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JAILHOUSE INFORMANTS IN CANADIAN CRIMINAL COURTS

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JAILHOUSE INFORMANTS

JAILHOUSE INFORMANTS IN CANADIAN CRIMINAL COURTS

by

Olena Beshley (090740030),
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Thesis

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ABSTRACT

Criminal justice systems in Canada and around the world have been established to deal with matters that require attention, punishment, and justice. An important function of criminal justice systems is the evaluation of evidence presented in the court of law. Evidence from jailhouse informants who testify that they have been privy to confessions of crimes is a contentious issue. Much of the scholarly literature available to date on wrongful conviction cases focuses on causes of insufficient and unreliable evidence obtained through different techniques and from different sources. Despite the high number of investigations into wrongful conviction cases, the subject of jailhouse informants has not yet been thoroughly explored as a leading cause of wrongful convictions in Canada. The current study employed a qualitative methodology in analyzing reported criminal cases that have used jailhouse informant's testimony in order to find parallels with respect to cases, informants, and testimonies. The findings center on the credibility of evidence, the trustworthiness of informants, judicial cautions and the consequences that followed the use of such evidence. While jailhouse informants have been identified as a cause of wrongful convictions, there have been few studies that provide insight into these cases in Canada. The present study focuses exclusively on the influence of jailhouse informants (also known as in-custody informants) and their role and impact on decision-making in criminal trials. Further implications of the findings on potential miscarriages of justice are also discussed.

Keywords: jailhouse informants, in-custody informants.

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JAILHOUSE INFORMANTS IN CANADIAN CRIMINAL COURTS

Introduction

The Canadian Criminal Justice System is an institution tasked with the delivery of societal justice, however, it is not perfect. There is anecdotal and empirical evidence that shows occasions where miscarriages of justice¹ occur and our legal system has failed to fulfil its role (Sherrin, 1997; Sorochem, 2009). These mistakes can cause the criminal justice system to be called into disrepute. Wrongful convictions, where an innocent person has been convicted and punished for a crime they did not commit, occur regularly and have a negative effect on the public's perception of the criminal justice system when they are discovered (Rosen, 1992). When wrongful convictions occur, the system is seen as unproductive and unsatisfying. One example was the infamous trial of Guy Paul Morin of Ontario in 1995– an individual whose life was ruined by the egregious failings of the judicial system, which wrongfully convicted him for a crime he did not commit. The testimony provided by jailhouse informants played a significant role in his conviction.

A growing body of empirical research has begun to reveal the imperfections of our nation's legal system, and how improvements must be made to ensure that justice is fairly dealt (Sorochem, 2009; Trotter, 2004, Weisman, 2004). Miscarriages of justice occur in part due to the use of investigative tools and trial evidence used by law enforcement bodies. The most common examples of investigative tools and evidence that result in errors are: legal officials' tunnel vision, eyewitness unreliability, misleading scientific evidence, jailhouse informants, false confessions, and disclosure failures (Sagiul, 2007; Sherrin, 2005). In-custody informants or

¹ Quirk (2007,) explains that miscarriage of justice not only involves conviction of an innocent person butt it also allows “guilty to walk away unpunished”, therefore undermining the whole idea of the justice system (p.761).

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jailhouse informants are defined as persons "in custody or facing criminal prosecution" who have an "expectation of some reward in the form of reduction of charges, eligibility for bail, leniency in sentencing or better conditions of confinement" in exchange for information provided to law enforcement officials (Burnett, 2008, p. 1079). The present study focuses exclusively on the influence of jailhouse informants (who may also start out as police informants), and their role and impact on decision making in criminal trials.

Miscarriages of justice brought on by 'system failures' result in significant personal loss, including broken families, lack of trust in the judicial system, ruined lives, restricted opportunities, and loss of self-belief and faith (Huff, Rattner, & Sagarin, 1996; Leo, 2009; Macfarlane, 2006). However, the subject of jailhouse informants and their contribution to injustices lacks attention. There are significant gaps within the literature on jailhouse informants with regard to types of cases where they are used, information on their criminal histories, and other relevant information that could help to identify these individuals as unreliable witnesses. To the extent that the use of jailhouse informant testimony is related to wrongful convictions, it is important, therefore, to study how courts use jailhouse informant testimony in Canada, in order to implement changes that will help to deliver justice. While in-custody informants have been identified as a cause of wrongful convictions in Canada and elsewhere (Innocence Canada, 2016; Natapoff, 2006; Roach, 1999, 2007, 2010), there are few studies that provide insight into these cases in Canada.

The Purpose of the Study

The following literature review will demonstrate that there are numerous cases in which evidence provided by jailhouse informants has been used at trial and has resulted in a wrongful conviction (Burnett, 2008; CBC News, 2009; Raeder, 2007; Report of the Kaufman Commission

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on Proceedings Involving Guy Paul Morin, 1998). In addition, several commissions of inquiry were established to address specific wrongful convictions and have provided recommendations and insight into the use of in-custody informants in their recommendations. The present study was performed in order to examine the influence of unreliable evidence by jailhouse informants on trial decisions and outcomes. The current study also identifies the similarities between cases in which the reasoning behind the use of jailhouse informants were investigated, with those cases that provided recommendations on how to avoid systemic acceptance of such evidence in future instances.

The phenomenon of wrongful convictions in Canada is not a new concern. Moreover, the use of jailhouse informants in Canadian criminal courts has been practiced since the 1980s (*Sophonow* 1982). Therefore, the subject of jailhouse informants requires thorough attention and analysis because of the potential for it to contribute to wrongful convictions. Researchers have also drawn attention to the fact that the testimonies provided by jailhouse informants could have different meanings depending on the context. For example, how the information was acquired and provided to the interested bodies, and how it was introduced to the general public can alter the importance that is placed on the testimony (Reader, 2007). For some, jailhouse informant's testimony may be seen as a helpful gesture of one 'honest' inmate testifying against another individual to assist authorities in providing justice. For others, however, jailhouse informant's testimony may be seen as a decision to satisfy personal interests such as receiving incentives. The current study will shed light on the use of jailhouse informants in the Canadian court system.

The literature review outlines some of the most common issues that the Canadian criminal justice system has faced when dealing with numerous evidentiary matters and investigative techniques that have been erroneously used to prove an accused's guilt. However,

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the main objective of this research was to discover how jailhouse informants' testimony has been used in Canadian Courts. To address this question, a descriptive analysis that examined judicial decisions from Canadian Criminal Courts, that were later appealed and published in LexisNexis Quick Law database was performed. A qualitative paradigm used in the current study permitted a discovery of patterns of similarities and differences amongst cases that used jailhouse informant evidence.

CHAPTER TWO

Literature Review

Jailhouse Informants: Who are They?

In-custody informants or jailhouse informants have been defined as individuals who are currently in custody awaiting their trials, or already serving their sentences as a result of criminal prosecution, who expect compensation in exchange for providing information about other accused individuals (Burnett, 2008). In addition, Winograde (1990) defines an in-custody informant as "an inmate, usually awaiting trial or sentencing, who claims to have heard another prisoner make an admission about his case" (p.755). The term jailhouse informant is not the same as police informants, police agents, or confidential informers, who sometimes are intentionally placed closer to accused individuals in custody in order to gain information. Such informants carry out the specific task of acquiring evidence, which is later reviewed and in some cases, manipulated by investigative bodies in order to aid their investigation (Department of Justice Canada, 2013). The Morin and Sophonow Inquiries, both examining the factors that influenced these wrongful convictions, specify that individuals who have acquired second-hand knowledge regarding statements provided by the accused, that did not come directly from the accused, were not classified under the category of jailhouse informants (Kaufman Report, 1998; The Inquiry Regarding Thomas Sophonow, 2001). Moreover, simply being in detention/custody with the accused and possessing some information regarding an accused's confession, does not yet grant an individual the status of an informant (Dufraimont, 2008).

Dufraimont (2008) argues that because jailhouse informants are often individuals who are awaiting their own trials, or are serving their own sentences, they are motivated to provide testimony against an accused in order to gain a personal benefit. The information provided by the

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jailhouse informant to the police could have been exchanged for a sentence reduction, dropping of certain charges, and other benefits (Dufraimont, 2008). The exchange of testimony for any sort of incentive may motivate an informant to provide false evidence and consequently, false claims made by jailhouse informants have resulted in wrongful convictions (*Morin 1992; Sophonow 1984; Truscott 1967*). In some instances, jailhouse informants manipulated their testimony in order to satisfy their own interests (Dufraimont, 2008). Many scholars have argued for the irrationality of accepting into a court of law the testimony of a person who remained in detention and was considered a sophisticated and convincing liar, to prove the guilt of another individual, who is ostensibly regarded as innocent until proven guilty (Burnett, 2008; Dufraimont, 2008; Winograde, 1990). The use of jailhouse informant testimony is considered to be particularly troublesome when such evidence is the only evidence available in a criminal case and points to the guilt of the accused. Winograde (1990) adds that the use of jailhouse informant's testimony in criminal courts not only creates the potential for wrongful convictions, but it also raises various challenges regarding the proper use of such evidence and its credibility. In summary, the use of jailhouse informant's testimony is problematic and presents significant issues related to the credibility of evidence and trustworthiness of so-called 'prison rats'.² Consequently, many have argued for the use of protections, such as judicial warnings, to safeguard against potential miscarriages of justice.

The *Vetrovec* Warning

Canadian law requires that trial judges must provide cautionary instructions to jurors about the appropriate use of jailhouse informant's testimony (Shukra, 2002). More specifically, this involves giving a *Vetrovec* warning to jurors in cases where jailhouse informant evidence is

² Sometimes jailhouse informants or in-custody informants are referred to as 'prison rats', 'snitches', informants, 'rats', and other. Many of these synonyms are found throughout literature and used in this paper.

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used. A *Vetrovec* warning is a "clear and sharp warning" provided by the judge in order "to encompass any prosecution witness who was deemed to be untrustworthy. The true purpose of the warning when given was to avoid the risk of conviction based on unreliable evidence" (Shukra, 2002, p. 759). The evidence presented by jailhouse informants is considered of questionable reliability thus requiring the need for the judicial warning. *Vetrovec* warnings became mandatory after the case of *Vetrovec* (1982) where an accused had been convicted of conspiracy to commit drug trafficking (heroin). Mr. Vetrovec was charged along with eight other individuals in the city of Vancouver, British Columbia. As a result of the trial Mr. Vetrovec was sentenced to 16 years imprisonment. In this case, one of the accomplices of the accused provided a key piece of evidence in the case, accusing Mr. Vetrovec in the commission of the crime. Based on the evidence provided by this accomplice, the trial judge decided that it would be prudent to warn the jury about the danger of taking into consideration any evidence provided by an accomplice who is considered an 'untrustworthy witness' and ultimately testifies in his own best interests (*Vetrovec* 1982). As a result,

In rejecting any rigid formulation that would lead to an automatic warning and a requirement for corroboration for accomplice testimony, the Supreme Court of Canada chose instead to fashion a flexible rule that could accommodate the particular circumstances of each case (Shukra, 2002, p.760).

This risk however, did not prevent jailhouse informant evidence from being accepted into Canadian court proceedings. Instead, the court decided to clarify the requirements for accepting such evidence and in such cases the credibility of the informant must be established (Shukra, 2001). In addition, jailhouse informant testimony has to be corroborated with other evidence to prove the guilt of the accused. Each court case is different in its nature, despite its structure, and so, it is not always easy to apply a standardized set of rules to each individual witness providing testimony; sometimes exceptions and errors are possible.

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Innocence Canada [formerly the Association in Defence of Wrongly Convicted (AIDWYC)], concurs that a suitable option would be to warn the jury about the risks and benefits of adopting testimony of an untrustworthy person. Shukra (2002) recommends that judges should use the *Vetrovec* warning when informant evidence is provided, in order to caution jurors about the risk of using such evidence. While Kaufman's and Cory's recommendations, (stemming from the inquiries examining the wrongful conviction of Guy Paul Morin and Thomas Soponow) around dealing with informant testimony are significant, (Kaufman Report, 1998; The Soponow Inquiry, 2001), many of these recommendations have not yet been implemented (Reader, 2007).

Causes of Wrongful Convictions

Research has revealed that jailhouse informants are motivated to advance their own interests above all else (Dufraimont, 2008). Furthermore, lying under oath is common for jailhouse informants (see for example: *Brown* 2003; *Druken* 1999; *Duguay* 2007; *Warner* 1994). Thus, their perjury is known to have a negative impact on the final decision of the court and is also a factor leading to wrongful convictions (Dufraimont, 2008). Since the time of the original trials of Steven Truscott, Guy Paul Morin, and Thomas Soponow (all individuals who have been publicly recognized as being wrongfully convicted), numerous recommendations and guidelines regarding the use of this type of testimony have been provided. The recommendations include guidelines and procedures that law enforcement must follow when investigating criminal matters and emphasizes that evidence which contradicts any case they may be building (and which may point to an alternate suspect) should not be discarded (Kaufman Report, 1998). It is concerning that the utilization of jailhouse informants still continues after their use has resulted in several widely known wrongful conviction cases, especially following the guidelines for the

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use of this evidence were established. Given that Canadian courts still maintain the use of jailhouse informant testimony this creates the potential for wrongful convictions.

One of the leading causes of wrongful convictions in Canada is prosecutorial misconduct (Reader, 2007). One example of prosecutorial misconduct involves the falsification and an introduction of incorrect evidence by investigative bodies and Crown Attorneys (Reader, 2007). Introduction of false evidence may not only lead to injustice, but it often contradicts and undermines information produced by truthful witnesses. Other types of prosecutorial misconduct may cause violations affecting constitutional provisions, procedural and evidentiary law violations, and others, which may each lead to wrongful convictions. The logic of procedural misconduct extends to the use of jailhouse informants by prosecutors where the Crown attorneys to convict, use unreliable and untrustworthy witnesses who, in many cases, possess extensive criminal histories and previous records of testifying.

For those tasked with prosecuting and “punishing” the perceived wrongdoers (notably investigative units, Crown Attorneys, and legal systems), there is often great pressure and scrutiny from higher authorities, victim stakeholders, and society-at-large to exact swift justice, particularly in high profile cases. Subsequently, this pressure often contributes to the “cutting of corners” if these shortcuts accomplish the desired outcome (i.e. clinching a guilty verdict). It is in these very circumstances that testimony of jailhouse informant is likely to be used (Natapoff, 2006). The desire to resolve the case by any means can lead to tunnel vision or confirmation bias. Tunnel vision is defined as the process where “actors in the criminal justice system focus on a suspect, select and filter the evidence that will ‘build a case’ for conviction, while ignoring or suppressing evidence that points away from the suspect’s guilt” (Findley & Scott, 2006, p. 292). Similarly, confirmation bias refers to the process where authorities try to confirm their own

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hypothesis by “favouring information that confirms rather than refutes their initial assessment” (McMillan & White, 1993, p. 443). Thus, the lack of evidence, confirmation bias, and tunnel vision of the personnel in the justice system frequently results in the use of jailhouse informant testimony, which may lead to a wrongful conviction.

One of the reasons inmates who are serving their own sentences are allowed to testify against other inmates, is that the criminal justice system officials, while in the process of investigation and witness selection, tend to choose witnesses who provide favourable information to them, information that supports their case and helps to convict an individual (Raeder, 2007). Several research studies have discovered that, in some instances of wrongful conviction, the prosecution was willing to use 'experts' that favoured their case (Medical Misdiagnosis Research, 2011). For example, Dr. Charles Smith was a forensic pathologist who provided professional opinion and evidence in numerous murder cases implicating defendants in crimes. According to Dr. Smith, he believed that his job was to help the Crown to convict an accused rather than provide truthful evidence (Medical Misdiagnosis Research, 2011), as has been found in other instances in the literature (Giannelli and McMunigal, 2007; Levy, 2009). In other cases, experts gladly provide their 'professional' opinion, in exchange for monetary rewards or other forms of compensation (Levy, 2009). As a result, an expectation to receive compensation for professional judgment could result in biased opinions by these witnesses. This potential for bias is concerning not only as it relates to jailhouse informants, but also to other professional experts who are called to testify (Levy, 2009).

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No 'Honour among Thieves'

The perception of prisoners testifying against one another has changed over time. In the past, it was considered a violation of a supposed "prison code" to testify against other prisoners for personal gain. Today only a small portion of prisoners adhere to the code "honour among thieves" (Curriden, 1989, p. 56). Instead, the notion of 'honour' has turned into a "dog eat dog" mentality, where everyone fights for his or her own survival in any way possible (Curriden, 1989, p. 56). Today in most prisons across the world, "prison officials" must provide "specific inmates with protection through a number of administrative methods, including transfers to safer facilities, institutional segregation orders, and assignment to protective custody" to protect them from violent and angry inmates (Vaughn, 1996, p. 143-144). Jailhouse informants are among the prisoners who may require this level of protection, as their testimony against other inmates goes against the 'honour code' within prisons; thus, other inmates may subject them to violence and prejudice. There is however, lack of information in the literature on the justification for informing, specifically involving jailhouse informants.

Fighting Wrongful Convictions: Organizations and Inquiries

The Morin Inquiry

A number of inquiries established as a result of previous wrongful convictions have provided guidelines regarding how jailhouse informant evidence should be managed. The Morin Inquiry, established in response to the wrongful conviction of Guy Paul Morin and The Inquiry Regarding wrongful conviction of Thomas Sophonow offered specific instructions regarding the use of such testimony. Judicial authorities suggested prohibiting the use of jailhouse informant's testimony unless the alleged confession was recorded (Kaufman Report, 1998). In addition to the recorded confessions, Justice Kaufman suggested that each statement made by the informant

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must be handwritten, "supported by a witness who is not an in-custody informer, or unless the statements contain reference to previously unknown facts, subsequently substantiated by the authorities" (p. 599).

In addition, one of the sections of the Morin Inquiry addresses compensation for providing information to law enforcement agencies. Kaufman suggested that in future prosecutors must ensure a record be kept of any agreements law enforcement personnel make with in-custody informants (Kaufman Report, 1998). In addition, any information regarding incentives or an informant's cooperation must to be written down and signed by the Crown Attorney, the defence, and the informant or his/her counsel (Kaufman Report, 1998). This procedure should benefit three parties: the Crown Attorney, the informer, and the accused, where an issue regarding cooperation and motivation to testify arises. As a benefit to an accused, the inquiry required that the Crown disclose to the defence any information regarding the informers' previous history of testifying, criminal records history, and information about benefits awarded to an informer. These disclosure procedures are designed to ensure the trustworthiness of an informant, as well as enhance justice and accuracy in the admission of the testimony (Kaufman Report, 1998).³

The Kaufman (1998) report provided numerous suggestions on how to work with cases where jailhouse informant evidence was presented, such as accuracy hearings, cautionary instructions, corroboration, and full disclosure of relevant information. The most important part of the debate around the use of in-custody informants centered on the corroboration requirement. The report suggested that statements from in-custody informants (and from any other informant

³ Several Canadian provinces have enacted many of these policies and have created additional instruction in regards to the use of jailhouse informant in Canadian criminal courts. These provinces are as follows; Ontario, Manitoba, New Brunswick, New Foundland and Labrador, Alberta, and Nova Scotia (Kaufman Report, 1998).

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who is receiving a benefit for assisting law enforcement) must be corroborated; that is, some other evidence that confirms the jailhouse informant's testimony must be available to support it. In *Warner* (1994), "the trial judge went on to direct the jury that it was 'dangerous for [them] to act on the evidence of such a person unless it is corroborated. The trial judge then pointed to one piece of evidence the jury could rely on as corroboration" (p.20). According to the Kaufman Report (1998), it is the responsibility of the judge to inform the jury about an informant's reliability, incentives offered to an accused, and the informant's previous testimonials. The Morin Inquiry suggested that prosecutors must take a proactive attitude in deterring wrongful convictions (Kaufman Report, 1998). The job of the Crown Attorney is not limited to the simple task of convicting perpetrators. Instead, their job is to deliver justice, as they are the representatives of the justice system.

In *Morin* (1992), one of the suggestions emphasized by the inquiry was to establish an in-custody informer registry. The registry would provide access to any information about the informer, including the history of prior testimonials, information about incentives received, and assessments of reliability of an informant as a witness (Kaufman Report, 1998). According to the Kaufman Report (1998), access to the registry must be granted to "prosecutors, defense counsel, and police" ("Recommendation 64", p. 621). The objective of such a database would be to save officials time and resources when trying to assess an informant's credibility. These measures would also eliminate costly pre-trial motions, hearsay hearings, *voir dire*s, and possibly court hearings. In addition, the prosecutors' obligation to disclose relevant information would remain not only to the defence, but to the registry as well. The disclosure of evidence would allow access to relevant information in a short time. Additionally, the Kaufman Report (1998) emphasizes the prosecutor's duty to inform the defense about any relevant information regarding

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informers that the registry may contain. Full disclosure to the registry by the Crown may contradict their entire case, but the job of the Crown Attorney should be focused on attaining justice, rather than simply the successful prosecution of an accused. Furthermore, mutual cooperation of all sides would allow for a faster and more efficient process. On the other hand, failure to disclose relevant information to the defense may lead to an injustice (Kaufman Report, 1998; The Sophonow Inquiry, 2001).

The Sophonow Inquiry

The Sophonow Inquiry (2001) holds very strong opinion as to the untrustworthiness and unreliability of jailhouse informant's evidence. Unlike The Morin Inquiry, the Sophonow Inquiry takes a strong stance against the use of jailhouse informant's evidence in Canadian Criminal Courts. According to the Sophonow Inquiry (2001):

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. The inquiry emphasized that in-custody informants should not be used as reliable witnesses in the courts (p.101).

The only case when jailhouse informants evidence can be accepted, according to the inquiry, is in the case of kidnapping. Jailhouse informants "might be permitted to testify [only] in a rare case, such as kidnapping, where they have, for example, learned of the whereabouts of the victim" (The Sophonow Inquiry, 2001, p.21). In such situations where jailhouse informant's evidence is being accepted, appropriate rules and procedures must be followed and the number of jailhouse informants should be limited to one. Additionally, a strict warning from the judge about the dangers of accepting the testimony from untrustworthy witness must be provided to the jurors (The Sophonow Inquiry, 2001).

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One of numerous errors that have been identified by the inquiry that resulted in the wrongful conviction of Thomas Sophonow was the failure of the Crown attorney to disclose all relevant information pertaining to the credibility of jailhouse informants in the case, to the defence (The Sophonow Inquiry, 2001). The disclosure of relevant materials would allow for cross-examination and possible elimination of some witnesses. Alike the Morin Inquiry (1998), the Sophonow Inquiry (2001) requires that all relevant information must be disclosed to the defence by the Crown in order to avoid further mistakes and injustices.

In addition to other recommendations provided by the inquiry, any interviews with jailhouse informants should be videotaped or audiotaped and further steps should be taken to ensure that provided statements have not been discovered through the media or any other sources but came directly from an accused (The Sophonow Inquiry, 2001). In addition, the statement provided by jailhouse informants must reveal information that is only available to the person who committed the crime, provide enough significant information about the crime, and must be “confirmed by police investigation as correct and accurate” (The Sophonow Inquiry, 2001, p.114).

Lastly, the inquiry emphasizes that “in those rare cases where the testimony of a jailhouse informant is to be put forward, the jury should still be instructed in the clearest of terms as to the dangers of accepting this evidence” (The Sophonow Inquiry, 2001, p.114). Specifically, the report advises that it may be wise to provide examples of “both the Morin case and the Sophonow case as demonstrating how convincing, yet how false, the evidence of jailhouse informants was” (The Sophonow Inquiry, 2001, p.114). Adequate warning to jurors about the dangers of accepting evidence of jailhouse informants must be provided. The warning should contain explanatory information about how easy, in some cases, it is for jailhouse informants to

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obtain information that they later use to their advantage. Failure to provide warning or follow any of the listed recommendations should result in mistrial (The Sophonow Inquiry, 2001).

Innocence Canada

Innocence Canada, formerly the Association in Defence of the Wrongly Convicted (AIDWYC, 2013), is a Canadian-based non-profit organization focused on helping the wrongfully convicted. The organization is interested in overseeing cases that are defined as potential injustices; thus, this organization is tasked with representing the rights of potentially innocent individuals who have been incarcerated. Innocence Canada (2016) has been very successful and productive in preventing injustices; having assisted in exoneration of twenty-one individual convicted of crimes that they did not commit. Innocence Canada began its practice from a small group of volunteers, who came together to investigate the circumstances and evidence that led to the conviction of Guy Paul Morin. Following this, numerous individuals organized the *Justice for Guy Paul Morin Committee* (AIDWYC, 2013). The Committee's main objective was the collection of proper evidence to prove the innocence of Guy Paul Morin. Later, the Committee became known as AIDWYC (2013) – currently Innocence Canada. To date, numerous wrongly convicted Canadians have been exonerated with the help of the organization (Innocence Canada, 2016). Some of these cases involved inaccurate use of jailhouse informant testimony that resulted in the incarceration of innocent people (i.e. *Morin* 1997). Innocence Canada takes a strongly conservative stance against the use of jailhouse informant testimony by recommending the withdrawal of evidence of in-custody informers (Kaufman Report, 1998; The Sophonow Inquiry, 2001) due to the increased potential for wrongful conviction (Innocence Canada, 2016).

Literature Review Conclusion

It is abundantly clear that courts are well aware of the problems and challenges regarding the credibility of jailhouse informants. According to Lincoln and Morrison (2006), the use of untrustworthy witnesses raises concerns regarding the "fallibility of due process, human rights violations, and the limitations of the adversarial approach" (p. 3). Thus, more attention should be paid to the accused's right to a fair trial and the role of a trial judge in excluding unreliable evidence. Unfortunately, Canadian courts, despite being aware of the dangers brought about by informant's testimony, have not been receptive to recognizing a right to the exclusion of unreliable evidence, such as that provided by jailhouse informants.

Numerous factors leading to wrongful convictions have been discussed. Many of the causes have been largely studied by researchers and other concerned stakeholders, but some, like jailhouse informants, have received very minimal attention to provide answers to important questions. The use of jailhouse informant testimony in the Canadian justice system has raised countless concerns. Such evidence offers a significant influence on the verdict, has been demonstrated to be potentially unreliable, and is vulnerable to overvaluation by the trier of fact. For these reasons, it has been strongly associated with wrongful criminal convictions (Dufraimont, 2008).

CHAPTER THREE

Research Gap

Much of the literature available on in-custody informants provides information regarding theoretical problems with their testimony. Numerous cases point to the fact that the use of jailhouse informants in Canadian criminal courts creates a potential for injustice⁴ but in practice, no study has been done to discover and analyse the circumstances of the use of these witnesses in court cases. Moreover, scholars suggests that there is a high possibility of wrongful convictions in cases where the evidence provided by jailhouse informants is used (Burnett, 2008; Dufraimont, 2008). Some scholars point to the fact that jailhouse informants are willing to manipulate the criminal justice system to satisfy their own interests (Dodds, 2008). While there has been much discussion about the credibility of in-custody informant's testimony, there is a paucity of empirical knowledge concerning informant identities and the circumstances surrounding their use in court cases. Reader (2007) suggests that due to the lack of systematic research on wrongful convictions arising from jailhouse informants' testimony in Canada, further investigation is required. A detailed analysis of cases that have used jailhouse informants' testimony to date has not been performed. Through a qualitative content analysis of judicial decisions of Canadian cases involving jailhouse informants' testimony, the current study aimed to address this research gap and discover the similarities between informants, defendants, and cases in general.

⁴ Several high-profile Canadian cases have resulted in wrongful convictions. The most well known cases are; *Sophonow* (1982), *Morin* (1992), and *Truscott* (1959). The particular example of injustice in these cases was the use of jailhouse informants' evidence as reliable evidence to convict.

Research Questions: Similarities between Cases that Used the Testimony of Jailhouse Informants

One of the main arguments raised by scholars and other concerned individuals against the use of jailhouse informants in Canadian court proceedings contends that the testimony of such informants is a leading cause of wrongful convictions (Dufraimont, 2008). The current study was designed to gain insight into the nature of Canadian criminal court proceedings involving jailhouse informants' testimony. The following sub-questions were investigated over the course of a thematic, qualitative data analysis, which informed the main research question;

- What were the demographic characteristics of jailhouse informants?
- In what types of cases were jailhouse informants used (e.g., offence type)?
- What judicial precautions or warnings were provided, if any, in cases where jailhouse informants' testimony was used?
- Were there commonalities between the cases with respect to defendants, and informant's characteristics (e.g., age, criminal record, education, relationships between them)?
- What incentives did jailhouse informants receive for their testimony, if any?
- Was jailhouse informant testimony a reason for appeal of the case?
- What justifications did jailhouse informants provide for their decision to testify?

Importance of the Current Study

The present study on the use of jailhouse informants is important, because jailhouse informants are perceived by judges as untrustworthy witnesses who are able to invent evidence in expectation of compensation. Thus, they create a significant risk of injustice in the criminal justice system (Kaufman Report, 1998). Indeed, the use of jailhouse informants raises concerns

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regarding the deficiency of the process of justice, violation of human rights, and the weakened legitimacy and professionalism of the justice system.

Several high-profile Canadian cases have resulted in wrongful convictions. The most well known are that of *Truscott* (1959), *Sophonow* (1982), and *Morin* (1992). In these cases, jailhouse informants' testimony played an important role in convicting innocent individuals. These cases have fuelled the debate over whether, and how, such testimony should be used in criminal courtrooms. As discussed, current law in Canada encourages trial judges to use discretion when allowing the testimony of a jailhouse informant to be heard or to be accepted in the court of law, and to provide cautionary instructions to jurors about the appropriate use of jailhouse informant's testimony and about the false reliability of such evidence (Roach, 2010). Despite known deficiencies with this type of testimony, the use of jailhouse informants' testimony in Canadian courts continues. The present study is designed to enhance our understanding of the nature and use of jailhouse informant testimony in Canadian courts cases that were later appealed.

CHAPTER FOUR

Research Method

Qualitative Research Study Procedure

The purpose of qualitative research is not only to investigate the natural world, but also to discover the meaning and relationships between different variables (Warren & Karner, 2010). The main question that this study was designed to answer was, “In what circumstances does jailhouse informant’s testimony tend to be used in Canadian criminal court proceedings?” In the current study, a thematic analysis of cases aimed to uncover what happened during the court proceedings that allowed jailhouse informants’ testimony to be produced and introduced in the court of law. The qualitative study design, through the process of coding, helped to locate common patterns between judicial decisions of cases that used the testimony of in-custody informants.

Analytical Plan

This study used constructivist grounded theory (Charmaz, 2006), which helped to direct, manage, and construct an original analysis of the data. The "grounded theory method consists of systematic, yet flexible guidelines for collecting and analyzing qualitative data to construct theories ‘grounded’ in the data themselves" (Charmaz, 2006, p. 2). The study began with a content analysis of several court cases, in order to develop a conceptual analysis from the beginning of the project. In addition, an examination of the existing literature on the topic of jailhouse informants and the use of their testimony in Canadian court cases was completed (as discussed in CHAPTER TWO of this paper).

The jailhouse informant study began with structured coding sheets that were used to capture descriptive information about cases, defendants, and jailhouse informants. Following

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that, a thematic analysis of most prevalent themes found in the judicial decisions of cases involving jailhouse informant's testimony was conducted. This study used qualitative coding to "separate, sort, and synthesize" data (Charmaz, 2006, p.3). Coding means attaching "labels to segments of data that depicts what each segment is about"; "it distils data, sorts it", and provides a way to make comparisons between different segments of data (Charmaz, 2006, p.3). Data for the current study was coded using both initial and focused coding. Through the initial coding process, specific fragments of court cases (relevant words, lines, phrases, and sentences) were examined to understand their meaning and analytic importance (Charmaz, 2006). The focused coding followed next. This process allowed for the selection of the most useful codes discovered by the process of initial coding and then separated the most relevant ones to analyze them further and to understand their theoretic importance (Charmaz, 2006). Analytical description was used to refer to the development of a conceptual understanding of how, in which cases, and with what cautions (if any), jailhouse informant's testimony was used in Canadian court cases that were later appealed. Analytical description helped to identify similar patterns between important elements of data, in order to construct a consistent representation of records (Warren & Karner, 2010). The preliminary stage of the study helped to identify the similarities between court cases being analyzed. The similarities found through coding helped to establish particular areas of interest, which assisted in providing answers to sub-questions. Results from the present study identified four dominant and recurring themes: (1) Evidence for the use of judicial cautions in the court trials; (2) Information on incentives received by in-custody informants for testimony; (3) Information on judicial opinions of jailhouse informants and their evidence; and (4) The value of evidence provided by informants and its importance in the case.

Objectives and Scope

The study's intention was to explore how jailhouse informant's testimony has been used in Canadian court cases that were later appealed. Based on the literature review, it was concluded that evidence provided by in-custody informants was insufficient to be used as significant proof of guilt in the court of law – especially to demonstrate the guilt of an accused individual. The current study aimed to discover the similarities between cases where jailhouse informant's testimony was used. Analysis of the similarities was important, as these were believed to have an impact on the cases. The main intention was to discover and analyze these similarities, with hopes to understand the systematic issues caused by the evidence of jailhouse informants contribute to the system's failure. For this reason, a comprehensive and detailed analysis of 35 cases was completed.

As previously stated, commissions of inquiries have determined that significant errors have happened in the court of law pertaining to an unreliable evidence. Thus, the current study carried out the process of coding and selected meaningful themes that could potentially explain errors in the criminal cases through one specific form of evidence. These investigative, procedural, and judicial errors can be explained as systemic injustices. Given the fact that numerous studies emphasized the possibility of miscarriages of justice caused by the use of jailhouse informant's testimony, this study intended to find out whether jailhouse informant's testimony was used as a reason for an appeal of the case. Additionally, other themes such as credibility of the evidence, judicial opinions about informants and their evidence, the importance of such evidence to a conviction, the benefits provided in exchange for testimony, the demographic characteristics of defendants and informants, and judicial warning were examined

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in the current study. All of these themes helped to provide answers to research questions posed by the current study.

The similarities between cases that used such testimony were uncovered, information as to why and how jailhouse informant's testimony in cases occurs, who benefits from it, and what additional concerns arose from its usage were all revealed in the study. It was beyond the scope of this study to test whether the use of jailhouse informants leads to miscarriages of justice. Rather, the research was interested in describing the circumstances of their use in the criminal trials.

Methodology

Case Selection

This study conducted an analysis of the written judicial decisions from Canadian criminal trials, including in-custody informant's testimony, to determine how courts have handled such testimony over the past 22 years. The LexisNexis Quick Law database was used to identify and select these court judgments using specific search criteria. LexisNexis Quick Law is a Canadian database that contains judicial decisions primarily from appellate courts (i.e., Supreme Court of Canada and Courts of Appeal). All cases selected for the study had been appealed and involved jailhouse informant testimony pertaining to alleged confessions by an accused. The Wilfrid Laurier University library database provided access to the relevant court cases, with links to numerous Canadian and International databases. This study included only English judicial decisions. All cases between 1994 and April 12th of 2016 were included in the search. The first reported case available through LexisNexis that has used an identified jailhouse informant as a witness was from the year of 1994; therefore, it was selected as the beginning time period for the study. The following search criteria was used:

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In LexisNexis Quick Law – Court Cases tab was selected in order to conduct the advanced search. In the "Search Terms" a key phrase "jailhouse informant" or "in-custody informant" was entered. Next, the source option "All Canadian Court Cases" and the jurisdiction "All Jurisdictions" were selected from the drop down menu. Finally, in the court option "Courts of Appeal" was selected. Lastly the "Search" option was pressed.

The above criteria helped to identify all reported judicial decisions of cases from Canadian history that have used jailhouse informant's testimony and have been appealed.

Eighty-eight unique court cases resulted from the search. However, the relevance of cases was determined through thoughtful examination and coding and as a result, only 72 reported cases were available for inclusion in this study. These cases were sorted in chronological order. When one of the cases was selected, "The Related Content" option in the top right corner provided the link to the relevant documentation regarding the case (lower court case trial, summary of the case, *voir dire*, and other documents). To answer the main research question and sub-questions, all relevant documentation was examined and analyzed.

Overall, 72 reported court cases from Canadian jurisdictions (with an exclusion of the province of Quebec) had been coded. For a case to be included in the study and later coded, sufficient information about the actual case that used the testimony of in-custody informant, the crime, informant, other relevant study information had to be available in the matter.⁵ Only 35 cases appeared to be sufficient for the current study, as other cases only included the phrase a 'jailhouse informant' or an 'in-custody informant' for citation purposes, or referred to other cases where jailhouse informants were used. Consequently, the present study included 34 defendants

⁵ Information on how cases have been selected for current study is described in the *Case Selection Section* of this paper.

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and 45 jailhouse informants in 35 cases.⁶ Additionally, all cases studied were for indictable offences and had been tried by the jury.

The majority of cases studied were in the province of Ontario. Table 1 illustrates the division of cases used for the study among Canadian provinces⁷.

Table 1. Division of Cases with Jailhouse Informants by Canadian Provinces

Provinces	Case Frequency	Percentage
Ontario	22	62%
Nova Scotia	4	11%
Newfoundland and Labrador	3	9%
British Columbia	2	6%
Manitoba	2	6%
New Brunswick	1	3%
Saskatchewan	1	3%
Total	35	

All of these cases included sufficient information about the evidence of jailhouse informants to be included in the study.

The concentration of the majority of cases being from one province (Ontario) may be explained through general statistics. According to Statistics Canada (2011), the province of Ontario is the most populated Canadian province; containing more than thirteen million people (as of 2011). Ontario also has the largest number of people in correctional institutions (Statistics Canada, 2015). Quebec, if it were also included in the sample, would have been the second largest province with cases involving jailhouse informants; as it is also the second region by the

⁶ In two cases (*Tran*, 2000 and *Tran*, 2001) an accused was the same person charged with two separate offences. Additionally, some cases involved more than one jailhouse informant.

⁷ For the purpose of current study, only reported court cases available through LexisNexis have been used. As a result, some Canadian provinces were not included in the study as no reported court cases that have used jailhouse informants have been found through the applied search criteria in the LexisNexis database.

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population size among Canadian provinces⁸. Despite the vast majority of cases centred within one specific province, 35 cases in total had been included from seven different provinces of Canada. This study included all available (reported) English judicial decisions from Canadian provinces with substantive information about cases involving jailhouse informant's testimony.

Defining, Collecting and Storing Data

As suggested by Warren and Karner (2010), current study and any other "qualitative analysis requires a large quantity of thickly descriptive data, good organizational skills, and interpretive ability" (p. 215). However, before data can be analyzed, the researcher must decide on which data are relevant and important to be examined. The current study analyzed numerous court documents, legal writings, and academic literature. An Excel spreadsheet was created in order to organize these themes. Found recurrent themes created the foundation for further analysis and discussion. As the process of coding continued, many new themes were discovered and added to the spreadsheet. This allowed for organization of important elements of information, which were later analyzed to answer the main research question as well as to identify the most prevalent themes.

Although the current study did not require anonymity or confidentiality procedures, limited access to all the data and other relevant materials was maintained to avoid any loss or damage to the data. Access to relevant materials was provided to the thesis supervisors, who have provided significant assistance and guidance during the study process. Thus, part of the data were stored on the primary researcher's personal laptop, and hard copies were kept in a home office in a locked office desk to prevent any loss of the data.

⁸ The province of Quebec was not included in the study as it contains French language cases. In order to code French language court decisions for current study, research would need to hire someone fluent in French language. However, the lack of financial resources did not permit this.

CHAPTER FIVE

Analysis and Findings

Demographic Characteristics of Jailhouse Informants

A key characteristic of jailhouse informants was that they were predominately male (94%, 33 cases out of 35). Female in-custody informers were involved in only 6% of cases (2 cases). The current study discovered that much of the information that would help to identify specific demographic characteristics of in-custody informants was unavailable in sampled cases. Specifically, there was a paucity of information regarding age, education, family status, social status, and ethnicity; only in rare occasions were such variables mentioned.⁹

Due to the informer's privilege clause (Ashenhurst, 2013), several cases had replaced the name of the informant with the conventional "John Doe" (McInnis 1999; Pelland 1997), making it difficult to locate demographic information about these individuals. Specifically, "the Supreme Court of Canada has long held that an informer's identity is privileged information. This is to protect informers from retribution and to encourage citizens to help police" (Ashenhurst, 2013, p. 617). Therefore, informer's privilege limits identifying information about an informer who provided a statement regarding the commission of a particular crime by a

⁹ The ethnicity of the defendant was described only in two cases; in one, the defendant was identified as Indo-Canadian and in another case as Indian (*Dhillon* 2002; *Sharif* 2009). The same was evident for jailhouse informers; in one case informant's ethnicity was described as African American (*White* 2014) and in the other case as Indian (*Dhillon* 2002). The age of informant and defendant was disclosed in 9 out of 35 cases; an average age of informant was 26.5 years of age, and an average age of defendant was 36 years old. The youngest accused was 18 years old and the oldest was 53 (*McInnis* 1999; *White* 2014). In relation to informants, the youngest informant was 21 years of age and the oldest was 32 years of age (*Baltrusaitis* 2002, *Brooks* 1998). These numbers were based only on the small percentage of information obtained through the process of coding as majority of cases did not disclose much relevant information regarding the personal characteristics of the informant or the accused. Information about education level or marital status of informants and defendants was not significantly available. Only in one of the cases the jailhouse informant was described as being married (*Morin* 1997). In five out of 35 cases defendants were described as being married, having partner, or being in common-law relationships (*Brooks* 1998; *C.D.* 2005; *Mallory* 2007; *Stark* 2002; *Travenor* 2001).

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specific offender (Lawlert, 1986). Out of 35 cases coded that used the testimony of jailhouse informants, only 23 cases (66%) included the name of the in-custody informant. Nine cases listed only the initials of the informer's name – “Mr. X” or “D.M.” for example.¹⁰ In thirteen cases, the name of the informant was either not provided or replaced by “John Doe”.¹¹ The number of informants used in cases studied exceeds the number of cases but not all informants have been identified by any name in cases (see Table 2); some cases simply stated that two or more jailhouse informants had been used.

Table 2. Identification of Jailhouse Informants by Names

Identity of Informant	Frequency of Cases
Name available	23
Initials or Short Abbreviation	9
Name replaced with “John Doe”	13

Similar to the demographics of jailhouse informants, male defendants represented 94% of cases and female defendants were involved in 6% of cases. Considering that “in 2014/2015, women accounted for 15% of overall correctional admissions to provincial/territorial correctional services” in Canada (Reitano, 2016, p. 4), such a low number of cases with female defendants (and by extension, informants) is consistent with the statistics. Based on the information presented by Simpson, McMaster, and Cohen (2013), females represent a significantly smaller percentage of the Canadian prison population. As expected, there were also fewer female jailhouse informants than male jailhouse informants in the current study.

¹⁰ *Dhillon* 2002; *Druken* 1999; *McInnis* 1999; *Morin* 1997; *Sharif* 2009; *Snow* 2004; *Wells* 2001.

¹¹ *Babinski* 1999; *Baksh* 2015-2016; *Baltruaitis* 2002; *Brown* 2002; *Campbell* 2005; *Dickins* 2001; *Khela* 2009; *Mallory* 2007; *McArthur* 2013; *McInnis* 1999; *Pelland* 1997; *Smith* 2002; *Travenor* 2001; *Warner* 1994; *White* 2014.

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In 33 cases that involved 32 male defendants, 43 male jailhouse informants were identified suggesting multiple informants were used in several observed cases (*Brooks* 1998; *Jawbone* 1998; *Mallory* 2007; *McInnis* 1999; *Morin* 1997,).

Demographics on Criminal History

In comparison to the personal demographics of informants and defendants described in cases studied, significantly more information regarding the wrongdoing of both informants and defendants was identified. Information regarding the defendant's current crime was easily accessible and described in each of the cases, which also led to information about defendant's previous criminal history, as this was considered relevant in the course of the trial. Much less information regarding informants' criminal past or current crimes was available. Only in 26% of cases was information about the informants' current crimes available, and in 71% of cases information about informants' past crimes was described. The criminal past of informants was highly diverse, and included crimes such as: assault, drug related crimes, fraud, "possession of stolen property, failing to comply with an undertaking, uttering death threats, failing to comply with a probation order" (*Baksh* 2015: para 21), sex offenses (including offences against young children), robbery, break and enter, arson, conspiracy, attempts to commit murder (*Mallory* 2007), and many others. Moreover, the majority of informants had extensive prior criminal histories and were repeat offenders¹². More importantly, many in-custody informants had repeatedly engaged in crimes of dishonesty during the course of their lives. Indeed, of the cases where information about previous criminal convictions of informants was described, 56% of convictions were identified as crimes of dishonesty. Crimes of dishonesty and untrustworthiness

¹² *Assoun* 2006; *Babinski* 1999; *Baksh* 2015-2016; *Baltrusaitis* 2002; *Brooks* 1998; *Brown* 2003; *Campbell* 2005; *Dhillon* 2002; *Druken* 1999; *Duguay* 2007; *Hurley* 2010; *Khela* 2009; *Mallory* 2007; *McDonal* 2000; *McFarlane* 2012; *Morin* 1997; *Sharif* 2009; *Snow* 2004; *Stark* 2000; *Tran* 2000; *Tran* 2001; *Travenor* 2001; *Trudel* 2004; *Warner* 1994; *White* 2014.

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are best described as including crimes such as "failing to comply, failing to attend, impersonation with intent and obstruct police" (*Baltrusaitis* 2002: para 40), and theft and fraud (*Babinski* 1999). In the present study, appellate judges in their reviews of appealed cases pointed to the fact that criminal history of dishonesty should be considered in accepting the testimony of jailhouse informant. This trend indicates that the trait of dishonesty was considered very important to the analysis of the informant's credibility and trustworthiness as a witness. Such untrustworthiness of jailhouse informants has become one of the main arguments in the wrongful conviction debate. Inquiry commissions in Canada and the United States have investigated wrongful convictions and analyzed the substantial damage done by the use of jailhouse informants, whose testimony was accepted despite the possession of records for crimes of dishonesty in their criminal past (Natapoff, 2006). Natapoff (2006) listed a few examples as to why it is unjust to use the testimony of jailhouse informant:

The founders of the Innocence Project discovered that 21% of the innocent defendants on death row were placed there by false informant testimony.

The Illinois Governor's Commission on Capital Punishment unanimously concluded that "[t]estimony from in-custody witnesses has often been shown to have been false, and several of the 13 cases of men released from death row involved, at least in part, testimony from an in-custody informant" (p.123).

Natapoff's (2006) concern for the use of unreliable witnesses with significant criminal records, including crimes of dishonesty, is supported by findings of the current study as in 56% of cases studied jailhouse informants had dishonest criminal histories. Moreover, in seven cases (20%) jailhouse informants in the study were still awaiting decisions of their own legal matters, as charges against them were pending, creating an opportunity for informants to work out a deal with authorities in exchange for their testimony. Several research studies show how unreliable such witnesses are and how their testimony has led to erroneous convictions (Natapoff, 2006). It

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is concerning that most jailhouse informants used to testify have such unsavoury histories, despite previous concerns voiced and the potential for significant injustices.

The study also revealed significant use of incentives. Unfortunately, the history of our judicial system is rife with cases where unsavory witnesses were allowed to testify against individuals who were presumed innocent until proven guilty and who, based on the testimony of those unreliable agents (often with an element of corroboration), were wrongfully convicted (Roach, 1999; Saguil, 2007). It is outrageous that “a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else’s expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration” (Natapoff, 2006, p. 123). The current research supported this idea, given that in 23 cases (66%) informants received various benefits for their cooperation with authorities (*McDonald* 2000; *Tran* 2001). Incentives will be discussed in greater detail in CHAPTER SIX.

In regards to other demographic characteristics of jailhouse informants and defendants, the current study did not uncover significant information about the level of education of either party. Only in two cases (6%) high school level of education was mentioned when explaining defendant’s employment situation (*Dhillon* 2002, *Morin* 1997). Other variables that were impossible to adequately uncover were ethnicity¹³ and marital status. Too little information on these demographic variables was available in sampled court cases to allow for assumptions or conclusions to be responsibly made.

¹³ In *White* (2014), the in-custody informant was described as African American of origin. The *Dhillon* (2002) case, on the other hand, mentioned that an informant was Canadian but with Indian background. The accused in *Dhillon* (2002) was described as an individual of Indian descent as well.

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In terms of the defendant's age, the youngest defendant in cases studied was 18 years of age. The oldest defendant was to 53 years of age. However, limited information regarding the age of informants was available, making it difficult to derive any specific conclusions. In terms of the relationship between informants and defendants, in 29 cases (82%) they first met in jail; in only two cases did the informant and defendant know each other prior to incarceration. Information about how defendants and informants first met was missing in four cases (11%). According to the jailhouse informants, all of the confessions from defendants were either directly heard in jail during conversations, or were overheard by informants while defendants engaged in the conversations with other inmates. In one case, the confession alleged to have come from a defendant's sleep talking (*Warner 1994*).

Description of the Testimony

Regardless of their veracity, most in-custody informants (68%) claimed that the accused confessed to the crime. Despite different wording and situations in which confessions were obtained, the nature of all confessions was similar in its context; an accused was alleged to have talked about some detail of the crime, more or less stating his relation to it. For example:

A jailhouse informant provided the evidence needed to plug potential cracks in the Crown's circumstantial case, testifying that in the course of two meetings with the accused while the latter was in custody awaiting trial, the accused told him that he had killed his brother, that the police and the Crown would have a hard time proving the case because there was no forensic evidence linking the accused to the murder scene and he would make it look like the deceased was killed by his wife, and that the police did not find the murder weapon because he discarded it before they searched his camper (*Baltrusaitis 2002: p. 2*).

Some informants claimed that over the course of conversation with the accused, they had a feeling that the defendant felt enjoyment for what they had done and that police would have a difficult time proving the defendant's guilt (*Morin 1992*). Others provided detailed information regarding how the crime unfolded (*Snow 2004*), the type of weapon that was used (*Stark 2000*),

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or other details about the perpetrator's emotions during the commission of a crime (*Warner* 1994). Overall, the alleged confessions were diverse in their wording. Some confessions contained slang language used by defendants, while others paraphrased content to make their testimony sound more presentable in court without using offensive lexicon. In *Batrusaitis* (2002), the jailhouse informant employed a strongly worded apparent confession of an accused: "You know I did it. I know I did it. Let's see them fucking well prove that I did it" (para 46). The descriptions of confessions in the current study appeared to illustrate that defendants have confessed to the crimes committed, or presented significant details about specific crimes to implicate defendants for specific crimes.

In the current study, all cases were eventually appealed when defendants made claims of innocence, or identified errors during the course of the trial. This finding is encouraging as "[in] recent years, the media have reported numerous high-profile cases in which individuals were convicted of and incarcerated for serious crimes they did not commit, only later to be exonerated" (Leo, 2009, p. 332). Twenty-nine cases (82 %) examined in the current study were appealed either solely on the evidence provided by jailhouse informants regarding a defendant's confessions, or a combination of unsavory informant's evidence and several other grounds. Those other grounds included the fact that the confessions were police-induced, new evidence was uncovered with the development of post-conviction DNA testing, there were problems with the *Vetrovec* warning or eyewitness identification, there was new evidence regarding recantation of informant's testimony, and a possible violation of citizens' right (Gross, Jacoby, Matheson, et al, 2005). In some cases, the defence argued that the use of untrustworthy witnesses as jailhouse informants infringed the right of an accused; therefore, guilty verdicts led by the testimony from jailhouse informants should be dismissed and new trials ordered.

Types of Criminal Cases in Which Jailhouse Informants’ Testify

Despite the literature review emphasizing the fact that “informants have become law enforcement’s investigative tool of choice, particularly in the ever-expanding world of drug enforcement” (Natapoff, 2006, p. 111), the current study provides only partial support for this pattern. Notwithstanding the fact that drug-related crimes played a significant role in informants’ lives, these crimes did not prevail in the current research study; indeed, the crime of homicide dominated in 94 % of cases studied (*Hurley 2010; Khela 2009; Mallory 2007; Sharif 2009; Trudel 2004*). Table 3 illustrates the variety of crimes for which jailhouse informants were used in current study.

Table 3. Type of Crimes

Type of Charge	Number of Cases
1 st Degree Murder	22 cases
2 nd Degree Murder	12 cases
Manslaughter	1 case
Aggravated Sexual Assault	1 case
Attempted Murder	1 case
Sexual Assault	1 case
Robbery with Weapon	1 case
Conspiring to Obstruct Justice by Attempting to Hire a Person to Kill a Witness in a Murder Trial	1 case

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The current research demonstrates that in some cases, defendants were charged on more than one count of murder or a combination of charges and that jailhouse informants were used in cases involving serious violence.¹⁴

In summary, jailhouse informants were used for the most egregious crimes, which carry the heaviest penalties in our society; murder and manslaughter. These crimes rarely go unnoticed by the media and society-at-large. Thus, in these cases, there is a great pressure on authorities to uncover and punish the perpetrator. The current study also demonstrates that police agencies are willing to rely on untrustworthy witnesses such as jailhouse informants in cases of serious crimes; as their aim may be to proceed with the charge and discover evidence to obtain a conviction when evidence that is more reliable is elusive. Authorities may be willing to pay for evidence that leads to the conviction of an accused; the more valuable an informant's evidence is perceived to be, the higher the financial compensation provided by police will be (Dodds, 2008).¹⁵ In many situations, authorities ignore the trustworthiness and reliability of evidence.¹⁶

Judicial Warnings and Grounds for Appeal

The current study paid close attention to judicial cautions employed in court matters that used jailhouse informants as witnesses. Not surprisingly, only one type of judicial caution had been referred to in most cases; in 18 of 35 cases (51%) there was reference to a *Vetrovec* warning and problems with its use.¹⁷ The use of *Vetrovec* warnings in cases suggest serious credibility issues imposed by the evidence provided by jailhouse informants. Appellate judges reasoned

¹⁴ Information regarding the use of jailhouse informants in cases of heinous crimes is available in later sections of this paper.

¹⁵ More information on police willingness to provide financial and other types of compensations to in-custody informants in cases where no other sufficient evidence to convict an accused is available can be found in CHAPTER SIX of this paper.

¹⁶ The tendency of jailhouse informants to fabricate evidence in exchange for financial compensation and other benefits is broadly described in the Incentives Section and throughout this paper.

¹⁷ The matter of the *Vetrovec* warning is widely discussed in the Judicial Cautions section of this thesis.

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that lower court judges in numerous cases should have provided a judicial warning to caution the jury about suspicious evidence that in many cases seemed untruthful. The fact that a *Vetrovec* warning was required suggests that evidence of jailhouse informants required special attention; as such evidence is generally considered unreliable and dangerous and should be treated with extreme caution.

Overall, the analysis demonstrated that judicial warnings played an important role in a significant number of cases, however, there were problems with the adequacy of the *Vetrovec* warning. In *Assoun* (2006), “the trial judge did not give a clear sharp warning cautioning the jury about the dangers of accepting the evidence of any of the disreputable witnesses without some corroborating evidence” (para 145). Despite the presence of a warning in other cases, appellate judges identified numerous problems concerning judicial warnings. These problems were: no full warning was given, the judicial caution was not elaborated or explained to the jury, the trial judge failed to provide a warning after the testimony of an unreliable witness was presented, the defence council failed to request the *Vetrovec* warning, and/or that the warning was not presented at an appropriate time during the trial.¹⁸ McElhaney (1995) demonstrated that the timing of any judicial instruction, including warnings, had an effect on how jurors perceived legal evidence. His study of mock jurors demonstrates that jurors might ignore judicial instructions if they were delivered at the wrong time during the trial.¹⁹ The absence of a sufficient warning when evidence of a jailhouse informant was presented posed a significant risk to the fairness of due process and reliability of such evidence.

The current study demonstrated that appellate judges considered judicial warnings essential in all cases where informant’s testimony was used. Due to previous criminal histories

¹⁸ *Assoun* 2006; *Brooks* 1998; *Hurley* 2004; *McDonald* 2000; McElhaney, 1995.

¹⁹ The mock juries study by McElhaney (1995) is discussed in later chapter of this paper.

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and demands for incentives, jailhouse informants were described as "a class of self-serving and unreliable witnesses. Widespread recognition of their inherent unreliability has grown in the aftermath of public inquiries into wrongful convictions where jailhouse informers figured prominently" (Public Prosecution Service of Canada, 2011). According to Chasse (2010), a *Vetrovec* warning is used as a measure to deal with potentially unreliable evidence of jailhouse informants. Thus, the present study revealed that the main issue of appeal in the majority of cases was, in fact, the lack of a proper *Vetrovec* warning. However, given the number of appeals for improper use, the results indicate that simply giving a *Vetrovec* warning is not sufficient. Rather, proper execution of the warning in such cases is also important and costly when it goes wrong. Therefore, the *Vetrovec* warning or a similar warning must be provided following the presentation of questionable evidence and should be emphasized and summarized by the judge at the end of the trial.

Similarities between Cases

This study collected information about the criminal records of defendants and informants, relationships between them, records of psychological issues of both, and the type of current incarcerations of defendants and informants for most cases. Besides the gender, one of the most substantial characteristics that was evident in the majority of the cases was the criminal record of the defendant and informant. As mentioned previously, the majority of cases (71%) contained information about previous criminal records/convictions of informants. Diverse criminal histories of informants ranged from crimes of dishonesty to more serious crimes such as aggravated assault, drug offences, fraud, and sexual assault. Fifty percent of defendants had a

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reported criminal history when tried for crime in analyzed cases.^{20,21} Other similarities such as compensation for testimonies, judicial warnings, and the role of testimony of jailhouse informants found in cases studied are explained in later sections of this paper.

Compensation for Testimony

The tendency of jailhouse informants to fabricate evidence and testify against an accused is known to increase the risk of a wrongful conviction of the innocent (Mosteller, 2009). In many cases “the testimony has been gained by the prosecution through explicit promises to benefit the informant if he or she testifies in support of the prosecution’s case” (Mosteller, 2009, p. 548). The availability of incentives in exchange for testimony can encourage an informant to fabricate evidence in order to satisfy the requesting party. The history of exoneration through DNA technology is replete with examples of how innocent individuals were wrongfully convicted. A recent study demonstrates how 30% of individuals convicted based on the testimony of informants have been freed due to the advancement of DNA technology (Mosteller, 2009). Mosteller (2009) describes another study “of 340 exonerations from 1989 through 2003” where the phenomenon of wrongful convictions due to the use of evidence from in-custody informants was not widely studied, “however, their data revealed the important role of jailhouse informants in these convictions” (p.550). Jailhouse informants, involved in ninety seven cases in a study identified by Mosteller (2009), were described as providing false testimonies and receiving compensation for their participation.

²⁰ One of those defendants was arrested for suspicion in murder while in a process of committing sexual assault on another victim (Snow 2004).

²¹ In *Mallory* (2007), both defendant and in-custody informant ended up in jail for the same criminal act; both were at the crime scene together but the informant did not actually see the defendant committing the crime. Later, the informant claimed that he overheard the defendant’s conversation in jail where he confessed to the crime.

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The current study demonstrates that most informants were rewarded for their assistance to the prosecution, which likely increased their motivation to testify (*Mallory 2007; Tran 2001*). The range of incentives varied in its diversity; ranging from better conditions of confinement, monetary rewards, reduction of charges, or other favours. The most powerful incentive that can be offered in exchange for testimony, however, is the promise of liberty (Mosteller, 2009). During none of the cases in the current study was a reward of liberty promised in exchange for informant testimony. Information about the type of incentives offered to jailhouse informants for their testimony was available in twenty cases (57%) in the current study. In other cases, the information about incentives was either protected, not disclosed, or in some instances, informants denied receiving any incentives at all (*Dhillon 2002; Snow 2004*).

Overall, it was challenging to determine what motivated jailhouse informers to testify against other inmates; however, 16 cases (47%) suggested that the availability of benefits had a positive effect on their willingness to provide testimony (*Mallory 2007*). For example, "In return for \$10,000, Metrakos [jailhouse informant] provided a sworn statement to the police claiming that Stewart [defendant] had admitted his involvement in the murders" (*Mallory 2007: para 236*). Other cases also illustrated how informants were able to manipulate police in order to receive incentives. In *Tran (2000)* and *Tran (2001)*, an informant did not provide evidence in-full until he was paid a promised \$5000 for his testimony. Further, in *Assoun (2006)*, a jailhouse informant made a deal with police prior to giving his testimony in the court. The informant demanded that he:

“Would have one of his pending cocaine trafficking charges and his possession of proceeds of crime charge stayed and on the other count of trafficking he would receive a two year sentence followed by three years probation. He testified that prior to making this deal he had been offered a five year sentence in a plea bargain on all charges (para 156) [but his was not what he wanted].

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Nevertheless, the present study identified that in 66% of cases informants were compensated for their testimonies. Paid compensation ranged from \$CAD 100 to 12,000. The type of incentive was dependent on the importance of the case and availability of other evidence. Findings suggest that a key factor for the prosecution to rely on evidence provided by jailhouse informant was the lack of other evidence to successfully convict. The prosecution tended to be more generous when compensating jailhouse informants in those cases where no other sufficient evidence to convict was available (Mosteller, 2009). In such cases, evidence provided by informants had a significant effect on conviction (Mosteller, 2009). Additionally, the informant's evidence was of high importance in serious cases such as murder or manslaughter, which typically demands "swift justice" by society. Thus, "strong incentives lead to risks of distorted information and false testimony" (Mosteller, 2009, p. 552). This is especially evident in those cases where there "is clear potential for these incentives to produce false evidence implicating those 'believed' to be guilty of the crimes and for informants to embellish the responsibility of those they implicate" (Mosteller, 2009, p. 552). This practice has led to numerous wrongful convictions, but has not been prohibited in Canada.

Since the use of incentives was a dominant theme within the current research study, CHAPTER SIX explores incentives in further detail.

Justifications for Providing Evidence

The judicial decisions described several reasons why informants testified against an accused. These ranged from financial benefits, sentence reductions or having charges dropped, and/or special treatment from authorities while in jail or afterwards. However, there were also those who claimed that their pure motivation to testify came from remorse for the victims or their families (Morin 1997). In Trudel (2004), "Emmerson and Jack Trudel [both jailhouse

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informants] claimed that they came forward, in part, because of their horror over the killing of the pregnant victim. Interestingly, in one way or another, Emmerson and Trudel also claimed some kind of epiphany that led them to testify” (para 77). This statement however, did not disentangle whether they testified because of a feeling of empathy, or because both were later offered incentives for their testimony.

On the other hand, there were also those informants who did not want financial compensation or other privileges for their testimony. B.S., a jailhouse informant in *Dhillon* (2002), “came forward about a year after sharing a cell with the appellant because he said that he wanted to change his criminal ways” (para 11). "I wanted to change myself because I have given a lot of pain to my family", claimed B.S. when asked for his reasons to come forward with incriminating evidence against an accused (*Dhillon* 2002: para 23). Despite feelings of horror, remorse, or need to change criminal lifestyle, the present research showed that the majority of informants who provided justifications for testifying have requested or received incentives for doing so. In sixteen cases (46%) the information on justifications for testimony was provided. In eighteen cases (51%), however, informants had received either financial compensation, sentence reduction, dropped charges, or other privileges. Table 4 illustrates the variety of incentives offered and number of cases in which they were discussed.

Table 4. Type of Compensation

Type of Incentive	Number of Cases
Financial compensation	7
Reduction of sentence	6
Better condition of confinement	4
Other favours not disclosed	2
Outstanding parole application	3

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Witness protection program	4
Conjugal visit with informant's spouse in paid hotel room	1
Phone call to informant's	1

Most jailhouse informants received a combination of incentives for their testimony. In *Baltrusaitis* (2002), for example, a jailhouse informant received financial compensation and the reduction of his current sentence for his help to authorities. Some informants (37%), while being compensated for their help to authorities, claimed that they were doing it for moral reasons. For example, in *Babinski* (1999), an informant “approached the police because it was a "good" thing to do and implied that he was also motivated by concern for the deceased's child" (para 3). Overall, informants claimed that they felt they had an obligation to help authorities to serve justice and punished perpetrators.

Still, the fear of being punished by fellow inmates for assisting authorities may overcome any compensation offered by police. This is a significant danger that informants are exposed to while in jail or even outside in the community. While, the notion of “honour among thieves” is not as widely practiced nowadays as it was in the past, the fear of retaliation is always present and informants may become victims themselves (Curriden, 1989). According to Mosteller (2009), “informants are particularly needed ... to solve and prosecute many cases”, thus, the police are often in need of the help from “insiders who inform on the activities and who testify against those in the enterprise (p. 551). Furthermore, “revealing information about a powerful and dangerous criminal may demand physical protection and also require a positive inducement in order to endure the anticipated costs of testifying” (Mosteller, 2009, p. 551). Authorities must provide informers with not only monetary compensation or other benefits, but must ensure their safety and security following those trials where they testify against other

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inmates. Authorities protect and compensate informants to ensure future cooperation and supply of information. Thus, in some cases:

“for informers who are also targets of prosecution, the incentives must outweigh the consequences of providing self-incriminating information. The informant must calculate that the threat to liberty is reduced by cooperation, which often requires the dismissal of a large number of potential charges in exchange for admission of involvement in some criminal acts” (Mosteller, 2009, p. 551).

This research demonstrates that several jailhouse informers were promised sentence reduction, better conditions of confinement and the dropping of charges for their assistance to authorities (*Assoun* 2006; *Brown* 2003; *Duguau* 2007). In most of these cases police relied on information provided by informers to convict an accused, as other evidence they had was weak. As in *Brooks* (1998):

Despite the appellant's denials, the evidence of King and Balogh [jailhouse informants] figured prominently in the prosecution's case. Their testimony provided direct evidence of the appellant's guilt. Although neither gave evidence about any sexual assault, they each testified that the appellant admitted to killing his baby. Thus their evidence, if accepted by the jury, was very incriminating (para 115).

Similarly in *Babinski* (1999),

In summary, Crown counsel relied upon L.'s evidence to fill a gap in the prosecution's case arising from a lack of trace evidence to connect the appellant to the crime. The trial judge instructed the jury that they could find that the appellant had confessed to L., with the result that there was direct evidence of his guilt. Finally, the trial judge told the jury that L.'s evidence was confirmed by other admittedly true evidence. The undisclosed evidence and the fresh evidence impact upon the reliability of that part of L.'s evidence implicating the appellant in the crime (p. 25).

Thus, it can be summarized that the main justification for using jailhouse informants was a lack of other sufficient evidence to prove the guilt of an accused.

CHAPTER SIX

Influence of Incentives on Jailhouse Informants' Motivation to Testify

Incentives often become a reason to suspect the credibility of jailhouse informants. As noted in *Brooks* (1998), “the prospect of receiving a benefit gives any informant, whether in jail or not, a motivation to lie, or, at least to give inaccurate testimony” (para 100). Sherrin (1997) believes that the motivation to lie for benefits is growing with every opportunity. This is especially the case for informants who have spent some time behind bars. They are able to appreciate favors from authorities and are easily coerced to produce false testimonies:

Obviously the strength of any motivation to fabricate evidence will vary with the conditions in which an informant lives. But even the nicest jail is still a jail, and I think it is trite to say that there are very few prisoners who would not actually desire an improvement of their living conditions, especially if it involved their release from custody (Sherrin, 1997, p.112).

Desire to satisfy one's own ends motivates unsavory witnesses to manipulate not only police authorities but also the courts and especially the triers of fact. For this reason, the courts should be very careful when dealing with in-custody informants. Judicial authorities are more educated and experienced on how to differentiate truth telling from evidence fabrication. On the other hand, jurors are not as knowledgeable in handling jailhouse informant's testimony; they are community members who are called to the jury duty, and most of them have little prior familiarity of the process (Dufraimont, 2008; Schroer, 2011). Many informants in the current study were able to present their testimony very reliably and persuasively. Through their testimonies, informants tried to convince jurors that they are telling the truth about a defendant's confession and convince the jury of the defendant's guilt (*Assoun* 2006; *MacDonald* 2000). Thus, everyone taking part in the court process where evidence from jailhouse informants is

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presented must pay absolute attention and be very cautious about information they hear and decisions they make.

Manipulation of Evidence to Receive Incentives

Informants may use evidence available to them in order to receive incentives. This is especially likely to happen if the information about the case is accessible to the informant through news reports, lawyers, other inmates, or other sources of information. For example in *Mallory (2007)*:

The appellants contended that Gaudreault (informant) had obtained details of the crime from newspaper accounts, including some incorrect facts that found their way into the information he provided to the police... Later in the trial, the defence adduced the articles in evidence and, on the basis of the contents of those articles, the defence submitted to the jury that the articles contained almost all of the information Gaudreault needed to concoct his story (para 109).

Despite this, the jailhouse informant in *Mallory's (2007)* original trial used this information to his advantage and demanded compensation for helping authorities. The current research demonstrates that in 29% of cases, information about criminal matters received some media attention, thus providing jailhouse informants another means of obtaining information on a case, rather than from defendants directly.

The current study also found that informants were motivated to fabricate statements if they expected to receive sentence reduction, monetary reward, dropping of charges, and other goods in exchange for their testimony (*Baltrusaitis 2002; Brooks 1998; Duguay 2007; Sharif 2009*). Their testimony gave them an opportunity to become important players in the criminal trials. Furthermore, Natapoff (2006) argues that “many wrongful convictions represent instances where an innocent defendant refuses to plead guilty and goes to trial, but is nonetheless convicted because the jury accepts a snitch’s testimony as credible and true” (p.113). Similar to juries, law authorities are not always able to differentiate real evidence from fabricated evidence.

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Sometimes, the justice of the peace, through the judicial caution, can be the only individual who can have a potential effect on jurors' opinions about an informer or an evidence. For example in *Tran* (2001):

In his charge to the jury, at the outset of his review of Mr. Liebhardt's [informant] evidence, the judge referred to the witness's criminal lifestyle; the fact that he had lived on proceeds of crime; that he has 52 criminal convictions, most relating to dishonesty; and that he had received money from the Crown in relation to his participation in this matter. At the conclusion of his review of Mr. Liebhardt's evidence the judge cautioned that, in assessing Mr. Liebhardt's credibility, the jury should take into account his criminal record and the financial arrangement with the police (para 50).

The judge emphasized the untrustworthiness of an informant with an extensive criminal background. In addition, by providing a sufficient caution when it was required, the trial judge helped to emphasize problematic areas of particular evidence to avoid the possibility of wrongful conviction. Nevertheless, the current research demonstrates that judicial cautions during the criminal trials were at issue as they were either not provided or were not provided in full (*Brown* 2003, *Dickins* 2001).

Empirical research by Swanner, Beike, and Cole (2010) demonstrated that availability of incentives enhanced motivation to testify. In current study, the case of *Hurley* (2010) shows:

The central reason for approaching Mr. Niemi's [informant] evidence with caution was that, at the time he provided his original statement to the police, Mr. Niemi was aware of what he believed to be a \$50,000 reward in connection with evidence concerning Ms. Naistus' death. As indicated, in his testimony he acknowledged an interest in the reward and even confirmed that he had tried to collect it some months after providing his statement to the police (para 47).

Moreover, informants were motivated to fabricate confessions if they knew that they would be rewarded and no punishment would follow if the fabrication is uncovered. As Schroer (2011) notes: "One problem with the finding that incentives increase false testimony was that informants who provided false informant testimonies were rarely prosecuted, often leading them to think that they had nothing to lose by lying in exchange for an incentive" (p. 9). Moreover, the

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current study demonstrated that even those informants who had been convicted for crimes of dishonesty and had previously lied to authorities were allowed to testify in some cases studied (*Dhillon 2002; Duguay 2007*).

Additionally, according to Diamond (2003), juries would not question whether the testimony of a witness was truthful if the witness testified for the Crown. Diamond's findings come from an empirical study of court cases and jury decisions where the prosecution witnesses presented evidence. Some juries presume that only reliable and truthful witnesses are called to testify for the prosecutors (Diamond, 2003). In addition, informants who testify for the Crown:

“Make very good witnesses. Not only may they have experience testifying, they may have few scruples about perjuring themselves. They will be highly motivated to testify well, because of the potential rewards for doing so and they may be able to gather information about the accused that makes their evidence more plausible” (*Brooks 2000: para 119*).

The current study determined that jailhouse informants were often witnesses with experience who had testified previously; some even in several cases (*Duguay 2007; Sharif 2009*). On the other side, jurors often did not have as much experience with the criminal justice system, therefore, they “were not able to properly assess information relevant to the credibility of jailhouse informants' testimony” (*Brooks 2000: para 119*).

Some in-custody informants made excessive demands to authorities to satisfy their requests. In *McInnis (1999)*, a jailhouse informant named John Doe,

...Discussed the Martin homicide but refused to talk about the Côté homicide unless his demands were met. The police arranged for Doe to stay in a hotel room with his wife, and to be interviewed by an official with the Witness Protection Programme. The following day, Doe finally decided to tell what he knew about the Côté killing and Crosby agreed to look into his various demands. Doe was later transferred to Maplehurst Institution and released on parole (para 27).

On the other hand, when authorities were not able to fulfill desired requests by the informer, the latter tried to recant earlier statements, such as in the case of *Trudel (2004)*:

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Jack Trudel falsely implicated his brother and Sauvé in another murder and attempted to obstruct the course of the preliminary inquiry. He was unhappy with his treatment by the authorities, especially the witness protection programme, and was concerned that a videotape statement he had given to the police was circulating in the Ottawa underworld. He demanded a new identity and \$300,000 from the witness protection programme. These demands were not met. The appellants seek to introduce as fresh evidence statements made by Jack Trudel in which he was said to have recanted his trial testimony (para 18).

The current study found that in 17% of cases informants recanted their testimony following the trial (*Babinski* 1999; *Travenor* 2001; *Trudel* 2004). However, limited information about the punishment for perjury was uncovered. In her dissertation, Schroer (2011) who examined jailhouse informants and their influence on jury decision making, discussed a case of an in-custody informant who had an extensive history of providing testimony to authorities in different cases before being caught for providing false testimonies. Despite the fact that this individual was eventually prosecuted and punished for his deeds, many innocent individuals were wrongfully convicted because of his false confessions (Bloom, 2002). Moreover, Schroer (2011) emphasized that repeatedly testifying for different cases is common for most jailhouse informants, a finding that has been borne out by the current study as well.

CHAPTER SEVEN

Judicial Perceptions of Jailhouse Informants

The judge's opinion on the evidence of jailhouse informant's testimony has an effect on how jurors perceive jailhouse informant testimony (Bloom, 2002; Burnett, 2008; Diamond, 2003). This study did not try to determine whether judicial opinion had an influence on jurors' decision making; rather, it identified phrases and sentences that illustrated judicial opinions about jailhouse informants and their evidence. A key finding regarding the description of the jailhouse informants was that most of them were viewed in a negative light by judges and defense attorneys. In *Mallory* (2007), the trial judge referred to those Crown witnesses as "rats" who had "a lengthy criminal record, have received benefits of either reduced sentences or monetary rewards or other benefits to help the police" (para 51). The judge also pointed to the fact that "the jury should scrutinize their evidence very carefully" (*Mallory* 2007: para 51). Through the judicial warnings where jailhouse informants were mentioned, judges emphasized negative characteristics (e.g., criminal records, unreliability) of informants. Moreover, in none of the studied cases did justices express a positive view of jailhouse informants or the evidence presented by them. Rather, in those cases where judges chose not to provide special cautions in regards to jailhouse informants, they missed the chance to recall aspects pointing to the unreliability of jailhouse informant and their evidence.

The current study has focused its attention on cases where jailhouse informant testimony was used to influence court trials and jurors' decision-making. Judges' opinions in different trials were diverse. In some trials, judges pointed out to the truthfulness and reliability of informant's evidence; providing suggestions on how informants' testimony should be treated. For example, in *Baltrusaitis* (2002),

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The Crown says the admissions to John Doe on two different occasions are clear confessions of guilt by the accused. John Doe has nothing to gain or lose at this point. He said he does not care if you believe him or not. It is up to you. He has completed all his sentences and is not facing any more charges. Despite his criminal past he was an honest witness worthy of belief. His testimony was a strong piece of evidence identifying the accused as the killer, says the Crown (para 51).

In other cases, judges posed more negative attitudes towards informants:

The trial judge, however, concluded that the probative value of Bishop's testimony was affected by his lack of credibility and reliability as a witness. She was of the view that he was, in effect, a fraudster whose evidence was highly suspicious, particularly considering that Duguay, having been described as a secretive person, would not likely confide such incriminating information to an inmate he had known for only a few weeks. The trial judge used the "threshold reliability" test and concluded that such "questionable evidence" did not satisfy the test. Thus, she concluded that it "would be an error to let it go to the jury as it could be highly prejudicial to the accused (*Duguay* 2007: para 32).

In some instances, judicial comments underscored the unreliability and untrustworthiness of in-custody informants. Additionally, justices emphasized the informer's ability to obtain information:

Informers, especially jailhouse informers, have means to obtain information other than from the accused. The prosecution will often take the position that this evidence must have come from the accused since the informer had no other means of obtaining it. Informers are resourceful and well capable of obtaining information that they later plant into the mouth of the accused (*Trudel* 2004: para 78).

In *Wells* (2001), the trial judge pointed out to the jury the danger of accepting informant evidence in the case: "I would suggest that you use some caution in dealing with his evidence" (para 82). In addition, he referred to jailhouse informants as "being totally disreputable persons [who] should not be believed" (*Wells* 2012: para 82). Thus, judicial skepticism towards jailhouse informants raised many concerns with such evidence being accepted in a court of law. Numerous justices emphasized the need for eliminating the evidence of jailhouse informants based on previous wrongful convictions of individuals such as *Morin* (1998), *Truscott* (1959), and *Sophonow* (1982, 1983, 1984). These cases have left a negative mark on the history of Canadian criminal justice (Kaufman Report, 1998; The Sophonow Inquiry, 2001).

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The literature review demonstrated that some judges tended not to question the evidence provided by jailhouse informants who claimed that defendants confessed to them: “American judges too tend to presume that a defendant who has confessed is guilty and, accordingly, treat him more punitively” (Leo, 2009, p. 341). Moreover, “conditioned to disbelieve defendants’ claims of innocence or police misconduct, judges rarely suppress confessions, even highly questionable ones” (Leo, 2009, p. 341). An additional aggravating factor, identified by the study to have an influence on the final decision in the case was the lack of judicial warning in the trial where evidence of jailhouse informant was presented. The following elements combined to create a potential for wrongful conviction: judicial belief in the guilt of the accused, acceptance of potentially false evidence, and absence of judicial warnings. Numerous studies have demonstrated that “a false confession is a dangerous piece of evidence to put before a judge or jury, because it profoundly biases their evaluation of the case in favor of conviction, so much so that they may allow it to outweigh even strong evidence of a suspect’s factual innocence” (Leo, 2009, p. 341).

Most justices however were skeptical about the trustworthiness and reliability of jailhouse informants: “The history of jailhouse informants providing evidence that has led to wrongful convictions has caused courts to take extra efforts to scrutinize evidence from witnesses who might be in that category” (*Baksh* 2015: para 4). Although most cases accepted the evidence of unsavory jailhouse informants in court, which contributed to a majority of guilty verdicts in the current study, there was much skepticism about their character and their evidence. A quote from *Brooks* (1998) represents a type of reasoning found in the majority of the cases:

There were cogent reasons to suspect the credibility of the two jailhouse informants in this case. K had a substantial criminal record for crimes of dishonesty. He was facing a three-year sentence in the penitentiary and his testimony was motivated by his desire to obtain a lighter sentence. Whether he ultimately obtained any benefit was not

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determinative. Because he had previously made a deal with the authorities to avoid going to the penitentiary by testifying against a cellmate, he had reason to believe that his testimony in this case would gain him a lighter sentence. B also had a long criminal record, mainly for crimes of dishonesty, and had a long psychiatric history which demonstrated mental instability and a skewed sense of reality. While he claimed that he wanted to testify because his father was a violent man, such claims should be treated sceptically (p. 2).

Most informants identified by the current study had a history of past convictions (71%), as well as a history of testifying in previous cases (40%) which negatively affected their reputation.

Additionally, in seven cases (20%) jailhouse informants were awaiting sentencing for charged offences. Thus, when providing a special warning to the jury, judges should emphasize a jailhouse informant's criminal record, especially if it contains crimes of dishonesty or perjury, and any previous records of testifying. Based on data uncovered by the current research, the majority of cases contained significant issues with the *Vetrovec* warning. Specifically, the *Vetrovec* warning must be provided in cases where "the evidence of certain witnesses is identified as requiring special scrutiny" (*Sauve* 2004: para 82). Furthermore, while judges did not express personal opinions about informants in studied court cases, in some instances they placed significant emphasis on the credibility of in-custody informants and their legal histories during the warning.

Indicators of Jailhouse Informant's Credibility

The current research determined several potential indicators of informants' perceived credibility, as highlighted by the judge. These indicators included; history and types of previous convictions, number of charged convictions with a special focus on crimes of dishonesty, history of mental instability, and history of substance abuse. One of the main elements affecting the perceived credibility of the informant, however, was the availability of incentives received for the testimony provided. In *Dhillon* (2002), the trial judge emphasized negative aspects about the

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credibility of an informant to the jury when warning them about accepting evidence of such individuals, as stated: “Keep in mind his lengthy criminal record, his admissions of past dishonesty and even the intervening fraud during the time that he was testifying before you” (para 16). Such a caution by the judge should have had a powerful influence on jurors’ perception of evidence provided by the prison snitch. The majority of guilty verdicts (97%) in sampled cases, however, illustrated the opposite.

Another indicator of an informant’s perceived credibility, according to this study, was an informant’s previous record of testifying. In fourteen cases (40%), jailhouse informants had testified against other inmates in the past; some had testified more than once, while others offered to testify in exchange for benefits (*Babinski 1999; Baltrusaitis 2002; Brooks 1998; Dhillon 2002; Mallory 2007; McFarlane 2012*). In addition, it was determined that in-custody informants could be classified as either those who voluntarily approached police with incriminating evidence or those who were approached by police and asked to carry out the special task of acquiring information. Yet, it is hard to determine whether informants presented in this study approached authorities voluntarily with evidence of an accused’s confession or were coerced to provide testimony against an accused. The evidence in 11 cases (31%) suggested that jailhouse informants had been set up by authorities. The case analysis demonstrates that, in most circumstances, jailhouse informants were rewarded with incentives for their testimony, despite many claims that testimony was provided in the name of justice and morality (*Morin 1997; Trudel 2004*). Overall, judicial quotes about the evidence of jailhouse informants reflected their negative view of such witnesses.

Summarising the Credibility of Jailhouse Informants

As Mosteller (2009) notes, “Judge Stephen Trott of the Ninth Circuit, writing from his experience as a prosecutor said, “[s]ometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air” (p. 555). Similar comments have been made about informants in the cases in the current study, which emphasizes the untrustworthiness of these witnesses.

Determining an informant’s credibility “would include a review of the evidence to determine whether there are factors which have properly led the courts to be wary of accepting a witness's evidence” (*Brooks* 1998: para 96). Specific factors needed to be examined especially in those circumstances where the witness’s evidence played a key role in the Crown’s case.

Factors might include involvement in criminal activities, a motive to lie by reason of connection to the crime or to the authorities, unexplained delay in coming forward with the story, providing different accounts on other occasions, lies told under oath, and similar considerations (*Brooks* 1998: para 96).

The cases analysed for the current study have found all of these factors and some others in the backgrounds of informants. Additional factors that have been discovered included previous records of testifying, substance abuse, emotional disorders, and an availability of incentives. These risk factors for false testimony were found to co-occur in several cases from the sample (*Brooks* 1998; *Mallory* 2007; *Morin* 1997). Thus, individuals with such histories of personal characteristics should not be allowed to testify.

Most of the negative attitudes towards informants were based on their tendency to fabricate evidence and their willingness to provide testimony in exchange for incentives. Unfortunately, in many criminal matters the fact that incentives were received was not disclosed to the jury. Generally, this happens because of the informer’s privilege clause, which protects information about incentives, and other personal characteristics of informants that may be very

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important for the case. Opponents believe that informer privilege is an unlawful tool that provides opportunity for informants to manipulate the justice system and to fabricate stories knowing they will receive protection (Ashenurst, 2013). As noted, “That provision allows courts to prohibit the disclosure of government information if it engages a ‘specified public interest’ that needs protection, such as safeguarding intelligence-gathering techniques or the work of the public service” (Ashenurst, 2013, p. 617). Two most common techniques where informer’s privilege may be applied are the *Mr. Big* technique²² and the use of jailhouse informants. The current study illustrates that the non-disclosure of relevant characteristics such as type of incentives received, previous criminal record of the informer, and history of psychological problems, substance abuse, and previous informing is common in cases where jailhouse informants testify. Consequently, prosecution or defence attorneys often appealed cases where non-disclosure of relevant information appeared.

Unfortunately, sometimes the system ‘makes the blameless seem blameworthy’ which in many cases has fatal results. Hence, “where witnesses have such unsavoury backgrounds” including lengthy criminal records and history of past informing, “experience teaches us that sometimes justice is perverted by their conduct as witnesses” (*Mallory 2007: para 55*). Arguably, some of these trials could have different outcomes if the entire system focused less on conviction and more on obtaining true justice.

²² The *Mr. Big* technique is often used as a last resort for cases that have gone cold, or where the police strongly suspect someone of committing a crime but have thus far not been able to obtain any other evidence” (Milward, 2013, p. 81). The *Mr. Big* technique often involves using an undercover officer who plays at being a member of either an organized crime group or an affiliate of an individual who is a suspect of a specific crime. The main intention behind the technique is to collect information about the crime or provoke the suspect into confessing to the crime (Milward, 2013).

CHAPTER EIGHT

The Role of Testimony in the Conviction of an Accused

Grounds for Appeal

While identifying and analyzing cases that have used the testimonies of in-custody informants, the current study investigated the role of this testimony in contributing to the conviction of an accused. In the current study, numerous cases illustrated that defendants were convicted based on the evidence provided by jailhouse informants. In *Bevan* (1993), “the Supreme Court of Canada described the evidence of two jailhouse informants as *crucial* to the Crown’s case” (Genua, 2002, p. 4, emphasis mine). Another case, *Brooks* (2000), illustrated the situation where, according to the Supreme Court, the testimony of two jailhouse informants was not essential to the Crown’s case; however, it played an important role in convicting the accused (Genua, 2002). Thus, the present study reveals that given the centrality of jailhouse informant testimony, it became a primary ground for later appeal.

Current study discovered that the majority of appeals in cases studied were related to the testimony of in-custody informants; in 25 cases (71%) grounds for an appeal were based either on the use of jailhouse informant’s evidence, insufficient warnings provided in relations to the use of informant’s evidence, or a combination of both. In addition, only in ten cases (29%) were appeals allowed. Nine of these ten appeals were based solely on the testimony provided by in-custody informants. Another case, which was heavily loaded with in-custody informant’s testimony, resulted in acquittal based on new DNA evidence, which was discovered through further investigation (*Morin* 1997). The remaining 23 cases (66%) that applied for an appeal of

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the verdict were denied.²³ The current study identified various ground for appeals, but in the majority of cases, the use of jailhouse informants' evidence was a primary and significant ground for further review.

Importance of Evidence

Court cases analyzed in the current study revealed much information regarding the significance of jailhouse informant evidence, in particular for Crown arguments. In *Babinski* (1999):

Crown counsel relied upon L.'s evidence to fill a gap in the prosecution's case arising from a lack of trace evidence to connect the appellant to the crime. The trial judge instructed the jury that they could find that the appellant had confessed to L., with the result that there was direct evidence of his guilt. Finally, the trial judge told the jury that L.'s evidence was confirmed by other admittedly true evidence. The undisclosed evidence and the fresh evidence impact upon the reliability of that part of L.'s evidence implicating the appellant in the crime (p. 25-26).

Similarly in *Baltrusaitis* (2002), the jailhouse informant's statement "was the only direct evidence implicating the appellant as the killer. In that sense, it provided the Crown with the fill needed to plug the potential cracks in its circumstantial case" (para 55). The importance of in-custody informant evidence also depended on the availability of other evidence available to the Crown. This finding is consistent with Thomson, Hopgood and Valderrama (2011) who argued that in those cases where prosecutors lack sufficient evidence to prove the guilt of defendant, they are likely to use informant's evidence.

The majority of cases in the present study ended in convictions based on jailhouse informant testimony and/or other evidence supporting conviction. Most jailhouse informants were called to testify by the Crown. Only in two cases (6%) did defense attorneys use a jailhouse

²³ In another case, *Smith* (2002), an accused had died prior to the appeal hearing but his family continued with the litigation in order to clear his name. Unfortunately, besides the fact that that evidence in this case was circumstantial and other evidence came from in-custody informant, the appeal was denied (*Smith* 2002).

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informant to argue for a defendant's innocence. In *McInnis* (1999), the defense called in a jailhouse informant to testify to contradict the evidence provided by another in-custody informant who was called in to testify for the Crown.

Jailhouse informant's testimony was deemed admissible in 80% of cases, and heard either at trial, a pre-trial motion, or at a *voir dire*. In *White* (2014), an informant was not called to testify during the trial. However, "counsel at trial agreed that his evidence could be given through his handler" (*White* 2014: para 5). In two other cases, *Duguay* (2007) and *Jawbone* (1998), the evidence of jailhouse informants was not admissible. This was despite the trial judge's willingness:

To accord some probative value to the evidence, she also held that the proposed evidence was disproportionately prejudicial because the evidence was likely to confuse the jury, and further was a waste of time. Although there is some merit to this proposition, it is rather obvious that the main reason, if not the only one, for excluding Bishop's testimony was the trial judge's conviction that he was an unreliable witness (*Duguay* 2007: para 37).

In the second case, the informant's testimony was not admitted because the defence was not aware of the evidence at the time of trial (*Jawbone* 1998). Thus, testimony of jailhouse informants from all cases studied, excluding one, made their way to the courtroom.

The Use of Unreliable Witnesses and their Evidence

Lastly, the role of jailhouse informant's testimony may override other potentially significant evidence, which could aid in the acquittal of accused. In-custody informants are tools used by investigative authorities who may be guided by tunnel vision; "investigators often rely on jailhouse informants to bolster cases otherwise built on little more than circumstantial evidence" (*Jailhouse stories can't be trusted; Informants' Motives are Dubious*, 1999). Despite overwhelming credibility issues, testimonies of jailhouse informants were deemed admissible in the majority of cases analyzed by this study. In some cases, it was presented in trials where contradictory evidence was available. In *Hurley* (2009),

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The accused suggests that had the police tested more of the evidence found, perhaps they might have identified the real killer. For instance, there were three hairs identified as ones that could provide a DNA profile, plus numerous other samples, including blood-like samples from the hallway outside the room and from the bathroom floor that were not tested for DNA (para 89).

The current research observed that despite significant credibility issues, authorities accepted testimonies from jailhouse informants. Moreover, authorities provided incentives to informants for their testimonies, thus demonstrating their likelihood to accept evidence favourable to them without properly considering contradicting scientific evidence (in some cases). In conclusion, sometimes investigators gladly accepted statements provided by informants in order to achieve a conviction:

The concrete reality of the case ... is that the Crown's main witnesses were all of unsavoury character and most of them had benefited from their cooperation with the police. The respondent took the stand in his defence, and was vigorously and exhaustively cross-examined, as were all of the Crown witnesses. The main Crown witnesses all pointed the finger at the respondent as the person who ordered the killing (*Duguay* 2007: para 65).

The current study demonstrated that jailhouse informant's testimony had a significant influence on the due process and conviction of accused, further, it has illustrated that courts accepted the majority of informants' testimonies. Only a few cases did not accept jailhouse informant testimony (*Duguay* 2007; *Jawbone* 1998) and in those cases in-custody informants' testimonies were dismissed not due to the unreliability of testimony or unsavouriness of witnesses, but rather due to technical difficulties. For example, in *Jawbone* (1998), the testimony of the in-custody informant was dismissed only because the defence was not aware of this evidence at the time of trial. Moreover, testimonies from in-custody informants were accepted despite the unsavory reputation of the sources. In those 34 cases (97%) that resulted in guilty verdicts, jailhouse informant testimony was used as evidence to convict. Thus, whether jailhouse informant's testimony was considered major or circumstantial evidence in the case, the current study determined that the testimony of 'prison snitches' played a significant role in convictions.

CHAPTER NINE

Judicial Cautions

Throughout the literature review jailhouse informants were described as a class of individuals that had not only established a reputation as convincing liars but have also demonstrated their ability to manipulate the criminal justice system (Lam, 2009; Roach, 2007; Sorochem, 2008, 2009; Thompson, 2011). For this reason “they must be given special attention and their evidence should generally be excluded and only be admitted in very rare cases. On those rare occasions that it is admitted, it must be approached with the greatest caution” (*Trudel* 2004: para 76). The majority of cases in the current study appeared to struggle with court warnings required in dealing with evidence of jailhouse informants. In *Assoun* (2006), for example:

...The trial judge did not contribute a clear sharp warning cautioning the jury about the dangers of accepting the evidence of any of the disreputable witnesses without some corroborating evidence. The appellant argues that the trial judge erred by not electing to give a *Vetrovec* warning in respect of three witnesses of questionable character... (para 145).

The above matter was not the only case facing an issue with a *Vetrovec* warning; in fact, the majority of cases presently studied were appealed by defence on the grounds of insufficient warning provided by the judge in relation to the testimony of disreputable witness.

***Vetrovec* Warning in Cases Studied**

One of the most significant themes in all cases was the *Vetrovec* warning and the problems with its use. In criminal trials, judicial warnings play an integral role in achieving fairness of due process. As stated in *Wells* (2001), “the purpose of the *Vetrovec* warning is to alert the jury that there is a special need for caution in approaching the evidence of certain witnesses whose evidence plays an important role in the proof of guilt” (para 207). The current

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study was reminded of “two main factors relevant when deciding whether a *Vetrovec* warning is necessary: the witness's credibility and the importance of the witness's testimony to the Crown's case” (*Baltrusaitis* 2002: para 52). Justice Peter de C. Cory in *Trudel* (2004) argued:

... The caution is of particular importance where there are defects in the evidence of a witness that may not be apparent to a lay trier of fact. Perhaps the most important of these is the jailhouse informer. Recent experience has shown that jailhouse informers are a particularly dangerous type of witness. The Report of the Commission on Proceedings Involving Guy Paul Morin (Toronto: Ontario Ministry of the Attorney General, 1998) and The Report of the Inquiry Regarding Thomas Sophonow (Winnipeg, Man.: Manitoba Justice, 2001) have shown that these witnesses can be very convincing liars and are capable of fabricating evidence (para 76).

It was the responsibility of the trial judge to provide an adequate warning to the jury in cases studied; however, the responsibility of other parties (i.e., the defence and Crown) was not limited to requesting an appropriate caution. The current study demonstrated that the failure to request or provide adequate caution often led to appeal of the verdict.

As described above, the present study revealed several reasons why in-custody informants were seen as unreliable: 40% of cases used jailhouse informants who had a history of testifying in different cases.²⁴ In *Mallory* (2007), the defence raised a concern that the jailhouse informant who was called to testify for the Crown “regularly gave information to the police. In particular, he estimated that he had given [the police] between fifty to one hundred pieces of information” in total for different cases (para 292). In addition, some informants had a history of substance addiction, possessed various criminal histories, and received incentives for their testimonies. Thus, it was very important to use caution and follow proper procedures when dealing with evidence provided by these witnesses.

²⁴ *Babinski* 1999; *Baltrusaitis* 2002; *Brooks* 1998; *Dhillon* 2002; *Duguay* 2007; *Mallory* 2007; *McFarlane* 2012; *Morin* 1997; *Sauve* 2004; *Sharif* 2009; *Snow* 2004; *Stark* 2000; *Travenor* 2001; *Trudel* 2004; *Warner* 1994.

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The *Vetrovec* warning is essential in trials where unreliable witnesses testify as it allows the jury to sufficiently review evidence provided to them as well as assess its reliability. Some scholars have argued that the best way to deal with evidence provided by jailhouse informant was not to use such evidence at all (Neuschatz, 2008). In *Khela* (2009), Supreme Court Justice Fish gave his opinion regarding the issues with the *Vetrovec* warning provided by the trial judge. There, he argued that it was more important to focus on the content of any judicial caution presented in the court rather than on the form in which it is presented. Justice Fish also suggested that the jury must look for confirmatory evidence to any information provided by the jailhouse informant to make sure that such information is of value (Lam, 2009). This confirmatory evidence must be independent of the informant's testimony; it must not necessarily implicate the defendant but rather support the evidence of the in-custody informant and support his credibility (Lam, 2009). On the other hand, an absence of sufficient warning to the jury about the dangers of accepting evidence of an informant poses a risk that jurors without adequate skepticism or analysis will accept such evidence. Therefore, a clear, sharp, and sufficient warning by the judge has to be made in regards to the evidence provided by jailhouse informants.

Justice Binnie of the Supreme Court of Canada has supported clear judicial cautions. He explained in *Brooks* (1998), that "the jurors will not likely have the benefit of this 'experience' unless it is imparted to them by the trial judge in the 'clear and sharp warning' contemplated by *Vetrovec*" (*Khela* 2009: para 8). It is the role of the trial judge "to provide the proper framework within which that credibility can be evaluated, and in that regard, problems historically associated with particular types of evidence should not be overlooked" (*Khela* 2009: para. 8). The current study demonstrated that 49% of cases lacked sufficient warning pertaining to the credibility and trustworthiness of in-custody informants and their testimonies.

The Continued Use of ‘Polished and Convincing Liars’ in the Court

Police and prosecutors often used jailhouse informants to their advantage; in some instances, they willingly demonstrated the importance and reliability of informants. In *Trudel* (2004), the court found that “experienced police officers considered very unreliable informants to be credible and trustworthy”, and used their evidence to convict (para 76). It was not possible to measure whether police actually believed the evidence of an informant or pretended to do so. However, where police considered jailhouse informants reliable witnesses, they rewarded them with incentives despite the potential for devastating outcomes caused by their wrongful evidence (*Morin* 1997).

The reputation of the Canadian justice system has been marked by the use of in-custody informants as witnesses after several infamous cases have been demonstrated a wrongful conviction; notably *Truscott*, (1967), *Sophonow* (1984) and *Morin* (1997). Informant testimony greatly damaged the accused’s right to a fair trial as well as took away individual freedom, for individuals how were later innocent (*Morin* 1997; *Sophonow* 1984; *Truscott* 1967). Justice Peter Cory in *Trudel* (2004) describes issues associated with jailhouse informants. According to Justice Cory “jailhouse informants are polished and convincing liars” who “rush to testify particularly in high profile cases” and whose “mendacity and ability to convince those who hear them of their veracity make them a threat to the principle of a fair trial and, thus, to the administration of justice” (para 76). Additionally, Justice Cory specified that “jurors will give the same weight to ‘confessions’ made to jailhouse informants, as they will to a confession made to a police officer” (*Trudel* 2004: para 76). For this reason alone, evidence of jailhouse informants should be treated with caution.

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As of today it has not been possible to eliminate the use of such informants in Canadian courts of law; instead, the only protective measure required for use is a specialized judicial warning. The matter of improper warning had been highly debated in the majority of the cases studied. In those cases where “the conviction was quashed and a new trial was ordered”, it was explained that “the trial judge should have provided the jury with a *Vetrovec* warning, and his failure to do so constituted an error in law” (*Baltrusaitis* 2002: p. 2). The judge reasoned in the case of *Baltrusaitis* (2002):

The trial judge erred in failing to provide a *Vetrovec* warning to the jury with respect to the evidence of the jailhouse informant. A *Vetrovec* warning was required because the informant's testimony suffered from serious credibility problems and, although his evidence was perhaps not crucial to the Crown's case, it was very important to it. The informant's credibility was inherently suspect because he was a young man with a substantial criminal record; many of his convictions involved offences of dishonesty and untrustworthiness; he had shown in the past that he was willing to sacrifice the interests of a good friend to further his own self-interest; his motivation for contacting the authorities and cooperating with them was based entirely on his own self-interest; he gave evidence at trial that was inconsistent with his initial statement to the police; and he attributed information to the accused that was clearly incorrect. His credibility problems were extremely serious, if not overwhelming. As for the importance of his testimony, it was the only direct evidence implicating the accused as the killer (p. 2).

The use of ‘polished and convincing liars’ in the court of law is a problem on its own. The absence of proper warning regarding the assessment of evidence, however, compounds the issue.

The Duty to Convict

The role of the prosecution in criminal trials is not an easy one. Their main obligation is to deliver justice and to provide adequate justifications when proving the guilt of an accused. There are cases, however, when police and Crown Attorneys find ‘shortcuts’ to close the deal, rather than using resources available to them to find the truth. Shortcuts are often led by tunnel vision and motivation to convict at all costs. Mosteller (2009), suggests that if “the motivation is to convict a person who the prosecutor believes is guilty of some or many crimes, but not

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necessarily guilty of the crime at issue, the system breaks down” (p. 553). This further suggests that some “prosecutors may not fully test evidence of guilt on a particular case because prior crimes and reputation create an assumption of guilt” (Mosteller, 2009, p. 553). The prosecution’s real duty is to present reliable evidence to support the case at hand, rather than simply focus on conviction. Justice must be the main outcome of any criminal trial.

Prosecutorial willingness to employ the evidence of jailhouse informants bolsters the confidence of those witnesses. It has been noted that “witnesses are perceived by triers-of-fact to be more accurate if they seem highly confident in their testimony in court, despite the fact that confidence has been considered an unreliable indicator of accuracy by researchers” (Boydell and Read, 2011, p. 255). Several ways of potentially instilling confidence in jailhouse informants’ testimony were identified through the process of coding. Furthermore, the availability of incentives offered in exchange for testimony encouraged in-custody informants to act carefully and be very convincing in the information that they provided as uncertainty in their testimony could leave them without rewards (*MacDonald* 2000; *Tran* 2001). Moreover, “often during the negotiations that resulted in the bargain, the prosecutor used a discretionary leverage to persuade the witness to testify” (Fishman, 2005, p. 16). Thus, not surprisingly the availability of incentives may have a significant impact on an informant’s willingness to provide testimony.

Witnesses who were employed by authorities to fish for evidence against an accused and later to testify, were excluded from the present study. However, it was not always possible to discover whether jailhouse informants came forward with incriminating evidence voluntarily, or were encouraged by the state. Data analysis illustrated that in almost one-third of cases coded (ten out of 35 cases), an informant later reported that his testimony arose from the information that he received from a state agent rather than information that had been confessed to him by the

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accused (*Babinski 1999; Baltrusaitis 2002; Sauve 2004; Trudel 2004*). Thus, it became evident that the prosecutors often use their authority to feed information to the witness to win the case. In addition, prosecutors made it quite clear to jailhouse informants that they may receive compensation for their help in convincing the jury in defendant's guilt (*Tran 2000*). Fishman (2005), notes that "there was greater risk that jailhouse informants might falsely incriminate one or more defendants in order to have something to offer the prosecutor and thereby obtain a deal more generous than he deserves" (p.16). For these reasons, many unsavory witnesses provided false testimony.

False Confessions Introduced by Informants

False confessions of guilt on the part of defendants presented by jailhouse informants may disproportionately influence jurors against the defendant. Leo and Ofshe (2009) determined that "73 percent of all false confessors whose cases went to trial were erroneously convicted; this number went up to 81 percent in the study of Drizin and Leo of 125 false confessions" (p. 41). Thus, false confessions are dangerous evidentiary elements that lead to wrongful convictions. When such "dangerous piece of evidence" were "put before a judge or jury", "it profoundly biased their evaluation of the case in favor of conviction, so much so that they allowed it to outweigh even strong evidence of a suspect's factual innocence" (Leo, 2009, p. 41). Through their study, Leo, Ofshe and Drizin (2009) demonstrated "that real-world jurors simply fail to discount false-confession evidence appropriately, even when the defendant's uncorroborated confession was elicited by coercive methods and the other case evidence strongly supports his innocence" (p. 41). Triers of fact weigh evidence that involves confessions heavily, consequently jailhouse informant testimony is unduly damaging.

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Additionally, Dodds (2008) argues that informants who were known to recant their testimony should not be considered credible witnesses. The current study found that it was common for jailhouse informants to recant their testimony (*Babinski* 1999; *Travenor* 2001; *Trudel* 2004). In 17% of cases examined, jailhouse informants recanted their statements. For example, in *Babinski* (1999), "after the accused was convicted, the informant contacted the accused's counsel and recanted several key aspects of his evidence. Shortly thereafter he re-silenced from the recantation" (p.1). Thus, jailhouse informant's claims of hearing a confession by defendants, whether they are false or true, may cause errors and misunderstanding, as juries are inexperienced with weighing testimony in a criminal trial. Informants who recant their testimonies are not reliable and cast a shadow on their evidence post-decision.

Understanding Court Language and Terminology

One of the most difficult elements of the criminal trial for a jury member is the legal language used by court officials. As Diamond (2003) notes, "perhaps the most serious and unique obstacle faced by the jury arises in applying the facts it finds to the law it receives in jury instructions" (p. 154). Since jurors are lay people who are selected to participate in the trial, not all of them, if any at all, have an ability to understand the language used by lawyers and the judges during the process. Moreover, understanding complicated and wordy judicial warnings may pose another challenge for jurors. The current study did not try to determine whether jurors understood all steps of the legal process. Rather, it focused on the problems associated with judicial warnings and other similarities among cases where jailhouse informants' testimonies were used.

CHAPTER TEN

Discussion

The present study was designed to uncover the circumstances under which confession evidence was introduced in courts of law by jailhouse informants. In conducting a qualitative content analysis of judicial decisions of criminal cases involving jailhouse informant's testimony, many themes were uncovered. In order to discuss recommendations on how to use jailhouse informants in Canadian court cases and directions for future research, a summary of the key findings and the limitations of current study will be detailed.

Key Findings

Jailhouse informants tend to be used throughout the ten provinces, but more commonly in the province of Ontario. Informants are typically male, middle-aged, have a history of informing for the Crown, and possess extensive and varied criminal histories typified by crimes of dishonesty. Most informants receive compensation for their testimony. In fact, incentives were the primary justification for jailhouse informants providing testimony, followed by claims of morality and attempts to change their lives for the better. Jailhouse informants are generally called upon to testify in cases of serious and violent offences that hold heavy penalties for convicted defendants. Such cases tend to endure increased public attention and pressure for authorities to find a guilty party. Findings suggest that the duty to convict may have outweighed the duty to serve justice and authorities were willing to use non-credible witnesses to provide favourable evidence. Jailhouse informants were generally used to "fill gaps" in cases with limited evidence to prove the guilt of an accused beyond a reasonable doubt.

Most jailhouse informants initially met the accused in jail. As a result, confessions were obtained over the course of conversations between them, or overheard by an informant when the accused was conversing with someone else. Confessions varied in length and wording; however,

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their substantive content consistently involved an accused's confession, often accentuated by many details of the crime that were perceived to have only been known to the perpetrator. Yet, the current study found that in 29% of cases some media attention was drawn to the case indicating that there were alternative means of obtaining information about the case available to jailhouse informants.

All of the cases analyzed came from Canadian Criminal Courts that were later appealed. Only in few cases (29%), however, were appeals allowed. Various ground for appeals were presented, but the involvement of jailhouse informants in cases served as the most common ground for an appeal. Specifically, issues with the *Vetrovec* warning arose nearly in every case, where judges failed to provide adequate warning regarding suspicious and unreliable evidence by jailhouse informants.

Recommendations

The Commission on Proceedings Involving Guy Paul Morin and The Sophonow Inquiry are major sources of recommendations in relation to the use of jailhouse informants and recommendations on how to deal with their evidence in Canadian criminal courts. Among these inquiries, over forty recommendations were dedicated to the issues imposed by in-custody informants (The Inquiry Regarding Thomas Sophonow, 2001; Kaufman Report, 1998). The main arguments raised by these commissions were focused on the unreliability of jailhouse informants and their undue influence on wrongful convictions. These arguments were supported by other independent organization - Innocence Canada (2016). Innocence Canada (2016) emphasizes the danger of accepting evidence of in-custody informants and suggests an absolute prohibition of its use. Further recommendations suggest changes to the Crown's policies on how to present evidence of jailhouse informants:

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The Crown policy should reflect that such evidence has resulted in miscarriages of justice in the past or been shown to be untruthful. Most such informers wish to benefit for their contemplated participation as witnesses for the prosecution. By definition, in-custody informers are detained by authorities, either awaiting trial or serving a sentence of imprisonment. The danger of an unscrupulous witness manufacturing evidence for personal benefit is a significant one (FPT Heads of Prosecutions Committee Report of the Working Group on the Prevention of Miscarriages of Justice, 2015).

The above quote points to the fact that such evidence leads to wrongful conviction, emphasizes untruthfulness of jailhouse informants, and suggests that they are prone to fabricating evidence in order to manipulate the system. Based on the data collected in the current study and literature review, it was supported that jailhouse informants should be excluded from the list of potential and reliable witnesses.

The current research reviewed the idea of ‘paying for evidence’ and its effect on informant’s willingness to testify. Indeed, in several cases authorities were willing to pay for information that helped them to win the case. In addition, this study found that evidence provided by in-custody informants was used in cases where heinous crimes had been committed. The pressure to solve crimes on the part of authorities and the practice of exchanging benefits for testimony by informants could encourage informants not only to manipulate authorities but also to fabricate evidence and use it to their advantage. Despite many recommendations on how to deal with jailhouse informant’s evidence, miscarriages of justices based on informant testimony continue (Innocence Canada, 2016). When the system of justice often makes mistakes such as a wrongful conviction, the social and personal consequences are tremendous. Thus, those in authority must ensure that laws and regulations are created and implemented in order to serve justice rather than cause injustice.

Furthermore, the criminal justice system must pay closer attention to determining the trustworthiness and reliability of the evidence provided by informants. In the current study, this

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requirement was crucial in excluding dishonest evidence that could lead to wrongful conviction. Some scholars suggest establishing the reliability of an informer before issuing a search or an arrest warrant based on an informant's testimony (Wolson & London, 2004; Roach, 2009; Stewart, 2008; Sherrin, 2005). Mandatory pre-trial reliability hearings could be helpful in determining the degree of reliability of statements provided by informers and to conduct an investigation into the background of an accused (Kaufman Report, 1998). Such investigations would help to determine an informant's previous criminal record and his previous testimonies, where applicable. Pre-trial reliability hearings should aim to make a decision about the informant's testimony: to establish whether the information provided by an informer was sufficiently reliable to be submitted before the judge or the jury at a trial (Lawler, 1986; Macfarlane, 2006).

Limitations and Directions for Future Research

Current study offers significant information on the circumstances around the use of jailhouse informants in Canadian criminal courts with potential contribution to existing laws and the justice system. However, the limitations of current study are worthy of mention. First of all, this study included a relatively small sample size, of just 35 cases. While 88 Canadian Appeal cases were initially examined, only 35 cases reflected the inclusion criteria. Thus, caution should be used in over-generalizing the findings of the study.

Qualitative case coding and analysis were used to provide answers to the main research question and sub-questions in the current study. These answers, however, varied in their informative strength given the limited information reported on some variables under study. Insufficient information was available to allow for predictions or generalizations regarding the demographic characteristics of informants and defendants (e.g., marital status or education), with only gender and age of informants and defendants being more readily available.

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In addition, the historical period of the cases poses another limitation. The earliest case studied was from 1994 and the most recent case was from 2016 (*Baksh* 2015, 2016; *Warner* 1994). Regulations regarding evidence have changed over time. Through the work of commissions of inquiry, rules and regulations on how to treat evidence received from jailhouse informants have become more stringent, though the extent to which this has eliminated the use of unreliable evidence is arguable. As a result, the amount of information related to informants, their criminal histories, and rewards offered for the testimony was not equally accessible in all cases, nor was all of this information available to juries.

An additional limitation that posed a challenge to the research study was the informer's privilege clause. Informer's privilege clause protects information that may reveal the identity of the informer. Thus, the current study, in some cases, was challenged by not being able to discover all the relevant information that was required (e.g., age of informants and defendants, information about incentives, other demographical characteristics of defendants and informants). Some cases did disclose information about an informer's background, identity, juvenile records, criminal history, history of mental illness, other medical conditions. The availability of more relevant demographic information would have allowed the opportunity to study further similarities between cases.

Additional limitations were imposed by the demographics of the research itself. An emphasis on one specific jurisdiction – Ontario cases (63%) - limited the study's ability to generalize nation-wide. On the other hand, including cases from other jurisdictions and territories provided a better understanding of the data and improved reliability. In addition, one of the challenges in studying all Canadian jurisdictions was the language barrier as some jurisdictions use the French language to administer and document court cases (e.g., Quebec). To resolve this

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issue, future research should include decisions written in French. Since the province of Quebec follows Ontario in the population size, it would be wise to examine French language cases that used in-custody informants in prospective study.

A final limitation, that may help guide future research, was the inability to interview individuals directly involved with criminal justice system; lawyers, prosecutors, judges, and jurors involved in cases where jailhouse informants have been used. Personal interviewing requires a flexible schedule on the part of researcher and subjects of interest. This study would allow the researcher to discover information unavailable from legal sources (e.g., Quick Law); it would allow an investigation into the personal opinions of those individuals who were directly involved in criminal cases where jailhouse informants were used. In addition, personal interviews would provide an opportunity to reveal information about geographic characteristics of informants and defendants, which was not available in all cases. Similarly, information about the incentives received and reality of police involvement in the process of discovering testimony of an accused could potentially be uncovered.

Conclusion

Today, numerous rules, suggestions, precautions, and laws are used in the criminal justice system to avoid mistakes that can lead to wrongful convictions. Inquiries into wrongful convictions of individuals highlight examples of how an innocent person's life can be damaged through these errors. Justice Peter Cory made the most powerful statement regarding wrongful convictions, stating:

Wrongful conviction... demonstrates the failure of our system of justice. Failures lead to a lack of confidence in police and the courts. That, in turn, can lead to a fear that anyone may be wrongfully convicted and imprisoned. Society must do all that is humanly possible to prevent wrongful convictions... (The Inquiry Regarding Thomas Sophonow, 2001).

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The current study emphasized several suggestions on how to use investigative tools, work with evidence, treat jailhouse informants, and accept or reject evidence from jailhouse informants in order to reach justice. These suggestions should be reflected in any new policies regarding jailhouse informants' and similar witnesses' testimony. Despite the fact that different inquiries, guidelines, and laws were created to deal with relevant evidence, injustices due to the use of in-custody informants' testimonies continue.

Every time someone is convicted of an offence for which they are innocent, it can be said the justice system fails in three ways: first, by inflicting unjustifiable harm on the wrongfully convicted person, secondly, by allowing the actual perpetrators of the crime to remain free to victimize others, and thirdly, by re-victimizing the victim or his or her family by undoing the emotional closure that has already taken place (Macfarlane, 2006, p. 403-487).

The phenomenon of jailhouse informants in Canadian criminal courts remains an understudied issue that requires thorough and comprehensive analysis given the potential of injustices caused by their use. The main intention of this study was to explore the circumstances in which jailhouse informant's testimony was used in Canadian Criminal Court proceedings, which were ultimately appealed. A qualitative analysis of judicial decisions identified trends across cases regarding jailhouse informants' unsavoury characteristics, influential confession testimony, precarious use of incentives and failures in jury cautions that, taken together, support existing arguments against the use of jailhouse informant's testimony because of the risk of injustice. The current study is among the first in discovering systematic issues and circumstances of the use of jailhouse informants in Canadian courts.

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