APPENDIX K / ANNEXE K

[see page 98] / [*voir la page 122*]

IN-CUSTODY INFORMANT TESTIMONY

TÉMOIGNAGE DES INDICATEURS EN PRISON

Criminal Section

IN-CUSTODY INFORMANT TESTIMONY

I. Introduction

The criminal justice system poses the greatest potential for interference by the state into the lives of individual citizens. In recognition that the consequences of a criminal conviction, both in terms of penalty and stigma, have a significant impact on an accused person, our justice system strives to ensure that no innocent person is convicted of a criminal offence. In spite of the safeguards in place to prevent wrongful convictions, they do occur as a number of recent high profile cases have demonstrated. In the conclusions to his report following the inquiry into the wrongful conviction of Guy Paul Morin[1] the Honourable Fred Kaufman states:

> …the causes of Mr. Morin's conviction are rooted in systemic problems, as well as the failings of individuals. It is no coincidence that the same systemic problems are those identified in wrongful convictions in other jurisdictions worldwide. It is these systemic issues that must be addressed in the future.[2]

This paper examines the issue of in-custody informant testimony, which has been identified as one of the causes contributing to wrongful convictions both in the Canada and in other common law jurisdictions.[3] This issue has been the focus of comprehensive inquiries in Australia[4] and Los Angeles, California[5] with legislative and policy changes resulting from both initiatives. In Canada, the issue has not been the sole focus of an inquiry but has been identified as a contributing factor in a number of wrongful conviction cases. The most extensive examination of the issue in Canada was conducted by the *Morin Inquiry*, in Ontario. In addition, the role of in-custody informants is one of the issues to be dealt with by the ongoing inquiry into the wrongful conviction of Thomas Sophonow in Manitoba.[6]

The paper will examine issues that arise from the use of the evidence of in-custody informers and raise remedial considerations in both legal and administrative contexts.

II. The "in-custody informant"

The term "in-custody informant"[7] is used in this context to denote an individual who:

i) is in custody at the same time as the accused person;

[1] *Report of the Commission on Proceedings Involving Guy Paul Morin* (Toronto: Ontario Ministry of the Attorney General, 1998) [hereinafter *Morin Inquiry*].

[2] *Ibid.* "Conclusions."

[3] It should be noted that informant testimony was not found to be the sole factor leading to the conviction of Mr. Morin and the Australian Inquiry (*infra,* note 4) stated that it found no evidence in the course of its investigation that a wrongful conviction had resulted from such testimony.

[4] *Report on Investigation Into the Use of Informers* (Sydney: Independent Commission Against Corruption, 1993) [hereinafter *Australian Inquiry*].

[5] *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. [hereinafter *LA Inquiry*].

[6] Thomas Sophonow was convicted in the 1981 murder of Barbara Stoppel. After four years in prison and three trials, Mr. Sophonow was acquitted by the Manitoba Court of Appeal in 1985. In 2000 police announced that they had a new suspect in the murder and apologized to Mr. Sophonow. The inquiry presided over by former Supreme Court Justice Peter Cory, will determine compensation for Mr. Sophonow and his family as well as examine the causes of his wrongful conviction. The testimony of an in-custody informant is one of the issues that have been identified as a contributing factor. The inquiry's report is expected in the fall of this year.

[7] This definition is based upon the one originally used in the *LA Inquiry*, endorsed by the *Morin Inquiry* and incorporated into a number of prosecution policies.

ii) is not considered to be an accomplice of the accused person or an eyewitness to the offence in question; and

iii) voluntarily approaches the authorities with incriminating information, purportedly obtained as a result of contact with the accused person during their mutual incarceration.

The term is not meant to include a person who is intentionally placed in proximity to the accused, by the authorities, for the specific purpose of acquiring evidence and does not include an informant who provides information that is used solely for the purpose of furthering a police investigation (i.e. will not be used as evidence in court).

The Honourable Fred Kaufman stated in the *Morin Inquiry* that the evidence of in-custody informants is widely held to be inherently unreliable:[8]

> 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…
>
> 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.

Further authority that there exists a need for concern about the reliability of evidence provided by in-custody informants can be found in the comments of Binnie J. in *R*. v. *Brooks*:[9]

> ...'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.

This concern is not unique to Canada but has been expressed in other common law jurisdictions. For example, Mr. Justice McHugh stated the following in the case of *R*. v. *Pollit*:[10]

> The evidence of a prison informer may in fact be true. But, with the exception of some remand prisoners, the source is always tainted. All accounts of traditional prisons agree that beneath the veneer of law and order imposed by the rules of prison discipline lies a brutal world of fear and sudden, and often irrational,

[8] *Supra*, note 1.

[9] [2000] 1 S.C.R. 237, 141 C.C.C. (3d) 321.

[10] *Pollit* v. *The Queen* (1992), 174 C.L.R. 558 (H.C. Australia) at 637.

> violence where conventional standards of conduct and values such as truth and respect for the rights of others have little relevance. It is not surprising, therefore, that, exposed to such an environment, some prisoners will become so indifferent to the rights and feelings of others that they will not hesitate to make false accusations of criminal conduct against other persons if acceptance of the accusations will advance their own interests.

Beyond the inherent unreliability attributed to the evidence of an in-custody informant, concern has been expressed about the ability of such an informant to convince a jury that his or her testimony is reliable. The *Australian Inquiry* made the following observation in this regard:[11]

> Furthermore, evidence given by prison informers is notoriously difficult to break down. The prison-informer witness is often a skilful liar, with a shrewd knowledge of the criminal courts and their procedures, a quick intelligence well suited to the giving of evidence and withstanding cross-examination and a good demeanour and friendly personality. At the conclusion of the cross-examination, the jury is likely to be left with the impression of a personable witness whose evidence-in-chief was intrinsically credible and remained unshaken after a "searching" cross-examination. The danger from prison-informer evidence, therefore, lies in the plausibility as well as the character of those who usually give it.

Although the adversarial system provides checks and balances that in most cases ensure trials are carried out fairly and wrongful convictions are avoided, experience in a number of cases has shown that the testimony of in-custody informants, especially in concert with other systemic factors, poses a risk to the administration of justice. Measures to reduce that risk warrant consideration.

III. Experiences in Other Jurisdictions

a/California

In the fall of 1988 Leslie White, who had been an in-custody informant in a number of cases over a ten year period, came forward and demonstrated for the news media and authorities that he could convincingly fabricate a murder confession by a fellow inmate. White showed that he could do this even where he and the subject had never been in contact. White showed how he was able to gather information from authorities by posing as a police officer, prosecutor or defence attorney. White and other informants claimed to have given false evidence in various cases in order to obtain benefits or lenient treatment in their own cases.

White's revelations resulted in the most comprehensive examination of the issue of in-custody informants anywhere to date. The Los Angeles County Grand Jury examined cases from January 1979 to October 1988. Estimates of the number of cases over that period in which

[11] *Supra,* note 4.

in-custody informants gave evidence range from 153 (according to prosecutors) to 250 (according to the defence bar). The focus of the grand jury was not individual cases but rather to conduct an overall inquiry into where the system may have been flawed and where it could be improved.[12]

The *LA Inquiry* resulted in two general findings:[13]

1. The Los Angeles County District Attorney's Office failed to fulfill the ethical responsibilities required of a public prosecutor by its deliberate and informed declination to take action necessary to curtail the misuse of jail house informant testimony.
2. The Los Angeles County Sheriff's Department failed to establish adequate procedures to control improper placement of inmates with the foreseeable result that false claims of confessions or admissions would be made.

The Grand Jury made the following recommendations with respect to prosecutors:[14]

1. The District Attorney's Office should maintain a central file which contains all relevant information regarding the informant. As a minimum, the file should include information regarding the number of times the informant has testified or offered information in the past and all benefits which have been obtained.
2. A complete record should be maintained describing all favorable actions taken on behalf of an informant, including copies of all relevant letters written. This information should be contained in a central index.
3. No consideration should be provided to an informant beyond that set forth in the written statement required by Penal Code Section 1127a, except as may be authorized by leave of Court.
4. The District Attorney should give increased consideration to the prosecution of charges of perjury and other crimes related to the conduct of jailhouse informants.
5. The District Attorney should conduct regular training of its professional staff regarding the specific ethical responsibilities of prosecutors.

Even before the Grand Jury released its report, remedial action was taken on both legislative and procedural fronts.

The California Penal Code was amended in September 1989 just less than 12 months after Leslie White first came forward and brought attention to the issue. The sections of the Penal Code applicable to in-custody informants are set out in their entirety in Appendix A.

[12] *LA Inquiry, supra,* note 5.
[13] *Supra,* note 4 at 35.
[14] *Morin Inquiry, Supra*, note 1 at 573.

The legislative amendments define "in-custody informant" as a person whose testimony is based on statements made by the defendant while both the defendant and the informant are held within a correctional institution. The definition excludes co-defendants, percipient witnesses, accomplices, and co-conspirators. The legislation mandates that in a trial or proceeding in which an in-custody informant testifies, the court must instruct the jury that the testimony should be viewed as unreliable. There is no discretion afforded to the court; the warning must be issued in all cases. The legislation also requires that the prosecution must disclose at trial any consideration given to the accused as a result of his or her testimony. A duty is imposed on the prosecutor to inform the victim of the offence for which the informant is in custody of the consideration given to the informant. Finally, a limit of fifty dollars is placed on the monetary consideration that can be paid to an in-custody informant for his or her testimony.[15]

Prior to the legislative changes and within a month of Mr. White's revelations, policy changes were introduced by the Los Angeles County District Attorney's office governing the manner in which prosecutors dealt with in-custody informants. These changes mandated that prosecutors use in-custody informant testimony as a last resort and put in place procedures for evaluating in-custody informant statements many of which are reflected in the recommendations of the *Morin Inquiry* and the Best Practices outlined in Section V of this paper.

A decision was also made to create a registry of informants to track their use and the accuracy of the information they provided. Rather than simply creating an ongoing registry, the District Attorney's office took the extraordinary step of reviewing all of its case files over the preceding decade to create a registry that was retroactive to January 1979. This was accomplished by searching all available records and interviewing prosecutors and defence lawyers to gather the information.

b/Australia

Created in 1989, the Independent Commission Against Corruption is a public body in Australia that is empowered, by statute, to examine government actions in order to expose and prevent corruption. The Commission received a number of complaints alleging misconduct in the criminal justice system with respect to in-custody informants after a number of cases were highlighted involving informants who obtained significant benefits as a result of giving evidence. The Commission also received a request, from the Director General of Corrective Services, to conduct an investigation. Hearings in aid of the investigation were conducted in the second half of 1991 and early 1992.

The Commission, drawing on the experience of the *L.A. Inquiry*, made recommendations that led to both legislative and policy changes.

In terms of policy, the Commission called for the creation of an informant registry, disclosure of all circumstances surrounding the informants agreement to provide testimony and controls on how rewards to informants were granted.

[15] See Appendix A for the relevant sections of the California Penal Code.

As in Los Angeles, the Australian Commission found that there was a need for caution in weighing in-custody informant testimony and, as in California, legislative changes to the manner in which juries are instructed about such testimony were put in place. However, unlike the changes to the California Penal Code, the amendments to the Australian *Evidence Act* do not require a judge to recite word for word a caution that is contained within the legislation. In addition, unless a party requests that a caution be issued, it remains within the trial judge's discretion to issue a caution to the jury about the reliability of the informant's testimony. The text of the Australian legislation can be found at Appendix B.

IV. The Canadian Experience

The *Morin Inquiry*

Guy Paul Morin was charged with the 1983 murder of his nine-year old neighour Christine Jessop and was acquitted at trial in 1986. A new trial was ordered by the Court of Appeal for Ontario and this Order was affirmed by the Supreme Court of Canada. The second trial was held, and Mr. Morin was found guilty of first-degree murder. An appeal was filed and in 1995, and on the basis of fresh evidence tendered jointly by the Crown and the defence Mr. Morin was acquitted.

On June 26, 1996, the Lieutenant Governor-in-Council for Ontario directed that a Public Inquiry be held into the events that led to Mr. Morin's wrongful conviction. The Commission was given a mandate to inquire into the manner in which the investigation into the murder was conducted as well as the criminal proceedings involving Mr. Morin. A public hearing began on February 10, 1997, continued for 146 days, and involved 120 witnesses and more than 100,000 pages of documents.

One of the aspects of the proceedings against Mr. Morin that was examined by the Commission was the evidence of two in-custody informants who claimed to have heard Mr. Morin confess to the murder while in custody.

The Commission found that:[16]

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

[16] *Supra*, note 1. Note that the reference to Great Britain alludes to a number of infamous cases of wrongful conviction in that jurisdiction. Although a Royal Commission was established in 1991 to examine the British criminal justice system, it did not examine the issue of in-custody informants in any detail. The Royal Commission's recommendations did result in the establishment of the independent Criminal Cases Review Commission in 1997 with an ongoing mandate to investigate alleged instances of wrongful conviction. (Report of The Royal Commission on Criminal Justice: London, July 1993).

The Commission made thirty-four recommendations on the issue of in-custody informants which are set out in detail in Appendix C. Many of the recommendations are reflected in the Best Practices set out in the section below while others are the subject of the discussion questions in section VI below.

V. Managing the Risk: Best Practices

Although the ultimate responsibility for weighing evidence and determining credibility lies with the trier of fact, prosecutors have a responsibility to ensure that the evidence on which they will build their case is scrutinized thoroughly before being tendered. A review of the recommendations of the *Morin Inquiry,* the provincial policies that have been developed as a result of that inquiry[17] and the results from Los Angeles and Australia reveals a number of best practices to lessen the risk to the administration of justice when the testimony of in-custody informants is being considered for use by prosecutors. The following is a summary of those best practices and is not intended to be a definitive statement of what should or should not be done. Rather this summary is intended to form the basis for further discussion.

1) In-custody informant evidence should be used only as a last resort and in all cases should be given careful consideration and thorough scrutiny to determine if it is in the public interest to rely on such evidence in a given case.

2) Confirmation of the information provided by an informant should be sought through an investigation carried out by police examining:

    a. independent evidence that supports or undermines the information provided;

    b. the extent to which the information contains details that could only be known to the perpetrator;

    c. the extent to which the informer may have access to sources of information that would provide details of the accused alleged conduct;

    d. the informer's state of mind; and

    e. the extent to which the informer has offered similar information in the past.

3) Informants should be advised to seek the advice of counsel at the time they come forward.

4) Communications and negotiations with the informant should be carried out through counsel and should be conducted by a prosecutor not associated with the proceedings against the accused or the informant.

5) A committee of senior prosecutors with no involvement in the case should ultimately determine if the evidence of an in-custody informant should be used.

6) When the decision is made to use the testimony of an in-custody informant, a written agreement should be entered into setting out any consideration that will be given and this agreement should be disclosed to the defence and introduced as evidence when the testimony is given.

[17] Crown policy directives from British Columbia, Alberta, Manitoba, Ontario and Quebec were reviewed.

7) Under no circumstances should consideration be contingent upon a conviction.

8) No consideration should be given in respect of future offences with which the informant may be charged.

9) The victim in relation to the offence for which the informant is in custody should be notified of the consideration extended to the informant in return for his or her testimony.

10) A decision to use the testimony of an in-custody informant should be reconsidered if a subsequent offence is committed by the informant prior to the evidence being given.

11) A registry should be developed to track the use of individual informants, the consideration that they are given and the findings with respect to their testimony at trial.

12) False testimony by an informant should be vigorously prosecuted.

VI. Discussion Questions[18]

To varying degrees, prosecution policies across the country have incorporated the recommendations of the *Morin Inquiry* as they relate to the process of handling in-custody informants by Crown prosecutors and police. There is some variance in the manner in which provincial policies deal with the issue and as well there are a number of recommendations that would potentially require legislative change.

The following questions are intended to elicit discussion on potential areas of reform of the manner in which in-custody informants are dealt with by the prosecutors and by the courts.

1. Should Mandatory Warnings be Required?

Following its inquiry into the use of in-custody informants, Australia made changes to its *Evidence Act* to the effect that, upon the request of the defence or the prosecution, the trial judge must issue a warning to the jury that the testimony of an in-custody informant may be unreliable. California has legislated a mandatory warning in all cases where such evidence is introduced. The *Morin Inquiry,* although not advocating a mandatory warning in all cases, recommended that trial judges should consider issuing a warning stronger than the standard *Vetrovec*[19] warning when in-custody informant evidence is introduced.[20]

Currently it is within the discretion of a trial judge to warn the jury about the reliability of a witness's testimony by way of a *Vetrovec* warning. In *Vetrovec*, Dickson J. held that a trial judge has the discretion to issue a clear and sharp warning to the jury directed at the testimony of certain "unsavoury" witnesses. Dickson J. emphasized that the trial judge did not have a positive duty to issue such a warning and that a common sense approach rather than "empty formalism" should be employed.[21]

....

[18] The following questions emerge from the sources outlined in this paper and also parallel options set out in Christopher Sherrin's article "Jailhouse Informants in the Canadian Criminal Justice System, Part II: Options for Reform" [1997] 40 C.L.Q. 157. This article was referred to by the Honourable Fred Kaufman in the Morin Inquiry and by the Supreme Court of Canada in its decision in *R*. v. *Brooks*.

[19] *Vetrovec* v. *The Queen*, [1982] 1 S.C.R. 811, 67 C.C.C. (2d) 1.

[20] *Supra*, note 1, Recommendation number 67.

[21] *Supra*, note 19 at 823.

The issue of providing a *Vetrovec* warning with respect to the evidence of in-custody informants was most recently considered by the Supreme Court of Canada in the case of *R*. v. *Brooks*.[22] The court was split four to three on whether the lack of a warning with respect to in-custody informant testimony in the charge to the jury would negate the conviction of the accused on a charge of first-degree murder. Although the majority of the court held that the accused's conviction should be upheld, only three of the four justices in the majority agreed that the trial judge was correct in not issuing a warning about the in-custody informant testimony to the jury. The fourth member of the majority, Binnie J., agreed that the conviction should be upheld on the sum of the evidence, but sided with the minority in ruling that the trial judge erred in not issuing a *Vetrovec* warning with respect to the in-custody informant testimony.

2. What level of corroboration should be required?

An amendment could be made to the rules of evidence to require that the testimony of an in-custody informant be verified by independent evidence. Questions that arise are, what form would this verification have to take and would the corroboration of another informant suffice?

The *Morin Inquiry* found that:[23]

> Jailhouse informant testimony should not be legally banned. Nor should corroboration be legally required. Prosecutorial discretion should be retained in relation to the tendering of such evidence, though significantly regulated. The existence or absence of confirmatory evidence should heavily factor in the exercise of that discretion.

3. Should Limits be placed on the Means Open to Informants?

Unlike law enforcement officials, informants currently are not limited in how they obtain a confession or information from an accused person. Specific limits could be placed on the manner in which informants gather information.

As a second option, in-custody informants could be deemed to be "agents of the state" in all circumstances so that they would be restricted in the same manner as persons put specifically in place to gather information from an accused person.[24]

A third option would be to impose a rebuttable presumption that an in-custody informant is acting as an agent of the state.[25]

The *Morin Inquiry* stated in relation to recommendation 69 that:

> Where an in-custody informer actively elicits a purported statement from an accused in contemplation that he or she will then offer himself or herself up as a witness in return for benefits, he or she should be treated as a state agent.

---

[22] *Supra*, note 9.

[23] *Ibid.* at 623.

[24] *R*. v. *Broyles* (1991), 68 C.C.C. (3d) 308 (S.C.C.) determined that the test of whether an informer is considered to be "an agent of the state" is "*Would the exchange between the accused and the informer have taken place in the form and manner in which it did take place, but for the intervention of the state or its agent.*"

[25] Clifford S. Zimmerman, "Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform" 22 HCLQ 81.

4. Should the trial judge be able to exclude unreliable evidence?

This option would allow a trial judge, in a forum such as a pre-trial motion, to exclude evidence that, in the judge's opinion, was inherently unreliable but that might be incorrectly given weight by a jury at trial. This would give a level of discretion to a pre-trial judge, which arguably belongs with a jury. In addition, the Ontario Court of Appeal has ruled that manifest unreliability of evidence is not sufficient reason to keep such evidence from a jury.[26]

The *Morin Inquiry* stated in relation to recommendation 59:

> Consideration should be given to a legislative amendment, providing that the evidence of an in-custody informer as to the accused's statement(s) is presumptively inadmissible at the instance of the prosecution unless the trial judge is satisfied that the evidence is reliable, having regard to all the circumstances.

5. Should consistent Crown policies be developed across all jurisdictions?

Several jurisdictions have developed policies controlling the use of in-custody informants by Crown prosecutors. Although these policies are similar in many respects, there is variation in the level of scrutiny and control that is employed. In addition, there are a number of jurisdictions with no policy at all.

6. Should a national informant registry be created?

Individual registries will assist prosecutors and defence counsel in dealing with the evidence of an in-custody informant with a history of giving evidence within that jurisdiction. However, informants can and do move from province to province and this may represent a significant weakness in the registry system.

The *Morin Inquiry* stated in relation to recommendation 57:

> The Government of Ontario should use its good offices to promote a national in-custody informer registry.

7. Should limits be placed on the incentives that can be given to an informant?

Based on the assumption that in-custody informants may be motivated to concoct false testimony in the hopes of personal gain, should limits on the type and magnitude of rewards that could be bestowed upon informants be put in place either as a matter of policy or legislation? As with the option of mandatory warnings there is a judicial history that would seem to run counter to such limits being imposed. For example, the Ontario Court of Appeal has held that a contingent fee arrangement in which an informant was paid based on charges being brought against certain suspects was permissible.[27]

[26] *R* v. *Buric* (1996), 106 C.C.C. (3d), 97.

[27] *R*. v. *Dikah* (1994), 94 C.C.C. (3d) 321.