden of proof lies with prison officials. These last two requirements would simply make the *CCRA* and *Regulations* consistent with the similar provisions found in the *Access to Information Act* and the *Privacy Act*.

While an independent review is critical, the *Regulations* must also contain provisions that shield the interests of correctional authorities. Confidentiality must be protected right up until the Independent Chairperson makes his or her determination, so that justified claims to non-disclosure will not be compromised. This necessarily entails that an inmate or his representative cannot be privy to the information in question while attempting to demonstrate that non-disclosure is unwarranted. Hence, the *Regulations* should adopt the procedures employed in all of the Federal Acts we have seen earlier that must contend with this same problem, and provide for an obligatory *in camera* hearing by the Independent Chairperson where correctional authorities make their representations *ex parte*. As well, it is important that the *Regulations* are set up so that there is no confusion as to what the consequences would be where a claim to non-disclosure is found to be unjustified. In such a case, the *Regulations* should once again mirror the *Immigration Act* approach. As such, after the Independent Chairperson inspects the information, that information should be returned to correctional authorities and shall not be considered by those authorities in their substantive decision (of administrative segregation or involuntary transfer) if, in the opinion of the Independent Chairperson, a claim to non-disclosure is unjustified and where prison authorities maintain their position refusing disclosure. If the Independent Chairperson determines that the information should not be disclosed pursuant to Subsection 27(3) of the *CCRA*, then that information should remain confidential but may be considered by the authorities in making its determination of the substantive issue.

#### **B. CREATING A RELIABILITY THRESHOLD TEST ADMINISTERED BY AN INDEPENDENT ADJUDICATOR**

In terms of the issues concerning credibility and reliability, we have seen how the central difficulty lies with a decision-making process devoid of any procedural safeguards aimed at facilitating an assessment of the reliability of prison informant information. It is clear that an inmate alleged of wrongdoing cannot be afforded the right to confrontation and cross-examination if it is necessary to maintain confidential the identity of informants. However, the governing legislation mandates correctional decision-making regarding administrative segregation and involuntary transfer on the basis of credible evidence, yet the present decision-making structure is not set up or executed in such a way as to provide any alternative means of assessing the reliability of confidential informant information that would satisfy a sufficient level of procedural fairness. It is asserted here that a viable solution to this problem would be to project into the correctional context a reliability threshold test similar to the one adopted by the

Attorney Generals of Ontario and Manitoba within their respective policy guidelines regarding the use of jailhouse informants in the prosecution of criminal offences.

The *Regulations* could easily incorporate a threshold test where information emanating from a prison informant could be assessed according to a set of objective, codified criteria thus ensuring the existence of a sufficient level of reliability before such information is relied upon to deny or further reduce an inmate's liberty. The test should begin with a stipulation that a correctional decision affecting the liberty interest of an inmate must not be made on the basis of "unconfirmed" information provided by an informant. Borrowing from Mr. Justice Kaufman's preferred definition, 'confirmation' of informant information should entail the existence of *credible* evidence or information, available to correctional authorities, *independent of the prison informant*, which *significantly supports* the position that the inculpatory aspects of the informant's proffered information were not fabricated. If the informant's information is deemed "confirmed," then that information may or may not be relied upon depending on a further qualitative assessment of credibility and reliability according, but not limited, to the following factors:

- the circumstances under which the informer's report of the proffered information was taken (for example: the report was made immediately upon an informant's observation of an incident)
- the manner in which the report of the proffered information is taken by correctional authorities (for example: use of non-leading questions, thorough investigation of circumstances which might suggest an opportunity, or lack of opportunity, to fabricate a statement)
- 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 inmate accused of wrongdoing and the informer
- the extent to which the information is confirmed in the sense set out above
- the informer's general character including his or her correctional record
- any request the informer has made for benefits or special treatment and any promises which may have been made by correctional authorities in connection with the proffering of the information
- whether the informer has in the past given reliable information to correctional authorities, or whether the informer has given information in the past that was viewed either as false or not credible/reliable
- the specificity of the information and the extent to which the information contains details and leads to the discovery of evidence known or attributable only to the perpetrator

It is suggested here that in incorporating the above threshold test, the *Regulations* should also make it clear that responsibility for the administration of the test must lie, as in the case of the disclosure issue, with the Independent Chairperson. Independent adjudication is necessary in this matter since it would be, as Madame Justice Reed asserted in *Gough*, self-serving and no answer to the inmate's perception that he is being dealt with arbitrarily and capriciously if correctional authorities themselves were to be authorized to administer the test.

Some may point to the fact that Crown counsel are responsible for administering the reliability threshold test for jailhouse informants in order to support an argument that independent adjudication in the correctional setting is not really necessary. While it is true that the jailhouse informant test falls under the rubric of prosecutorial discretion, the two situations are distinguishable and there nevertheless remains an undercurrent of arms-length decision making even though we are talking about internal crown policy guidelines. To begin with, it would have been preferable in the criminal trial context if the courts were to administer a reliability hearing at a *voir dire* for jailhouse informant testimony. Yet, as was discussed in Part I of this paper, there are serious legal and philosophical impediments deterring the courts from proceeding with that option. Entrenching a reliability threshold test for jailhouse informants within the internal policy manuals of the Crown can only be seen as the next best thing. There are no similar legal obstacles making independent adjudication of informant reliability in the prison context difficult to establish.

Furthermore, the reliability test established by the Crown for jailhouse informants is a threshold test only. Once the Crown decides to offer the jailhouse informant's testimony as evidence, the decision over the ultimate reliability still remains with an independent trier of fact – the jury. Just because a jailhouse informant has passed the Crown's internal threshold test it does not necessarily follow that a jury will find that evidence credible and assign any weight to it, particularly if cross-examination proves to be exceptional. In the prison context, the decision over the ultimate reliability of a prison informant's information lies not with an independent body, but rather with the correctional decision-maker. In such a case, it can only be fair to balance off the equation with independent adjudication at the threshold stage. Finally, although fully administered by the Crown, the jailhouse informant test nevertheless is characterized by a relative degree of arms length decision making in the sense that a committee, rather than the prosecuting attorney, conducts the review. All and all, it would be difficult to successfully argue that there is no need for independent adjudication of the matter in the correctional context on the

reasoning that a reliability review of jailhouse informants is conducted solely within the Crown's prerogative.

### ***C. SANCTIONS AGAINST DELIBERATELY PROVIDING FALSE INFORMATION***

This final proposal is aimed at deterring prison informants from deliberately passing on to correctional authorities information that they know is completely false. We have seen how Manitoba's jailhouse informant *Policy Directive* explicitly sets out that "Crown Counsel are expected to prosecute cases vigorously where an in-custody informer has lied to the police, Crown Attorney, or the court." As well, where a jailhouse informant is convicted of perjury or a similar offence, "Crown Counsel shall ask for a significant consecutive prison term." The rationale behind such a policy is deterrence and it is suggested here that this sort of reasoning applies also to the correctional context where prison informants are often immune from official sanction against the proffering of information that they know is false and which in some way serves their own interests. Perhaps the most efficient way to deter prison informants from passing on false information would be to remove the veil of confidentiality and grant the alleged wrongdoer with the right to confrontation and cross-examination. This option, however, would also have the negative consequence of drying up the well of accurate and truthful informant information. Thus, the only option for reform in this manner would be to create an official sanction against a deliberate proffering of false information that at the same time does not jeopardize the identity of the informant.

Given that any sanction must not have the affect of revealing the informant's identity, it would therefore not be wise to deal with this sort of activity by adding it to the list of disciplinary offences found in Section 40 of the *CCRA*. It would be possible, however, to situate a viable and appropriate sanction within the list of enumerated substantive criteria found in the model "Transfer Code" advocated by Professor Jackson.<sup>132</sup> Deliberately passing on false information that contains allegations of wrongdoing by another inmate to correctional authorities, with the design and intent of creating serious problems for that inmate, should be included in a list of acts considered as *prima facie* grounds for transfer to higher security. Ideally, it would be appropriate for correctional administrators to presently view this sort of action on the part of prison informants as a transgression falling within Section 28 of the *CCRA* and Section 18 of the *Regulations*. Yet, it is unclear whether prison authorities, particularly the IPSOs, view this sort of thing as a serious threat to the good order and security of the institution or whether they just simply turn a blind eye and consider it an unfortunate part of the job that just comes with the

territory. The creation of a Transfer Code, and the placing of this pernicious activity within the short list of criteria for transfer to higher security, would go a long way to deterring prison inmates from passing on false information which presently wreaks so much havoc in the lives of so many inmates and the just administration of the institution.

## **CONCLUSION**

In the end, there is no doubt that the use of the prison informant in the administration of the Canadian penitentiary is, at least for the near future, here to stay. Through a comprehensive comparison with the recent experiences of the criminal justice system in regards to jailhouse informants, this paper has attempted to flesh out the significant challenges posed by the use of prison informants, explain the manner in which the current correctional decision-making process is dreadfully inadequate in responding to these difficulties, and to suggest a series of reforms aimed at achieving a more appropriate balance between the operational requirements of Corrections and the need to provide inmates who face further restrictions upon their liberty with a sufficient level of procedural fairness. The Attorney Generals of Manitoba and Ontario have taken serious pro-active steps to ensure that the criminal justice system is no longer vulnerable to the unscrupulous jailhouse informant. It is time for Parliament, the CSC, and the Courts to follow that lead.



## ENDNOTES

1. Christopher Sherrin, "Jailhouse Informants, Part I: Problems with their Use" (1997), 40 CRIMINAL LAW QUARTERLY 106 at pp. 106-107.
2. Evan Haglund, "Impeaching the Underworld Informant" (1990), 63 SOUTHERN CALIFORNIA LAW REVIEW 1407 at p. 1423.
3. Elizabeth Ganong, "Involuntary Confessions and the Jailhouse Informant: An Examination of *Arizona v Fulminante*" (1992), 19 HASTINGS CONSTITUTIONAL LAW QUARTERLY 911 at p.932.
4. Christine Boyle and Marilyn MacCrimmon, "The Law on Fact Finding Simply Stated" (2001), in TOPICS IN PROCEDURE AND EVIDENCE CASEBOOK, (Vancouver: UBC Law School Distribution Centre: 2001) at p.123.
5. Sherrin, *supra*, note 1, at p.110.
6. *Ibid.*, at p.110.
7. Haglund, *supra*, note 2, at p.1412.
8. See *United States v Bernal-Obesco*, 989 F. 2d 331 (1993) (9<sup>th</sup> Cir. U.S. C.A.); and *Pollitt v The Queen* (1992), 174 C.L.R. 558 (Aus. H. Ct.)
9. Manitoba Attorney General, *The Inquiry Regarding Thomas Sophonow*, ON LINE AT: <http://www.gov.mb.ca/justice/sophonow/jailhouse/index.html>.
10. *Ibid.*, at <http://www.gov.mb.ca/justice/sophonow/recommendations/English.html>
11. Sherrin, *supra*, note 1, at p.116.
12. *R v Bevan* (1993), 82 C.C.C. (3d) 310 (S.C.C.) at p.327.
13. *R v Babinski* (1991), 67 C.C.C. (3d) 187 (Ont. C.A.), affirmed (1992), 76 C.C.C. (3d) 286 (S.C.C.).
14. *R v Brooks* (2000), 141 C.C.C. (3d) 321 (S.C.C.).
15. *Ibid.*, at p.361.
16. Sherrin, *supra*, note 1, at p.117.
17. Clifford Zimmerman, "Toward a New Version of Informants: A History of Abuses and Suggestions for Reform" (1994), 22 HASTINGS CONSTITUTIONAL LAW QUARTERLY 81 at p.105.
18. Sophonow Inquiry, *supra*, note 9, at <http://www.gov.mb.ca/justice/sophonow/jailhouse/us.html>.

19. Sherrin, *supra*, note 1, at p.117.
20. Welsh White, “Regulating Prison Informers under the Due Process Clause” (1991), 4 SUPREME COURT REVIEW 103 at p.136.
21. Sophonow Inquiry, *supra*, note 9, at <http://www.gov.mb.ca/justice/sophonow/jailhouse/index.html>.
22. Sherrin, *supra*, note 1, at p.113.
23. Jim Dwyer, Peter Neufeld and Barry Scheck, *Actual Innocence*, (New York: Doubleday, 2000), at pp.128-129.
24. Attorney General of Ontario, *Report of the Commission on Proceedings Involving Guy Paul Morin*, (Kaufman Report) (Toronto: Ontario Ministry of the Attorney General, 1998), at p.567.
25. Sherrin, *supra*, note 1, at p.117.
26. *Ibid.*, at p.118.
27. See Kaufman Report, *supra*, note 24, pages 602 – 642 for a review of possible reforms.
28. *R v O’Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.).
29. *R v Stinchcombe* (1991), 68 C.C.C (3d) 1 (S.C.C.).
30. *R v Dixon* (1998), 122 C.C.C. (3d) 1 (S.C.C.).
31. Kaufman Report, *supra*, note 24, p.638.
32. *R v Vetrovec* (1982), 67 C.C.C. (2d) 1 (S.C.C.).
33. Sophonow Inquiry, *supra*, note 9, at <http://www.gov.mb.ca/justice/sophonow/jailhouse/what.html>
34. Christopher Sherrin, “Jailhouse Informants in the Canadian Criminal Justice System, Part II: Options for Reform” (1997), 40 CRIMINAL LAW QUARTERLY 157 at p.165.
35. *State v Grimes*, 982 P. 2d. 1037 (Mont. 1999).
36. Jack Call, “Judicial Control of Jailhouse Snitches” (2001), 22 No.1 THE JUSTICE SYSTEM JOURNAL 74 at p.78.
37. *Dodd v State*, 1999 OK CR 29 (Okla.Ct.Crim.App. 1999)
38. Call, *supra*, note 36, at p.79.
39. *Dodd v State*, 2000 OK CR 2 (Okla.Ct.Crim.App. 2000).

40. Call, *supra*, note 36, at p.79.
41. *Dodd v State*, *supra*, note 39.
42. Sherrin, *supra*, note 34, at p.181.
43. *R v Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.).
44. *Ibid.*, at p.400.
45. David Paciocco, *Charter Principles and Proof in Criminal Cases*, (Agincourt, Ont: Carswell, 1987), at p.359.
46. *Ibid.*, at p.337.
47. *R v Buric* (1996), 106 C.C.C. (3d) 97 (Ont.C.A.).
48. *Ibid.*, at p.123.
49. *R v Mezzo* (1986), 27 C.C.C. (3d) 97 (S.C.C.).
50. *Ibid.*, at p.108.
51. *Paciocco*, *supra*, note 45, at p.337.
52. *R v Buric*, *supra*, note 47, at pp.126-127.
53. Michael Jackson, *Justice Behind the Walls*, (Vancouver: Douglas & McIntyre, 2002), Sector 5, Chapter 1.
54. *Ibid.*, at p.82.
55. *Ibid.*, at p.83.
56. *Gallant v Canada (Deputy Commissioner Correctional Services)* (1989), 68 C.R. (3d) 173 (F.C.T.D.), at p.189.
57. See *Gallant v Canada*, *supra*, note 56; and *Cardinal v Kent Institution* (1985), 23 C.C.C. (3d) 118 (S.C.C.).
58. *Chiau v Canada (Minister of Citizenship and Immigration)* (2000), 195 D.L.R. (4<sup>th</sup>) 422 (F.C.A.), at par 60.
59. See *Gallant v Canada*, *supra*, note 56.
60. *Ibid.*, at p.176.
61. *Ibid.*, at p.191.
62. *Ibid.*, at pp.191-192.

63. *Storry v William Head Institution*, [1997] F.C.J. No. 1768 (FCTD).
64. *Ibid.*, at par 33.
65. *Ibid.*, at par 36.
66. *Ibid.*, ay par 33.
67. *Wolff v McDonnell*, 418 U.S. 539 (U.S. Supreme Court).
68. *Ibid.*, at p.555.
69. *Ibid.*, at p.556.
70. *Ibid.*, at p.569.
71. *Gomes v Trivisono*, 510 F.2d 537 (1<sup>st</sup> Cir, 1974).
72. *Helms v Hewitt*, 655 F.2d 487 (3<sup>rd</sup> Cir, 1981).
73. *Ibid.*, at p.502.
74. *Ibid.*, at p.502.
75. *Ibid.*, at p.502.
76. *Gomes v Trivisono*, *supra*, note 71, at p.540.
77. *Kyle v Hanberry*, 677 F.2d 1386 (11<sup>th</sup> Cir, 1982).
78. *Ibid.*, at p.1390.
79. *Ibid.*, at pp.1390-1391.
80. *Ibid.*, at p.1391.
81. Jackson, *supra*, note 53, Sector 5, Chapter 1.
82. *Demaria v Canada (Regional Classification Board)* (1987), 30 C.C.C. (3d) 55 (FCA)
83. *Ibid.*, at p.59.
84. Jackson, *supra*, note 53, Sector 5, Chapter 1.
85. *Gough v Canada (National Parole Board)* (1990), 3 C.R. (4<sup>th</sup>) 325 (FCTD).
86. *Ibid.*, at p.329.
87. *Ibid.*, at p.344.
88. *Ibid.*, at p.338.

89. *Ibid.*, at p.336.
90. *Ibid.*, at p.341.
91. *Ibid.*, at p.343.
92. *Ibid.*, at p.341.
93. *Ibid.*, at p.343.
94. See Section 46 of the *Access to Information Act*, R.S.C. 1985, c. A-1; and Section 45 of the *Privacy Act*, R.S.C. 1985, c. P-21.
95. See Section 48 of the *Access to Information Act*, *supra*, note 94; and Section 47 of the *Privacy Act*, *supra*, note 94.
96. *Gough v Canada (National Parole Board)* (1990), 5 C.R.R. (2d) 127 (FCTD).
97. *Gough v Canada*, *supra*, note 85, at p.343.
98. *Gough v Canada (National Parole Board)* (1990), 5 C.R.R. (2d) 136 (FCA).
99. *Hiebert v Canada (Correctional Service)*, [1999] F.C.J. No. 1957 (FCTD).
100. *Gougen and Albert v Gibson*, [1983] 2 F.C. 463 (FCA).
101. *Ibid.*, at par 24.
102. *Hiebert v Canada*, *supra*, note 99, at par 25.
103. *Lee v Canada (Correctional Service)* (1993), 17 Admin. L.R. (2d) 271 (FCTD).
104. *Ibid.*, at p.280.
105. *Lee v Canada (Correctional Service)* (1994), 33 C.R. (4<sup>th</sup>) 328 (FCTD).
106. *Ibid.*, at p.341.
107. See for example: *Gaudet v Marchand et al.* (1994), 94 C.C.C. 1 (S.C.C.); *Rowse v Correctional Service of Canada* (1994), 86 F.T.R. 262 (FCTD); *Cartier v Canada (Attorney General)*, [1998] F.C.J. No. 1211 (FCTD); *Gravel v Canada (Correctional Service)*, [1999] F.C.J. No. 1569 (FCTD).
108. *Ayotte v Canada (Attorney General)*, [2001] F.C.J. No. 5 (FCTD).
109. *Ibid.*, at par 18.
110. *Ibid.*, at par 7.
111. *Carey v The Queen in Right of Ontario et al.* (1986), 30 C.C.C. (3d) 498 (S.C.C.).

112. *Ibid.*, at p.530.
113. *Ibid.*, at p.532.
114. Jackson, *supra*, note 53, Sector 5, Chapter 1.
115. *Marachelian v Canada (Attorney General)* (2000), 187 F.T.R. 238 (FCTD).
116. *Fortin v Établissement de Donnacona (Directeur)* (1997), 153 F.T.R. 84 (FCTD).
117. *Giesbrecht v Canada et al.* (1998), 148 F.T.R. 81 (FCTD).
118. *Marachelian v Canada, supra*, note 115, at p.243.
119. Jackson, *supra*, note 53, Sector 5, Chapter 1.
120. See Section 41 of the *Access to Information Act, supra*, note 94; and Section 41 of the *Privacy Act, supra*, note 94.
121. See Sections 54 and 55 of the *Access to Information Act, supra*, note 94; and Sections 53 and 54 of the *Privacy Act, supra*, note 94.
122. See Section 37 of the *Access to Information Act, supra*, note 94; and Section 37 of the *Privacy Act, supra*, note 94.
123. See Section 42 of the *Access to Information Act, supra*, note 94; and Section 42 of the *Privacy Act, supra*, note 94.
124. Kaufman Report, *supra*, note 24, Appendix L.
125. *Ibid.*, at p.582.
126. Sophonow Inquiry, *supra*, note 9, at <http://www.gov.mb.ca/justice/sophonow> Appendix F.
127. *Ibid.*, at <http://www.gov.mb.ca/justice/sophonow/jailhouse/what.html>
128. Kaufman Report, *supra*, note 24, at p.605.
129. *Ibid.*, at pp.607-609.
130. *R v Broyles* (1991), 9 C.R. (4<sup>th</sup>) 1 (S.C.C.).
131. Kaufman Report, *supra*, note 24, at p.620.
132. Jackson, *supra*, note 53, Sector 5, Chapter 1.

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