Manitoba
Department of Justice
Prosecutions

Guideline No. 2:INF:1

Policy Directive

Subject: In-Custody Informer Policy
Date: November 5, 2001

The testimony of in-custody informers is inherently suspect. Therefore, except in the unusual circumstances permitted by this policy, in-custody informers should not be called to testify on behalf of the Crown. The purpose of this policy directive is to highlight the dangers associated with this type of evidence, to outline a process for evaluating the reliability of the evidence in individual cases, and to describe the rare circumstances in which in-custody informant evidence may be tendered on behalf of the Crown.

The Dangers

In his landmark report on the *Morin* case, the Honourable Fred Kaufman, former Judge of the Quebec Court of Appeal, said as follows:

> In-custody informers are almost invariably motivated by self-interest. They often have little or no respect for the truth or their testimonial oath or affirmation. Accordingly, they may lie or tell the truth, depending only upon where their perceived self-interest lies. In-custody confessions are often easy to allege and difficult, if not impossible, to disprove…
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> The evidence at this Inquiry demonstrates the inherent unreliability of in-custody informer testimony, its contribution to miscarriages of justice and the substantial risk that the dangers may not be fully appreciated by the jury. In my view, the present law has developed to the point that a cautionary instruction is virtually mandated in cases where the in-custody informer's testimony is contested: see *R. v. Simmons*, [[1998] O.J. No. 152 (QL)(C.A.)]; *R.* v. *Bevan*, [(1993), 82 C.C.C. (3d) 310].

Subsequently, Binnie, J. of the Supreme Court of Canada highlighted the dangers associated with the evidence of in-custody informers (sometimes called "Jailhouse Informants") in *R. v. Brooks* (2000), 141 C.C.C. (3d) 321 (S.C.C.), at p. 360:

> …"jailhouse informant" is a term that conveniently captures a number of factors that are highly relevant to the need for caution. These include the facts that the jailhouse informant is already in the power of the state, is looking to better his or her situation in a jailhouse environment where bargaining power is otherwise hard to come by, and will often have a history of criminality.

Scope of this Policy

This policy applies where any inmate, imprisoned in either a provincial or federal correctional facility anywhere in Canada, usually pending trial or awaiting sentence, claims to have heard another prisoner make an admission about his or her case, and seeks to testify about it on behalf of the Crown. It is immaterial whether the proposed inmate witness seeks a benefit from the Crown or not.

The policy is not intended to address the use of police undercover operators, nor to limit the use of in-custody informers to advance police investigations.[1]

Criteria

Before it can even be considered, the statement of the in-custody informer must be reviewed to determine whether this information could have been garnered from other sources (e.g. media reports of the crime, the disclosure package or from evidence given at the preliminary hearing or from the trial if it is underway or has taken place). If the information could not have been obtained from these other sources, the full circumstances of the case and the background of the informer must be assessed, especially the following factors: [2]

1. The extent to which the statement is confirmed by independent evidence;

2. The extent to which the statement has disclosed evidence that is, in itself, detailed, significant, and revealing as to crime and the manner in which it was committed. For example, a claim that the accused said "I killed A.B." is easy to make but extremely difficult for any accused to disprove;

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

4. The informer's general character, which may be evidenced by his or her criminal record or other disreputable conduct;

5. Any request the informer has made for special benefits and any promises that may have been made;

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[1] Concerning the latter, see: *R.v. Leipert* (1997), 112 C.C.C. (3d) 385 (S.C.C.).

[2] These criteria are taken from the Morin Report, and were approved in *R. v. Brooks* (2000), 141 C.C.C. (3d) 321 (S.C.C.), at p. 348-9 (per Major, J., Iacobucci and Arbour JJ.)

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

7. Whether the informer has previously claimed to have received statements while in custody;

8. Whether the informer has previously testified in any court proceeding and the accuracy or reliability of that evidence, if known;

9. Whether the informer made some written or other record of the words allegedly spoken by the accused and, if so, whether the record was made contemporaneously with the alleged statement of the accused;

10. The circumstances under which the informer's report of the alleged statement was taken (i.e., how soon after it was made and to more than one officer, etc.);

11. The manner in which the report was taken by the police;

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

13. Any relevant information contained in the Manitoba Justice In-Custody Informer Registry;

14. Any medical or psychiatric reports concerning the in-custody informer where relevant;

Under no circumstance shall Crown Counsel call an in-custody informer who has a previous conviction for perjury, or any other conviction for dishonesty under oath or affirmation, unless the admission of the accused was audio or video recorded and the authenticity of the recording can be verified.

Counsel shall not proceed to trial where the testimony of the in-custody informer is the sole evidence linking the accused to the offence. Further, because of the unfortunate cumulative effect of alleged confessions, no more than one in-custody informant should be used, even if others meet the test. Finally, if the trial judge fails to give the jury the warning required by the decisions in *Simmons* and *Bevan*, the Crown Attorney should, where possible, remind the judge of the need to give such a warning.

The Decision Whether to Call the Evidence: Establishment of an In-Custody Informer Assessment Committee

The decision whether to call an in-custody informer as a witness on behalf of the Crown is a collective one, rather than one made only by the Crown Attorney having conduct of the case.

For this purpose, the In-Custody Informer Assessment Committee ("I.C.I.A.C.") is established. It is composed of the following: the Assistant Deputy Attorney General (as chair); the appropriate Director (Winnipeg, Regional or Special Prosecutions); the Senior Crown Attorney in charge; General Counsel, and the Prosecutor having conduct of the case. The mandate of this committee is to consider the proposed witness' evidence, the background of the witness, and the application of the criteria referred to above to the facts of the case in question.

Wherever possible, the Chair should arrange for the police to conduct an investigation that will assist in making a decision on the suitability of calling the in-custody informer as a witness. The Committee should have a broad range of material and information available to inform its decision, including: previous police reports dealing with the informer; a waiver of confidentiality concerning his (or her) prison files; disposition of charges previously laid against the informer; transcripts of previous testimony provided by the informer, including any findings of credibility made by the trial judge; aliases that may previously have been used, and information on whether the proposed witness has previously been turned down as an informant/witness. Any material received should be discussed with the informant before a decision is made.

Before making a final assessment, the in-custody informant must provide a videotaped statement in accordance with the decision of the Supreme Court of Canada in *R. v. K.G.B.* (1993), 79 C.C.C. (3d) 257 (S.C.C.).

In-Custody Informer Registry

Once a decision is taken by the In-Custody Informer Assessment Committee, either to call the informer as a witness or not, the chair of the Committee shall advise the Deputy Attorney General of the result. The office of the Deputy Attorney General shall maintain a registry of all decisions taken by the I.C.I.A.C. The Registry shall be a public document and information from the Registry shall be available to any member of the public on request, provided that disclosure of the information sought is lawful, will not prejudice any ongoing police investigation, or the conduct of a prosecution, and will not imperil the safety of any person. A decision by the Deputy Attorney General not to release information in a specific case is reviewable by the Ombudsman of Manitoba pursuant to provincial law.

Disclosure to the Defence

The decision to call an in-custody informer as a witness for the Crown creates additional disclosure responsibilities for the prosecuting Crown Attorney. In general, the following shall be provided to the defence in a timely way, although in particular cases there may be an obligation to disclose further materials or information in the possession of the Crown:

a) criminal record of the in-custody informer;

b) Manitoba Registry record of the in-custody informer, if any;

c) particulars respecting any benefits, promises or understandings between the in-custody informer and the Crown, police or correctional authorities, including any written agreements to testify;

d) any other known evidence that may attest to or diminish the credibility of the in-custody informer, including any relevant medical or psychological reports accessible to the Crown as well as all of the materials originally placed before the I.C.I.A.C., providing it is lawful to disclose them.

Written Agreement to Testify

Where the I.C.I.A.C. has approved the proposed testimony of an in-custody informer, the Department shall enter into a written agreement with the informer to testify, in which all of the understandings, terms and conditions of that testimony are agreed upon. The purpose of the agreement is to ensure that there is a clear understanding of the basis upon which the informer agrees to provide evidence. In all cases, Crown Counsel will provide the agreement to the defence as part of the pre-trial disclosure, and will seek to file the agreement with the court as an exhibit before the person testifies.[3] A checklist of those issues to be addressed in the agreement has been attached as an Appendix to this policy statement.

In circumstances where the agreement contemplates the conferring of a benefit on the informer (such as a reduction in charges, dropping charges, immunity from prosecution, etc), the benefit should be conferred *before* the in-custody informant testifies: see *R. v. Piercey* (1988), 42 C.C.C. (3d) 475 (Nfld. C.A.); *R. v. Canning* (1937), 68 C.C.C. 321 (S.C.C.) at page 322-3. This will serve to offset any suggestion that the in-custody informer is only providing testimony because there is still something to be gained by testifying in a certain way. Under no circumstances shall the conferring of a benefit on an in-custody informer be conditional upon the conviction of the accused. The informer must also be advised clearly that any benefits are based on the understanding that the testimony provided in court is truthful.

Where the informer is charged with further offences prior to completing his or her testimony, prosecuting counsel shall re-assess the future use of the informer as a witness on behalf of the Crown.

[3] As suggested by the Privy Council in *R. v. McDonald*, [1983] N.Z.L.R. 252 (P.C.).

Prosecution of an In-Custody Informer for Giving False Statements

Crown Counsel are expected to prosecute cases vigorously where an in-custody informer has lied to the police, Crown Attorney or the court. To ensure independent action, it will, in many cases, be necessary to refer the case to an independent counsel for the prosecution. The purpose of prosecuting in-custody informers who attempt (even unsuccessfully) to falsely implicate an accused is, amongst other things, to deter other members of the prison population from attempting the same thing. If convicted of perjury or a similar offence, Crown Counsel shall ask for a significant consecutive prison term.

Legal Authorities for Further Consideration

As in all cases of this nature, professional judgment will have to be made on whether or not to call a particular witness. In the exercise of that judgment, counsel should bear in mind, and be guided by, the following authorities:

R. v. Brooks (2000), 141 C.C.C. (3d) 321 (S.C.C.);

Manitoba, The Inquiry Regarding Thomas Sophonow
The Investigation, Prosecution and Consideration of Entitlement to Compensation (Winnipeg: Department of Justice, September 2001);

Ontario, Report of the Commission on Proceedings involving Guy Paul Morin ("Kaufman Report") (Toronto: Ontario Ministry of the Attorney General, 1998);

R. v. Bevan (1993), 82 C.C.C. (3d) 310 (S.C.C.);

R. v. Vetrovec (1982), 67 C.C.C. (2d) 1 (S.C.C.);

Sherrin, Christopher, "Jailhouse Informants, Part I; "Problems with their Use" (1998), 40 C.L.Q. 106;

Sherrin, Christopher, "Jailhouse Informants in the Canadian Criminal Justice System, Part II: Option for Reform" (1998), 40 C.L.Q. 157;

Report of the 1989-1990 Los Angeles Grand Jury: Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County, June 26, 1990.

For ease of reference, it should be noted that the Kaufman Report, referred to above, is available on the Internet at: www.gov.on.ca/ATG/morin, as is the decision of the Supreme Court of Canada in *R. v. Brooks*, at: www.droit.umontreal.ca/doc/csc-scc/en/index.html

Appendix
Contents of Immunity Agreements: A Checklist

An agreement with an in-custody informer should be in writing, be signed by and given to the witness before testifying, and should include, among other things, the following information:

a) the name of the in-custody informant who is entering into the agreement;

b) the person to whom the benefit is to be provided (if any) (usually the in-custody informant himself);

c) the benefit to be provided (e.g. staying existing charges, release from custody, Crown to suggest a particular sentence on outstanding charges, etc.);

d) the scope of the agreement (that it does not extend to crimes undisclosed by the in-custody informant, crimes unknown to the police and any future crimes that may be committed by the in-custody informant);

e) the evidence or other information provided by the in-custody informant in exchange for the benefit;

f) any additional commitments made by the parties, including the specifics of any expenditures to be made by the Crown;

g) a general description of what will amount to a breach of the agreement, and the consequences of such a breach;

h) an explicit statement by the in-custody informant that he or she is providing truthful information and will testify truthfully in all court proceedings;

i) a statement that the In-Custody Informer Assessment Committee has reviewed the agreement and endorses it;

j) the signatures of the Assistant Deputy Attorney General and the in-custody informant.