Uniform Law Conference of Canada

Working Group on Contradictory Evidence: Criminal Liability for Recanted *K.G.B.* Statements

Final Report
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Introduction

At the 2011 Uniform Law Conference of Canada annual meeting, the Criminal Law Section passed resolution NB2011-02 which reads:

> *That a criminal section working group be created to study and report on what amendments are required, if any, to capture the conduct of a person who gives evidence in a judicial proceeding contrary to the evidence previously provided in a KGB statement.*

A Working Group was struck, and included the following members:

Anthony Allman, Regional Director, Justice and Attorney General, New Brunswick
Catherine Cooper, Counsel, Criminal Law Policy Branch, Criminal Law Division, Ministry of the Attorney General, Ontario
Lee Kirkpatrick, Prosecutions Co-ordinator, Yukon Department of Justice
Joanne Klineberg, Senior Counsel, Criminal Law Policy Section, Justice Canada
Laura Pitcairn, Counsel, Public Prosecution Service of Canada
Kusham Sharma, Crown Attorney, Manitoba Prosecution Service
Erin Winocur, Counsel, Criminal Law Policy Branch, Criminal Law Division, Ministry of the Attorney General, Ontario

The Working Group held numerous conference calls over the year and what follows are the results of its efforts.

Background to the Issue

The starting point of the issue to be explored is the Supreme Court of Canada ruling in *R.* v. *K.G.B.*, [1993] 1 S.C.R. 740. *KGB* involved a prosecution of a young offender for murder. Three other young people who witnessed the murder were questioned by police and incriminated the accused as the murderer. However, at trial, the witnesses refused to adopt their previous out-of-court statements, instead testifying that they had lied to the police about the role of the accused in the murder. The question at issue in *KGB* involved the admissibility for the truth of their contents of the out-of-court statements of the witnesses. According to the existing common law at the time of the trial of the accused, the previous inconsistent statements were admissible only for the purpose of challenging the credibility of the witnesses; they were not admissible for the truth of their contents, as their introduction for this purpose would violate the hearsay rule. As a result, the statements were not admitted by the trial judge for the truth of the contents, and the accused was acquitted.

Ultimately the case reached the Supreme Court of Canada. In the years leading up to their consideration of the case, the Supreme Court had begun to recognize a more flexible approach to hearsay than the longstanding common law approach permitted. For centuries, under the common law, all hearsay was excluded unless it fit within one or more pre-determined rigid categories.

The new approach, set out in the well-known cases of *Smith* and *Khan*, sought to allow the admission of an out-of-court statement for the truth of its contents where two basic conditions were met: (1) there was necessity for the out-of-court statement to be admitted at trial, and (2) the statement had adequate indicia of reliability.[1] The concerns that animated a restrictive rule for hearsay are satisfactorily addressed where the statement meets the twinned principles of necessity and reliability.

Building on these cases and the new "principled" approach to hearsay, a majority of the Supreme Court in *KGB* advanced the law further in relation to the "prior inconsistent statement" sub-category of hearsay. Generally, the Supreme Court of Canada held that prior inconsistent statements of a witness could be introduced for their truth if they were found to be necessary and reliable, as per the more general rulings of *Smith* and *Khan*.

More specifically, the court held that the standard of reliability must be adapted to the particular context of witness statements to police. Prior inconsistent statements of a witness present an inherent (and relatively obvious) reliability problem, stemming from the fact that the same witness has provided two contradictory versions of events. In this context, the court opined that in the case of witness statements made to police during an investigation, the following three conditions could provide adequate indicia of reliability for later admission of the statement at trial for its truth:

1. The statement is made under oath or affirmation;
2. Before making the statement, the witness is given a warning regarding the offences that they could be charged with if they knowingly give false information; and
3. The statement is videotaped.

The court left open the possibility that other situations may act as a substitute for these indicia of reliability.[2]

The required element of necessity is met in cases where the witness renounces their previous statement when testifying at trial; that evidence is no longer available and thus the necessity for its introduction is created.[3] The fact that the witness is present in court and therefore available for cross-examination minimizes the most pressing concerns with admission of hearsay.

An abundance of case law and commentary has emerged since the Supreme Court's ruling, addressing more specific issues and questions surrounding the admission of KGB statements (as they have come to be referred to colloquially) by witnesses who later recant on the stand. As interesting and important as this body of law is, the Working Group's mandate is not related to hearsay at all. *Rather, the Working Group was mandated to explore the adequacy of existing criminal offences for addressing the disruption and mischief to the trial process, and more*

[1] *R. v. Smith* [1990] 2 S.C.R. 531; *R. v. Khan* [1992] 2 S.C.R. 915.

[2] In fact, a few years later, the Supreme Court decided that a prior inconsistent statement by a witness could be admitted where the three conditions were not present, but where other factors gave the out-of-court statement adequate reliability: *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764.

[3] As a threshold matter, the prior inconsistent statement must also be such that it would have been admissible as the witness's sole testimony (e.g. if the content of the statement is solicitor-client privileged, it would not be admissible as direct testimony from the witness, and therefore is also not admissible through the hearsay statement).

broadly to the administration of justice, that is caused by a witness who tells one version of events to the police in a KGB statement and then later gives a contradictory version to the court.

Brief Overview of Work Done

The Working Group's first task was to identify and assess the adequacy of all existing offences that are potentially applicable to a recanting KGB witness.

The Working Group also identified the need to obtain some "on the ground" information about the consequences of KGB recantations on the trial process, as well as consequential decision-making by prosecutors about whether and under what circumstances to prosecute a recanting witness. To this end, members of the Working Group sought to query a small sampling of prosecutors within their jurisdictions about their experiences with KGB statements. Upon considering the responses received, the Working Group further determined that it could benefit from additional information about the taking of KGB statements by police. In large part, the Working Group was keen to identify whether and to what degree different considerations and practices apply where the witness falls into the specific category of complainant in a domestic violence case. The results of these enquiries are described below.

Throughout these various undertakings and explorations, the Working Group was continually discussing options that could be explored for improving the law. There do appear to be a small number of possible legislative options that could address particular aspects of the problems identified. However, it is clear that the most directly responsive option would be the creation of a new offence to directly target a witness who contradicts in court a previously made KGB statement. In fact, the original wording of the resolution that led to the creation of the Working Group proposed the creation of a new offence in relation to the contradiction. The resolution was subsequently amended at ULC to propose the creation of a Working Group to study the issue more generally, but it began its work with the option of a distinct offence at the forefront of considerations.

The Working Group recognized the serious damage that recanting KGB witnesses can do specifically to the trial at which they recant and to the administration of justice more generally, but Members also identified some significant policy concerns associated with criminalizing conduct that encompasses the contradiction of a previous statement. Ultimately, the Working Group did not reach unanimous agreement as to this, or any other, recommendation. Instead, the Working Group hopes that by setting out the issues and the analysis done, it can stimulate a meaningful discussion with all Uniform Law Conference colleagues.

The Mischief Caused by the Recanting Witness

A. Summary of Analysis of Applicable Offences

A summary of the Working Group's assessment of the adequacy of existing offences to address the problem of the recanting witness is provided here.

The Working group began with the reasons of Lamer C.J.C. for the majority in KGB, in which he identified most of the offences that are potentially applicable in the circumstances:

> "A witness who tells one story to the police and another at trial is currently exposed to prosecution under ss. 139 (obstructing justice) and 140 (public mischief) of the *Criminal Code*, R.S.C., 1985, c. C-46. Furthermore, with the Court's decision in this case, prior statements which satisfy the criteria of admissibility will be used as substantive evidence in a subsequent trial; as a result, a witness who makes a false statement will also be liable to prosecution under s. 137 (fabricating evidence), once he or she is informed that the statement can, and indeed will, be used at trial if he or she recants."[4]

It is also apparent that if the witness knowingly provides false testimony in court, the offence of perjury (s. 131 of the *Criminal Code)* may also become available. Additionally, the offence of a witness giving contradictory evidence under section 136 of the *Code* has many similarities to the situation under consideration, and so it too was assessed by the Working Group for potential application.

The full analysis is provided in Annex 1. Briefly, the identified offences that could apply to the situation of a recanting KGB witness immediately draw attention to the fact that some offences target misconduct in relation to the investigation of offences by police, and other offences target misconduct in relation to the trial process. The spectrum of offences further reveals that there are two basic scenarios involving the recanting witness: (1) the witness tells the truth to the police, and later at trial contradicts the truth by telling falsehoods, or (2) the witness initially tells the police the falsehood, and later at trial recants that story and testifies truthfully.[5] The applicable offences are directed at mischief in the administration of justice at either the investigative or the trial stages. The exception is the offence of obstruction of justice, which can apply to misconduct in either stage of the criminal process.

The common elements of these offences are: (1) the requirement for proof of an intent to mislead, (2) the intent to mislead must be associated with the making of a false statement, and (3) the statement must be proved to be false.

As it turns out, the two objective possibilities as to when a witness is being truthful or deceitful match up imperfectly against the practical availability of evidence to substantiate charges in individual cases. More specifically, when faced with the recantation at trial, the Crown may either: (1) have reason to believe and evidence to support that the witness lied to the police (and told the truth at trial); (2) have reason to believe and evidence to support that the witness told the truth to police (and lied on the stand); or (3) have insufficient reason to prefer or evidence to support one possibility over the other.

This last scenario – lack of sufficient evidence as to the truth or falsity of the contradictory statements – can potentially arise in cases, for instance, where there is only one witness to the event and no other available evidence, or when the contradictory statements are equally consistent with the other available evidence.

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[4] [1993] 1 S.C.R. 740 at para. 88.

[5] Another possible scenario is where the witness tells lies at both stages, but those lies also contradict each other.

When the contradiction is in relation to a material fact, it is highly likely that either the witness misled police at the investigation by making the allegation (i.e. obstruction of justice, public mischief or fabrication of evidence), or the witness misled the court by later denying the allegation the witness attested to earlier (and thereby committed perjury). The recanting witness has *in some way* and *at some point* improperly interfered with the administration of justice and seriously disrupted the trial process. Yet, in this set of cases where there is insufficient additional evidence to support charges in relation to the specific time and manner of the misleading conduct, or where the additional evidence that is available is consistent with either scenario, it appears that the laying of charges is not possible because there is not a reasonable prospect of conviction.

The Working Group has identified that where a person tells one version of events to the police and another to the court, they are being duplicitous in a manner which is offensive to the administration of justice. The challenge posed by this duplicity is that although there may be a number of legal responses available at present under the *Criminal Code*, such as the charge of perjury or obstruction of justice, the practical reality is often that the inability to prove which of the two statements is false renders this mischief immune from prosecution. The concerns raised as a result are twofold. First, that the administration of justice risks being brought into disrepute if there is no mechanism to address this conduct. Second, this type of conduct by witnesses may leave the administration of justice incapable of responding to significant risks to personal safety of these same witnesses.

The case of *R.* v. *John* from the Ontario Court of Justice is illustrative of both of these risks.[6] On January 22, 2009 a shooting took place in the Osgoode subway station in Toronto. The victim, Lloyd Francis, received two gunshot wounds, one to his abdomen and one to his upper leg. Fortunately, he survived the attack. The primary issue at trial was identification. The Crown's case included some identification evidence beyond the testimony of Francis; however it was insufficient to establish the shooter's identity. Thus, Mr. Francis' evidence on the shooter's identity was essential to the viability of the prosecution. Mr. Francis initially identified the shooter in a KGB-style statement and then recanted that identification at trial. Although the trial judge admitted the KGB-style statement into evidence for the truth of its contents, ultimately the court found that the Crown failed to prove the identity of the shooter beyond a reasonable doubt and Mr. John was acquitted. Of note, at paragraph 46, Mr. Francis had been cautioned at the time he provided his sworn videotaped KGB-style statement that "any false statement could lead to charges of obstruct justice, public mischief or fabricating evidence". However, this case is one of those classes of cases identified above where the Crown lacked the ability to prove to the requisite standard which of Mr. Francis' statements was false and therefore could only prove the inconsistency.

It is understandable that Mr. Francis may have been frightened at the prospect of testifying against his shooter. At paragraph 96 the court notes Mr. Francis' testimony that "his neighbourhood is violent and he is afraid for his family and his own life". Thus, if there were an offence available which would capture Mr. Francis' conduct, the Crown would still have to consider whether such a prosecution is in the public interest, having regard to all the circumstances.

[6] [2010] O.J. No. 4738.

B. Special Considerations: Victims of Domestic Violence and other Vulnerable Witnesses

The Working Group recognizes that although many victims of violence and witnesses who fear retribution will be disinclined to testify against the accused based on their fears, victims of violence from an intimate partner face a unique combination of pressures when they are required to testify against their partner. These include but are not limited to financial, social, and cultural pressures. It is uniquely difficult to testify against the father of one's children or one's sole source of financial stability, particularly if other members of the community are actively discouraging participation with the court process. However, the Working Group is also mindful of the serious nature of many crimes which occur within intimate relationships and the vulnerabilities experienced by these same victims where the administration of justice is unable to offer protection.

The challenge associated with the recanting vulnerable victim is highlighted by the British case of *A* v. *R*[7]. "A", whom the British media referred to as "Sarah", complained that her husband had raped her. She subsequently withdrew her complaint, then re-asserted it, and then again took the position that the complaint was false. Proceedings against Sarah's husband were stopped (and were never recommenced). Sarah was prosecuted for having perverted the course of justice by making a false complaint of rape. Sarah then sought the advice of counsel and took the position that she had been raped. Sarah was then charged with two counts of perverting the course of justice. The first count was in relation to her claim that she had been raped, and the second in relation to her claim that she had not. Sarah pled guilty to the second count (perverting the course of justice by saying she had not been raped when in fact she had been. i.e. the recantation). The Crown withdrew the other count. Sarah was sentenced to 8 months in jail. That sentence was converted to a non-custodial sentence on appeal, but Sarah served 3 weeks in custody. Sarah has appealed the decision of the Court of Appeal, and a hearing before the UK Supreme Court is pending.

The case attracted a great deal of media attention. Further, in the wake of Sarah's case, fresh guidance was issued to the British Crown Prosecution Service as follows:

> Prosecutors "should avoid charging two alternative counts of perverting the course of justice in a case. It is not proper for the prosecution to charge two mutually inconsistent counts and then invite the jury to choose which one it prefers (*Tsang Ping-Nam v. R.* (1982) 74 Cr. App. R. 139)."[8]

C. Conclusion

In the Working Group's estimation, then, the adequacy of existing *legal* responses is seriously limited by the practical problems associated with lack of evidence in some cases of witness recantation. Notwithstanding the special concerns that might be taken into account in determining whether to prosecute witnesses who may also have been victimized, it is this type of scenario where the Working Group believes there to be the potential for significant mischief to the administration of justice. It is this mischief that guided the bulk of the Working Group's analysis.

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[7] [2012] EWCA Crim 434.

[8] UK Crown Prosecution Service Guidance Perverting the Course of Justice – Charging in cases involving rape and/or domestic violence allegations.

Informal Survey of Prosecutors and Police

Prosecutors

In an effort to gather more information about actual cases involving witnesses who contradict their previous statements while testifying in court, the Working Group undertook to informally survey prosecutors within their jurisdictions. The questions posed to prosecutors were:

1. *Where a KGB witness recants in a non-domestic violence case, generally speaking do you seek admission of the KGB statement?*
2. *Where a KGB witness recants in a domestic violence case, generally speaking do you seek admission of the KGB statement?*
3. *Where you seek admission of the KGB statement (for each type of case), generally speaking does it get admitted?*
4. *Where the KGB statement gets admitted (for each type of case), generally speaking do you obtain a conviction?*
5. *Where a KGB witness recants (for each type of case), generally speaking in what % of cases does the recant cause significant disruption to the trial? (here, disruption can include loss of confidence in the crown's theory of the case and/or delay and anything else that might be considered disruption from the Crowns perspective)*
6. *In what % of witness recant situations (for each type of case) did you seek to prosecute the witness in relation to their contradiction? What were the considerations you applied in determining whether to prosecute? If you experienced problems prosecuting, what was the nature of those problems?*
7. *In what % of cases (for each type of case) would you seek to prosecute if there was a distinct offence for in-court testimony contradicting a KGB statement?*

The survey produced a small but meaningful sample of responses. The responses revealed interesting results; certain questions elicited widely varying responses, while others generated very similar ones. Overall, the responses seemed to confirm concerns about the negative impact on the administration of justice and the trial process when a witness recants. They also left the Working Group members with questions about the degree to which police practices are consistent across various jurisdictions and/or across police departments and detachments. These questions caused the Working Group to try to obtain additional information directly from police (see below).

For instance, in response to Question 1, some prosecution respondents stated that KGB statements are very rarely taken by police in their jurisdictions, or are rarely taken in non-domestic violence situations, or that they personally had little personal experience with such forms of evidence. Other respondents seemed to indicate that in their work, they would generally consider introduction of a KGB statement, after taking into account the relevant considerations on a case by case basis. Relevant factors included the likelihood of conviction, the availability of corroborating evidence, and whether there was a public interest in proceeding without the cooperation of the witness.
In terms of the introduction of KGB statements taken in domestic violence cases (Question 2), responses varied somewhat once again, with a number of respondents indicating that the decision to seek introduction of the KGB statement may be made depending on relevant factors, such as the seriousness of the allegation, the seriousness of the recantation, the availability of other evidence,

whether the witness was also the complainant in the case, and whether the offender was a "target" offender with a history of violence.

The overall response to Questions 1 and 2 suggests that the taking of KGB statements is not part of typical police investigative practices, but remains relatively uncommon.

When asked about the likelihood of a KGB statement being admitted at trial where the witness does not adopt the statement (Question 3), the answers were fairly consistent; most respondents indicated that always or almost always the statement does get admitted. A few respondents indicated that the likelihood of admission was closer to 50%.

Question 4 asked, in cases where the KGB statement is admitted, how often a conviction results. Once again, answers varied:

- some respondents indicated that generally convictions do follow introduction of the KGB statement
- others stated that conviction was likely to follow only where there was additional corroborating evidence
- some indicated that convictions could follow in approximately 50% of cases

There was the greatest degree of consistency in responses to Question 5 which asks about whether, when a witness recants, the recantation causes a "significant disruption" to the trial process. All respondents replied that in all (or virtually all) cases, the trial process is indeed significantly impacted by the recantation.

Interestingly, when the follow-up question was asked (Question 6), i.e. whether an attempt was made to prosecute the witness for conduct which significantly disrupted the trial, virtually all respondents indicated that recanting witnesses are almost never pursued criminally for contradicting their previous statements at trial. One respondent suggested witnesses may be prosecuted in 10% of cases, but this was the highest cited percentage. Most respondents indicated that they were not aware of any such prosecutions, or were aware of only one. Many prosecutors cited "public interest" concerns with prosecuting the complainant in a domestic violence case, with one indicating they would only consider prosecuting in such a case if they believed that the original complaint was fabricated (and consequently not in cases where it is believed that the in-court recantation which was false. Some respondents did offer additional information. For instance, one indicated that it is difficult to prosecute because recantations are frequently ambiguous, i.e. recanting witnesses "rarely offer up completely contradictory stories" or the rejection of the previous statement is in the nature of "I don't recall" or "I was drunk".

Finally, Question 7 asked whether respondents would be inclined to prosecute in recantation situations if there were a distinct offence targeting a witness who, in court, contradicts a previous out-of-court statement made to police in compliance with the KGB process. Interestingly, the answers to this question were generally consistent, revealing that most respondents did not think they would lay charges for such an offence very often. Many respondents indicated somewhere between 0% up to a high of 30% (only one respondent suggested a likelihood as high as 30%, but only if the offence were hybrid). Many answers referred again to public interest concerns about

prosecuting victims, which could be seen as re-victimizing them or failing to show adequate sensitivity to pressure that some witnesses may come under. A few indicated that they would never prosecute a victim who recanted, but that they would consider prosecuting non-victim witnesses. One respondent suggested that the creation of an offence "might make the recantation less likely". Finally, a small number suggested that prosecution policies would be needed to help guide the application of such a new offence with reference to many of the sorts of factors and considerations that are currently taken into account in deciding how and whether to proceed with charges against witnesses.

Overall, then, the responses that the Working Group received substantiated concerns about the mischief that a witness causes when they fail or refuse to adopt previously given statements; in all or nearly all cases, prosecutors experienced a significant disruption to the trial process. It cannot be doubted that when such events occur, the administration of justice is negatively impacted by the conduct of the witness.

However, the responses also substantiated concerns and pre-occupations associated with prosecuting a recanting witness, notwithstanding the fact that their conduct causes serious disruption to the trial. Interestingly, when asked hypothetically about the possibility of prosecuting a recanting witness if there existed a distinct offence numerous respondents replied that they would never prosecute a recanting domestic violence victim, and in relation to other types of victims, the consensus seemed to be that such a prosecution would be contemplated in only a small percentage of cases.

Police

The findings of the survey of prosecutors led the Working Group to determine that additional information about the taking of KGB statements by police would also be helpful in its deliberations. In particular, the Working Group was interesting in obtaining information about whether there were differences in practices or treatment of different classes of witnesses from whom KGB statements are sought, such as witnesses who are victims of domestic violence relative to witnesses who are victims of other types of crime or who are not victims of the crime being investigated at all. The Working Group was also interested in the views of those surveyed as to whether, if an offence were to be created, it would impact upon police practices in terms of the taking of KGB statements, and whether it would impact upon witness cooperation with police. Members of the Working Group thus agreed to query police contacts in their jurisdictions about the taking of KGB statements from these different classes of witnesses.

Unfortunately, the Working Group was not able to obtain more than a few responses from police. The small number of responses left the Working Group with the view that additional consultation with police would be very helpful in further understanding the dynamics of taking evidence from witnesses in preparation for possible recantations.

Of the responses that were received, most respondents generally agreed that an offence targeting a recantation of a prior KGB statement:

- would not alter or affect police practices in terms of taking KGB statements,

- would not cause witnesses to be less cooperative with police investigations (with many noting that the KGB process already requires the witness to be cautioned about lying and potential offences that could apply); and
- would not diminish the likelihood or incidence of recantations

One respondent indicated a desire to see a specific offence of lying in a KGB statement, either where the lie can be proved or where the witness later gives contradictory evidence. This respondent felt that the specificity of the offence could be valuable over and above the current obstruct police charge. Another respondent felt that a new offence could potentially increase the number of KGB statements taken by police. And one expressed some concern that such an offence might discourage people from giving statements at all, and that if that were to happen, it would be disadvantageous as there can be investigative value to all statements, including those which are not true.

A number of police respondents (who appeared to work in the domestic violence area) expressed concerns about the possible creation of a new offence and indicated they would not see such an offence as being helpful. One respondent indicated "it is wrong to criminalize" a recantation by a domestic violence victim, who in their estimation recants because they cannot cope with the pressure created by the charges. Another respondent expressed similar thoughts, stating that in most cases, the complaint to police is legitimate, and the false recantations is influenced by a number of factors, such as financial pressure from the absence of the accused in the home and the detrimental impact of the prosecution on their children or themselves; there was concern about charging the victim with a crime in such circumstances.

Options

In light of the mischief that arises in a subset of KGB recantation situations - mischief that was further supported by the responses from the survey of police and prosecutors - the Working Group sought to identify possible options for addressing the problem.

Operational Options

The British case *R*. v. *A*, discussed above, raises the issue of whether creative charging practices could be used to charge a person who in testimony before a court recants a statement previously given to the police. The Working Group identified and considered two possible strategies for approaching cases of a witness recantation through creative charging of the offence of obstruction of justice:

1. Charge two counts each relating to one of the statements, i.e. an obstruct justice charge in relation to the KGB statement and an obstruct justice charge in relation to the in-court testimony.
2. Charge one count of obstruct justice which would cover both statements.

Strategy #1 Charge two counts each relating to one of the statements, i.e. an obstruct justice charge in relation to the KGB statement and an obstruct justice charge in relation to the in-court testimony.

The British Court of Appeal in *R. v. A.* upheld Sarah's conviction. The issue of whether it was lawful to charge an indictment containing mutually inconsistent counts was not addressed. However in *Tsang Ping-Nam v. R.* (1982) 74 Cr. App. R. 139, where the Crown also charged inconsistent counts in an effort to overcome the challenge of not being able to prove which of two inconsistent statements was false, the Privy Council noted that at the close of the Crown's case, a submission of no case to answer could properly be made as the Crown would have failed to adduce evidence and went on to hold at page 3:

> …however distasteful it may be to allow a self-confessed corrupt police officer to escape conviction for his gravely corrupt activities, it was wholly illegitimate for the Crown to seek to overcome their difficulties of proof by charging attempts to pervert the course of justice upon this alternative basis….

It is likely that, were a Canadian court to be faced with an indictment which charged two counts relating to inconsistent statements in the absence of proof that either was false, an application of no case to answer would be successful. Query whether a prosecutor in such a case would even have a reasonable prospect of conviction on either count.

The Working Group considered the degree to which the Supreme Court of Canada's ruling in *R. v. Thatcher* [1987] S.C.J. No. 22, could be invoked to assist in the prosecution of these types of cases. In *Thatcher*, the Crown presented two theories with respect to how Mr. Thatcher killed his wife: either he killed her himself or he hired someone to kill her. In interpreting the party provisions of the *Criminal Code* of Canada contained in section 21, the Supreme Court of Canada held it was open to the Crown to offer different theories of how the accused committed the offence because section 21 is designed to make the difference between aiding and abetting and personally committing the offence legally irrelevant (paragraph 68).

There are several factors present in *Thatcher* which suggest the principles applied in that case in allowing the Crown to argue alternate theories do not apply to situations where a witness provides testimony which is inconsistent with their KGB statement.

- In *Thatcher*, there was evidence to support both theories.
- Thatcher was charged with one count of murder. The alternate theories where different forms of committing the same offence as opposed to mutually inconsistent offences. By virtue of section 21, these two forms were legally identical and should be treated as one single mode of incurring criminal liability (paragraph 72).
- The court observed that had Mr. Thatcher been charged with two counts, one relating to each theory, then the Crown would have had to prove unanimity for each count to sustain convictions (paragraph 79).

Strategy #2 Charge one count of obstruct justice which would cover both statements

The Working Group considered whether the Crown could charge one count of obstruct justice with a time frame which encompasses both statements, with the *actus reus* of such a count being the giving of contradictory statements. The most significant challenge with such an approach would be establishing that the accused person had the intention to obstruct justice at some point during the period in which the statements were made. It was the view of the Working Group that it would be a very rare case where the Crown would be in a position to establish this.

The Working Group is therefore of the view that neither strategy is likely to be effective as a mechanism for prosecuting a recanting witnesses.

Legislative Options

A. New Offence of Contradictory statements

Given the existence of the offence of a witness giving contradictory evidence (section 136), the most apparent avenue for addressing the concern at issue is an offence that closely mimics section 136, namely an offence that captures the making of a statement in court which contradicts a previous statement made by the same witness to police in within a relatively formal KGB process.[9]

Elements

The Working Group considered what the basic elements of an offence would be to capture the conduct of concern:

- In-court testimony which contradicts a statement given to a police officer
- The statement to the police officer must have been sworn before a commissioner of oaths, recorded on video and include a caution regarding the importance of telling the truth and the potential for criminal liability if the statement provided to the police is false or subsequently recanted
- The offence could be hybrid
- It could require the consent of the Attorney General (as does current section 136) to ensure careful consideration before charges under this section are laid

The Working Group identified a number of issues for which additional consideration and reflection was still required:

  - How and whether to distinguish, in an offence, between statements given to police that meet KGB requirements, and statements given to the police that do not.

[9] In fact, the resolution that created the Working Group was an amended resolution, the original version of which proposed that an offence be created similar to section 136 (witness giving contradictory evidence) but applicable where it is a KGB statement that is recanted at trial.

- Whether an offence should apply to two contradictory KGB statements to police, a KGB statement that is contradicted at a preliminary hearing, or just a KGB statement that is contradicted in courtroom testimony.
- Whether consideration should be given to capture conduct of a defence witness who contradicts a statement previously made out of court, for instance, to the defence counsel.
- What the penalty for such an offence should be.
- Impact of section 13 of the *Charter* – there a need to ensure that the in-court statement would be admissible in a subsequent prosecution. Section 13 of the *Charter* states "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving or contradictory evidence".

Advantages

The advantages of such an offence could include:

- It would provide a mechanism to address persons who engage in duplicity which is offensive to the administration of justice. In this way it would avoid the perception of paralysis in the face of this conduct which could otherwise cause people to lose respect for the administration of justice and its institutions.
- To the extent that such an offence would cause witnesses to view the giving of statements to the police more seriously, an offence may improve the reliability of those statements and thus enhance the quality of police investigations.
- If it is accepted that this type of duplicity is serious criminal conduct, then that should be reflected in the *Criminal Code of Canada*.

Disadvantages

The Working Group also acknowledges that there are policy-related concerns with the creation of an offence directed at contradictory statements.

Using section 136 as a model, the very objective of such an offence would be to allow for prosecution and conviction upon proof of the contradiction and an intent to mislead but *without having to prove which statement was truthful, and which was false, and thus which statement was made with the intent to mislead*.

The main problem with an offence that is structured to allow for prosecution without requiring proof as to which statement was false or made with intent to mislead stems from the fact that such an offence would be complete upon the making of the second statement which contradicts the first. This would be so *even where that second statement was truthful*.

Imagine the scenario where the witness makes an untruthful statement to police during the investigation (e.g. a disgruntled spouse makes a false allegation that their partner sexually abused their baby). Upon the matter being pursued by police and Crown, the witness is called to testify.

They have a change of heart and wish to testify truthfully, but their truthful testimony will contradict the allegations they made to the police, bringing them squarely into the parameters of the offence.

There is something inherently disconcerting about a criminal offence which is completed upon a witness testifying truthfully. A related concern in this scenario is that the existence of the offence could serve to dissuade the witness from telling the truth (i.e. correcting previously false statements). Such an offence, at least in theory, could actually *frustrate*, rather than promote, the ends of justice. It could hypothetically influence a witness to maintain their original false story rather than face a charge for contradicting it, and potentially result in a wrongful conviction.

This cluster of concerns was noted by the UK Law Revision Committee when it studied the creation of an offence akin to section 136. The Commission noted the problems caused by the recanting witness, but largely out of concern for the issues describe above, came to the "reluctant but unanimous conclusion " that an offence based on the making of two statements (on oath) that contradict each other should not be created.[10]

It is true that s.136 permits prosecution in relation to a contradicted statement, but in this offence, all statements must be made in judicial proceedings, whereas the issue under consideration is sworn in-court testimony that contradicts out of court statements to police. It is arguable that conduct described in section 136 is more blameworthy or more potentially injurious to the administration of justice than the conduct under consideration by the WG. Reasons for this elevated blameworthiness could be:

- the two contradictory statements were both made in the most serious and formal of circumstances, namely a judicial proceeding
- both statements take place after the investigation is completed and charges are deemed warranted
- a witness is compellable to testify in a judicial proceeding, but is not required to provide information to police
- in the case of a criminal trial, an accused person is in jeopardy of being convicted and losing their liberty
- the witness' testimony is made under oath (and the oath is legally meaningful)

By contrast, the issue under consideration involves the contradiction in court of a statement made to the police. The original statement is made in a less formal setting (even where KGB procedures are followed) than in-court testimony. The witness is not legally compellable to provide information to the police, in other words, the first statement is voluntary. Statements given to the police during an investigation fall somewhere within the investigative process, meaning there is always still opportunity to correct the statement or for the police to gather additional evidence that calls into question the truthfulness of the statement, or which further bolsters its veracity. In other words, during the investigation, a suspect is not in legal jeopardy and there is no direct consequence to

[10] As well, in its report *Recodifying Criminal Law*, the former Law Reform Commission of Canada appears to have recommended that section 136 repealed; the offence does not appear in the reformulated offences in relation to the administration of justice. The recommendation for repeal was explicit in the study paper prepared for the Law Reform Commission on "Offences concerned with the administration of justice", which predated and informed the Commission's report.

another person (i.e. the potential future accused) that results from a false statement being given to the police. Finally, the legal "meaningfulness" of the swearing of an oath before giving a statement to police appears uncertain (as per the ruling in *Boisjoly,* discussed in the Annex under the analysis of perjury).

It is not clear how significant these distinctions are, but they do nonetheless suggest that it may not be perfectly straightforward to equate contradictory statements given in two court proceedings to a statement made in a court proceeding that contradicts a statement previously given to police in a KGB context.

In the other scenario, namely where the first statement made to police during the investigation is truthful and the recantation at trial is false, the application of an offence based on a contradiction does not give rise to the same policy concern as the first scenario. But it does carry its own problem. Very often, witnesses who recant at trial do so out of fear or other forms of pressure associated with incriminating the perpetrator of a crime at his or her trial. One category of such witnesses may be victims of domestic violence, the special circumstances of which have been set out above. Prosecuting these witnesses for their recantations is a very sensitive matter, and the prosecutors who were surveyed expressed a relatively limited willingness to prosecute in cases where the recanting witness was a victim.

Further, realistically, police do not take KGB statements except where that statement in some way inculpates a person who ultimately is accused of the crime. This means that in practical terms, the offence for the witness who recants will be complete upon the recantation of that accusation. The existence of an offence of making contradictory statements could have the unfortunate effect of bolstering the credibility of the recantation at trial, as defence counsel will undoubtedly argue that the witness' recantation is more worthy of belief despite the likelihood of his or her own prosecution. The existence of the offence could have the opposite and equally undesirable effect of diminishing the credibility of testimony *consistent* with the initial allegation at trial, as defence counsel will suggest that the witness maintains this story only to avoid prosecution.

All members of the Working Group recognize these potential policy-related concerns, but are not unanimous as to whether, on balance, it is preferable to address the mischief by creating a specific offence targeting contradictory statements in order to allow for prosecutions in cases where the witness recant leaves uncertainty as to the occasion on which justice was obstructed, or whether it is preferable to refrain from so doing in order to avoid criminalization of conduct that could dissuade a witness who had previously lied from telling the truth at trial. This is the key question on which the Working Group is seeking ULC Criminal Law Section's input.

B. Abolition of the Corroboration Requirement for Perjury

In recognition of the policy-related difficulties associated with the creation of a new offence as per above, the Working Group gave brief consideration to whether some legislative changes to existing offences could help to ameliorate the present situation. Specifically, the Working Group explored possibilities for modifying the offence of perjury. The focus was placed on perjury because it seems reasonable to conclude that the cases that are of the greatest concern to the

administration of justice are those where the original statement given to police is true, and the recantation in court is false.[11]

When the Working Group was engaged in its analysis of the adequacy of existing offences, discussion revolved around the corroboration requirement in the perjury offence as one of the biggest obstacles to the effective use of perjury to prosecute recanting witnesses.

The Working Group posits that the elimination of the corroboration requirement for perjury may be an option to consider. The corroboration requirement for perjury is one of the last remaining corroboration requirements in Canadian criminal law. At common law, and under earlier versions of *Criminal Code* offences, numerous offences required corroboration. Over time, virtually all such requirements have been eliminated. For instance, section 274 of the *Criminal Code* states that where an accused is charged with a specified sexual offence, "no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration". Although the word of one witness is sufficient enough to prove almost all offences, it is still not the case with respect to perjury. Many commentators query whether the existence of the corroboration rule partly explains why there are so few perjury prosecutions, and have expressed support for the removal of the corroboration requirement, as has the Law Reform Commission of Canada.

Removal of the corroboration requirement would likely have a beneficial effect on the Crown's ability to prosecute perjury, as perjury could be proved on the evidence of a single witness without corroborating evidence.

The perception of the Working Group (and those surveyed) is that most witness recantation cases involve what are believed to be true KGB statements to police, and false courtroom testimony (i.e. perjury). Given that the greatest impact on the administration of justice arises where the criminal allegations are true and the recantation false (as opposed to where the allegation is false, and the recantation true), it seems that perjury would often be an appropriate charge in cases where a witness recants, and that easing its prosecution would be of some assistance to the sorts of cases explored by the Working Group.

However, some members of the Working Group remain concerned that this option would not adequately address the cases where the Crown would still be unable to proceed with perjury charges owing to a lack of evidence to support the assertion that the courtroom testimony was false, as opposed to the initial statement made to police. Indeed, the very fact that the witness made two contradictory statements under oath may be sufficient to create a reasonable doubt on a perjury charge, even if perjury is made easier to prove.

[11] As per the discussion above (under the disadvantages of a new offence), it is difficult to maintain that the giving of truthful courtroom testimony that contradicts a previously given untruthful out-of-court statement frustrates the administration of justice. Rather, in this situation, the truthful courtroom testimony is best viewed as "correcting" the previous false statement. In this scenario, the witness could legitimately be prosecuted for making the false statement to police in the first place, but arguably (in the view of some members of the Working Group) ought not to face prosecution for testifying truthfully simply because they previously gave a false and contradictory statement.

As such, the Working Group may see merit in this option, but is not in agreement that it would address the full extent of the mischief.

Concluding Remarks

Throughout its examination of the issues, the Working Group was struck by the complex and multi-dimensional nature of the problem it was tasked with exploring. A nation's criminal justice system cannot function without the participation of its citizenry as witnesses to crime. And yet, as individuals, witnesses are vulnerable to a myriad of pressures which can flow directly from their willingness to assist in the detection and investigation of crimes. These pressures might lead witnesses to behave in ways that diminish rather than increase the system's ability to perform its function. Whether there are legal or operational strategies that could be employed to better protect the criminal justice system from witness malfeasance is a difficult problem to solve for many reasons, not least of which is that the witnesses whose conduct can frustrate justice are sometimes the very people the system is seeking to protect. Owing to such complexities and challenges, the Working Group was not able to come to a unanimous set of recommendations, and instead is looking forward to engaging all members of Uniform Law Conference of Canada in the discussion.

Annex 1 - Analysis of Applicable Offences

1. Perjury (14 year maximum)

> **Section 131.** (1) Subject to subsection (3), every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.

Elements of the offence

The requirements for perjury under section 131(1) can be broken down as follows:

- Make a false statement
- Knowing it is false
- Under oath
- With an intent to mislead

Section 131(3) further requires that the statement be made by a person who is specially permitted, authorized or required by law to make the statement.

And finally, under section 133, no person shall be convicted of perjury on the evidence of one witness unless the evidence is corroborated in a material particular by evidence that implicates the accused (see *Doz* (1984) 12 C.C.C. (2d) 200 Alb CA).

Parliament clearly views giving false information in court as a serious offence. This is not only reflected in the penalty for the offence (maximum 14 years imprisonment) but also in the requirements to obtain a conviction. Although perjury often conjures the image of the shady witness lying on the stand or the unscrupulous lawyer telling the witness to bend the truth, perjury can actually be committed in 2 separate scenarios; by lying in court or by lying in an out-of-court statement.

In either scenario, there must be intent to mislead; there cannot be a conviction for perjury on error or carelessness. For example, in *Calder* v. *R*. (1960), 129 C.C.C. 202 (S.C.C.), the accused testified to events at divorce proceedings for which he had no involvement of a situation that was not significant to him and a year after it had happened. He was convicted of perjury even though he asserted that his evidence had been an honest statement of what he could remember. His conviction was overturned by the Supreme Court of Canada who unanimously found that there was no evidence of any intent to mislead, or knowledge of the falsity of the evidence given.

The Court held that error alone affords no basis for the inference of the intent and knowledge necessary to support this charge. In *obiter*, five of the Justices went on to state that for a conviction of perjury, the prosecution must prove beyond a reasonable doubt three matters:

1. Evidence given by the accused is false in fact;
2. Accused knew the evidence was false when he gave it; and
3. Accused gave evidence to mislead the court.

The court also stated that if there was evidence to support findings that the appellant had knowingly given false evidence (under points 1 and 2 above), in the absence of other evidence as to his intention, the court could have properly drawn the inference that he intended to mislead the court.

This was certainly the case in *R*. v. *Wolf* (1974), 17 C.C.C. (2d) 425, where the accused confirmed his witness statement prior to taking the stand at the preliminary inquiry, but once in court said he could not remember most of what was in his statement. In appealing his conviction for perjury, the accused argued that his failure to give any affirmative response by saying he could not recall the events could not prove an intent to mislead the court when there was no other evidence to refute his lapse of memory. In rejecting this argument, the Supreme Court found that his intent to mislead could be inferred from the fact that he had just confirmed the contents of his out-of-court statement prior to testifying thereby suggesting that his failure to remember was dishonest and deliberately asserted to prevent the Court from arriving at a decision upon credible evidence. The court further stated that a person cannot escape a conviction of perjury by merely giving negative evidence (e.g. "I can't remember") when that evidence has been found to have been false and knowingly so. The quest for truth, so far as a court can discern it from evidence, can be as easily frustrated by false negative evidence as by false positive evidence. In this sense the falsity has positive consequences in either event.

A witness lying in court is a simple and straight-forward concept to comprehend but, it is the witness lying in an out-of-court statement that is relevant to the Working Group's examination. Unfortunately, the law that has developed in this area is more complicated with subtleties that are not always clear.

The seminal case in this area is *R*. v. *Boisjoly* (1971), 5 C.C.C. (2d) 309 from the Supreme Court of Canada. Mr. Boisjoly was being investigated for counselling M to give perjured testimony in L's preliminary inquiry. When the police questioned Boisjoly with respect to these allegations, he was not under charge and had no obligation to speak to them or to give a statement. He subsequently signed a document containing police questions and his (exculpatory) answers and certified its accuracy by affidavit. The Crown alleged that Boisjoly lied in this document and he was convicted of perjury. The conviction was overturned in the Quebec Court of Appeal because they found that the "statement" provided by the accused was not a statement which the person making it was "permitted, authorized or required by law" to make, by affidavit or orally under oath. This was confirmed by the Supreme Court, which pointed to historical developments in the law of administering and receiving oaths and affidavits voluntarily taken and made in proceedings which were not the object of a judicial inquiry, or in any way required or authorized by a statute. This background led the court to the conclusion that the legislator considered oaths which are not permitted, authorized or required by law, to be unnecessary, useless and as having no legal meaning or scope.[12] The court justified this by suggesting that the legislator could not

[12] This aspect of the *Boisjoly* decision was cited by the minority in KGB as a reason to omit the requirement proposed by the majority that the statement made to police be under oath. Cory J for the minority wrote: "With the greatest of respect for the contrary view, to make the oath one of the initial requirements for admissibility of a prior statement when no criminal consequences may be attached to the oath would seem to be an exercise in hollow formalism". Issues with respect to the "legal meaningfulness" of the oath taken by KGB witnesses arise as well in the

have intended an offence carrying a penalty of fourteen years imprisonment, based on affidavits that are not permitted, authorized or required, and have no legal meaning or scope in themselves. This issue of legally significant sworn statements was also addressed in *R.* v. *Hewson* (1977) 35 C.C.C. (2d) 407 (Ont. CA). In this case the accused swore an affidavit for his bail review hearing saying that he did not have a criminal record even though he clearly had a prior criminal conviction. The accused was acquitted of perjury due to a technicality, but the Court did clarify that his affidavit did not have legal significance within the meaning of *Boisjoly* until it was actually filed or used at the bail review hearing.

The issue was discussed more recently in *R.* v. *Seath* (2000) by the Alberta Court of Appeal. In *Seath*, a police officer was convicted of perjury when he swore an affidavit as part of divorce proceedings that turned out to contain false information. Although the conviction was overturned and a new trial ordered on other grounds, the Alberta Court of Appeal also discussed whether the affidavit was "specially permitted, authorized or required by law" and found that although it was never filed nor was the accused ever cross examined on it (as in *Hewson*), it still met the test of having legal scope and meaning. This was because the Alberta Rules of Court permit affidavits of the kind and for the purpose sworn by the accused. Although the affidavit was not filed, it was clearly made in a judicial context. It could not be said that the affidavit was done "in proceedings which are not the object of a judicial inquiry, or in any way required or authorized by any statute. The affidavit had both legal scope and meaning and cannot be properly characterized as unnecessary and of no legal significance... It was intended that the affidavit, whether filed or not, and whether examined upon or not, be relied upon."

Whether or not a statement falls into the perjury category seems from a review of the law to be a contextual determination. The context contemplated by the courts includes both the content of the statement and the circumstances under which it was taken and intended to be used.

What is the potential application of s.131 to the recanting KGB witness?

The question of whether someone could be charged with perjury for recanting on a KGB statement is not simple to answer. First it would have to be determined which statement is false – the original out-of-court KGB statement, or the subsequent recantation? As can be seen from the analysis above, prosecuting someone for lying in court is relatively straight-forward even if not easy to prove under the section.

But if the Crown alleges that the original KGB statement is false, then it has to be determined if the KGB statement is "legally significant" under the definition of *Boisjoly* and the subsequent case law. A KGB is a sworn statement given to a person who is authorized to receive it. Whether it is made by a person who is permitted, authorized or required to make the statement is the issue that is still open for debate and will depend on the particular circumstances of why and when the statement was made. One could argue that the legal meaning comes from the fact that the statement is made with the "object of a judicial inquiry" (as in the case of *Seath*). But conversely it could equally be argued that the test has not been met because the statement has not

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Working Group's consideration of a possible new offence for contradictory statements, and will be addressed later in the report.

been used or filed and at the time of the statement, the accused may not even be charged with an offence. Further complicating this analysis is section 134 of the *Criminal Code* which states:

> (1) Subject to subsection (2), every one who, not being specially permitted, authorized or required by law to make a statement under oath or solemn affirmation, makes such a statement, by affidavit, solemn declaration or deposition or orally before a person who is authorized by law to permit it to be made before him, knowing that the statement is false, is guilty of an offence punishable on summary conviction.
>
> (2) Subsection (1) does not apply to a statement referred to in that subsection that is made in the course of a criminal investigation.

The other important issue remains that even if one could technically prosecute someone for perjury for simply making a false KGB statement, practically this would still be a difficult task. It would have to be proved – with corroborating evidence – that the person lied in their statement. Many of the cases which ultimately rely on the taking of KGB statements have witnesses with existing concerns about their level of cooperation or involvement. Corroboration in that context would be a difficult if not impossible task.

2. Witness giving contradictory evidence (14 year maximum)

> **Section 136. (1)** Everyone who, being a witness in a judicial proceeding, gives evidence with respect to any matter of fact or knowledge and who subsequently, in a judicial proceeding, gives evidence that is contrary to his previous evidence is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years, whether or not the prior or later evidence or either is true, but no person shall be convicted under this section unless the court, judge or provincial court judge, as the case may be, is satisfied beyond a reasonable doubt that the accused, in giving evidence in either of the judicial proceedings, intended to mislead.

Elements of the offence

The essential elements of this offence are:

- A person must have on two occasions been a witness in a court proceeding
- The evidence given at the two proceedings must be contradictory
- The person must have intended to mislead

Several terms used in section 136 are defined in section 118 of the Code. "Witness" is defined in s.118 as being a person who gives evidence under oath in a judicial proceeding. "Judicial proceeding" is defined in s.118 principally a proceeding before a court or under the authority of a court of justice. The maximum penalty for the offence is 14 years.

Although s.136 requires an intent to mislead, it appears that it need not be proved which of the two contradictory statements was true and which was false. This would likely operate as a prosecutorial advantage where the Crown does not know, or can not prove, which of the two statements was true and which was false.

Section 136 also requires consent of the Attorney General for a prosecution for this offence.

What is the potential application of s. 136 to the recanting KGB witness?

Section 136 appears not to apply in the circumstance, because the KGB statement is not made by a "witness" nor is it made in a "judicial proceeding" within the meaning of those terms in the context of s.136.

3. Fabricating evidence (14 year maximum)

> **Section 137.** Every one who, with intent to mislead, fabricates anything with intent that it shall be used as evidence in a judicial proceeding, existing or proposed, by any means other than perjury or incitement to perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Elements of the offence

In *R.* v. *Carroll*, [2009] O.J. No. 5299, a ruling on the Crown's request for a charge on post-offence conduct, the Court discusses the issue of fabricated evidence, noting that the Court of Appeal for Ontario has addressed the issue by saying that courts "should proceed with great care in considering the use that may be made of disbelieved statements of an accused whenever they are made" (*R.* v. *O'Connor* (2002), 62 O.R. (3d) 263, Ont.C.A., at para. 27).

As to the elements of the offence, the court in *Carroll* states, at paragraph 4, that "to properly make a finding of fabrication we need: first, the false statement by an accused; second, evidence discrediting that false statement; and finally, independent evidence that supports a finding of fabrication, that is independent of the evidence discrediting the false statement."

With respect to what might constitute independent evidence discrediting the false statement, the Ont. C.A. in *O'Connor* explained, at para. 26:

> The circumstances in which a false statement is made may show an intent to mislead the police or others or an intent to deflect suspicion and may be evidence of a conscious mind that he or she has committed an offence.... If those circumstances tend to support a conclusion that the accused made a false statement because he or she was conscious of having committed the offence, then those circumstances may be used as independent evidence of fabrication.

In *Carroll*, the Ontario Superior Court also stated, at para. 3, "[t]he impermissible reasoning is that the falsity of the statement necessarily implies positive proof of fabrication."

Lastly, it has also been held that a person cannot be convicted of fabricating evidence where the fabricated evidence is inadmissible at the trial in which it was originally tendered (see: *R.* v. *Boyko* (1945), 83 C.C.C. 295 (Sask C.A), where the accused had signed notes alleging that she had been kidnapped by a certain person but the notes would not be admissible in evidence at the trial of the person alleged to have committed the kidnapping).

What is the potential application of s.137 to the recanting KGB witness?

Section 137 may be difficult to invoke against the recanting KGB witness for the following reasons:

1. Is there a false statement by an accused and an intent to mislead? It would appear from the wording of the offence that the Crown would need to show that it was the KGB statement (as opposed to the testimony given in court) that was fabricated, and that it was fabricated with intent that it be used as evidence in a judicial proceeding. However, in recanting KGB witness cases, this is not usually the case. Usually, it is the KGB statement that is true and subsequently recanted during in court testimony, which testimony is untruthful.

2. Is there evidence discrediting that false statement? The fact of the KGB statement and the court testimony being different would be evidence that at least one of them is false, though as the court in *R*. v. *Carroll* pointed out, the falsity of the statement does not necessarily imply positive proof of fabrication. The Crown will also need evidence of intent to mislead in a judicial proceeding.

3. Is there independent evidence that supports a finding of fabrication that is independent of the evidence discrediting the false statement? It is unknown if the Crown would have this type of evidence. Much would depend on the circumstances of how the statement was given (i.e. if it was given to avoid being charged etc.). It would likely be very difficult to find independent evidence of fabrication of the KGB statement.

On the other hand, if the Crown could show the testimony given in court was false, then likely the person would be charged with perjury instead of fabricating evidence.

4. Obstruction of justice (10 year maximum)

The only possible applicable portion is s. 139(2) which states:

> **Section 139.** (2) Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Elements of the Offence

The expression "the course of justice" includes, but is not limited to, judicial proceedings, existing or proposed. Thus an attempt to obstruct, defeat or pervert a prosecution decision which the person involved contemplates may occur, notwithstanding that no prosecution has been made, may be an obstruction of justice: *R*. v. *Spezzano* (1977) 34 CCC (2d) 87 (Ont. C.A.).

The *mens rea* is stated to be "willfully", i.e. the Crown has to prove an intention to bring about the proscribed consequence, *R*. v. *Buzzanzga* (1979) 49 CCC (2d) 369 (Ont. C.A.).

Where a person tried to persuade another to make a statement about another offence, there must be proof that the accused knew the statements he suggested be made were false.

There is no necessity to prove justice was in fact obstructed, because ss.(2) is a substantive "attempt" offence. The essence of it is that the act in question have a "tendency" to obstruct justice and be done for that purpose: *R*. v. *May* (1984) 13 CCC (3d) 257 (Ont. C.A.).

What is the potential application of s. 139 to a recanting KGB witness?

Lamer CJ in the original case that led to this issue, *KGB*, stated at para 93 that the declarant in a KGB statement is exposed to prosecution under sections 137, 139 and 140 so clearly s. 139 is theoretically available.

The problem, as always, lies with the issue of which statement is false, the KGB or the in court testimony. There is this difference. If a prosecution under s. 139 were brought based on a contradiction between the KGB and the testimony, the Crown might be able to allege that although it was not possible to prove which of them was false, one of them clearly was and so the declarant was attempting to obstruct justice either in the KGB or in his/her testimony.

The issue then would be, can the Crown proceed on a charge where it cannot prove specifically how the offence took place. The answer may be that that is permissible (Ewaschuck, 2nd Ed, para 17.4030 says a jury (i.e. trier of fact) can come at a verdict for different reasons or on different theories of liability and cites several cases including: *R*. v. *Thatcher* (1986) 24 CCC (3d) 449 (Sask. C.A.) affd (1987) 15 CR 652.).

However, there must be a "single set of essential elements" of the offence on which unanimity can be reached. It is not open to a trier of fact to convict on the basis of "differing elements or ingredients" of the offence unless they involve alternative modes of the same offence. The offence charged must be framed so there is only a "single set of elements" on which the trier of fact can be unanimous, *R*. v. *Sharpe* (2007) 219 CCC 3d 187 (B.C. C.A.) paras 27-30.

That said, in *R. v. KGB* Cory J. noted, at paragraph 157, a few cases where persons have been prosecuted for obstruction of justice as a result of giving one version of the facts to the police, while offering a different version when testifying as a witness. In one such case, *R. v. Gravelle* (1952), 103 CCC 250 (Ont Mag Ct), the accused was charged with attempting to obstruct, pervert or defeat the course of justice after he came to court and stated under oath that the statement he had given to the police (and signed) was not true. The court stated that, "I have to believe that it was substantially the truth that he had told the police...", and convicted him of the offence. In *R. v. MacGillivray* (1971), 3 Nfld & PEI R. (PEI Co Ct), the accused also told an entirely different story in court than that which he originally told the police and was charged with perverting the course of justice. In this case, the court does not give any indication as to which of the statements it believes were false before convicting the accused of the offence. The court does comment that the accused had encouraged the police and the Crown to take steps and undertake actions which they would not have considered taking had they not received from the accused the voluntary information which he gave them.

There is also the practical point that while alternative theories can be advanced, a jury is liable to say "if the Crown cannot be sure how the offence was committed, how can we?", and given the onus of proof, that would be a serious obstacle.

5. Public mischief (5 year maximum)

> **Section 140.** (1) Every one commits public mischief who, with intent to mislead, causes a peace officer to enter on or continue an investigation by
>
> (*a*) making a false statement that accuses some other person of having committed an offence;
>
> (*b*) doing anything intended to cause some other person to be suspected of having committed an offence that the other person has not committed, or to divert suspicion from himself;
>
> (*c*) reporting that an offence has been committed when it has not been committed;

There is very little jurisprudence interpreting the elements of this offence. However, the offence is drafted in a relatively clear and straightforward manner, with the elements plainly identified in the wording of the offence. The offence contains the following elements:

actions: accused must do one of the acts enumerated under subsections (a) to (c).

- Paras (a) and (b) describe different ways in which the offence can be committed relative to making false accusations against a particular person, ranging from words to actions or some combination of the two; para (b) also describes actions that do not directly accuse another, but are done to divert attention away from oneself.

- Para (c) describes the reporting of crimes that have not been committed.

- Depending on which subsection is alleged, there are additional elements that need to be proved, e.g. that an offence was not in fact committed (re 140(1)(c)) or that the person alleged to have committed it did not in fact commit it (re 140(1)(a) or (b)).

- The report or allegation of wrongdoing need not be made to the police directly, but can be made to another source that is likely to forward allegations on to police, eg. corrections authorities, children's aid society, guidance counsellor (*R.* v. *Delacruz*, [2009] O.J. No. 5536).

causation of consequence: the actions of the accused must cause a peace officer to begin or continue an investigation.

- In *Stapleton* ((1982), 66 C.C.C. (2d) 231 (Ont.C.A.)), the court suggested that in relation to the causation element, the test should be whether there is a "substantial" connection between the statements or allegations of the person and the police response of entering upon the investigation. This test would presumably

also apply where it is alleged that an investigation was "continued" instead of "caused".

- If a false statement made to a police officer (e.g. that the accused's car, found to have been in an accident, was stolen and therefore driven by the thief and not the owner) is not believed, then causation is not made out and the charge must fail. However, in these circumstances, the accused may be guilty of attempting to commit public mischief (*R.* v. *Mitchell*, [1994] N.B.J. No. 177; *R.* v. *Whalen* (1977), 34 C.C.C. (2d) 557). Such facts may also support a charge of obstruction of justice.

mens rea: the accused must intend to mislead.

- The wording of the offence is silent as to who the accused must intend to mislead.

- This issue arises in cases where the allegation is first made to a person other than a peace officer, such as a guidance counselor, a social worker or a corrections officer. Most cases suggest the intent must be to mislead a peace officer, even where this is accomplished through initially making the false allegation to an intermediary who is not a police officer.

- While there may be no direct evidence of intent to mislead, in addition to the principle that a sane and sober person means to do what he actually does, indirect and circumstantial evidence may also allow the trier of fact to infer an intent to mislead, e.g. repeated and escalating complaints (*Delacruz*).

- However, in *R.* v. *McQuarrie* [1992] M.J. No. 72, the accused made anonymous allegations to a child welfare agency that a woman was sexually abusing her child. The accused's motive was to "get even" with and cause difficulties for the mother, who owed the accused a debt. The court found that the accused could clearly be presumed to have intended that an investigation be carried out by the agency, but was left with a reasonable doubt about whether she could also be presumed to have known, and intended, that her actions would result in a police investigation.

Exaggerated allegations or allegations of one crime when in reality it was another crime that could be charged are difficult factual cases which are likely to give rise to a reasonable doubt: *R.* v. *Dueck* [2011] A.J. No. 137.

Also difficult to resolve on the facts are cases which involve partially true and partially false statements, and which are therefore partially believed by the accused. In *McQuarrie*, the court held that, if the offence is to be made out, it must be satisfied that it was the portion of the statement that the accused admitted was false which actually caused the investigation to be commenced or continued. The intent to mislead could not be proved with respect to the portions that the accused believed were true.

Finally, it maybe interesting to note that as the false statement alleged to be the subject-matter of a public mischief charge forms part of the *actus reus* of the offence, the confession rule requiring proof of the voluntariness of any incriminating statement made to a person in authority is not applicable to the introduction of such a false statement (*R*. v. *Stapleton* (1982), 66 C.C.C. (2d) 231 (Ont. C.A.)). Similarly, special rules under youth justice legislation for the taking of statements from young people are not applicable in the case of false reports of crime (*R*. v. *J.J.* [1988] O.J. No. 1247).

What is the potential application of s.140 to the recanting KGB witness?

As the false allegations must cause an investigation to be commenced or continued, the offence of public mischief could apply to the recanting witness in circumstances where it was the KGB statement (as opposed to the recant of the statement made during court proceedings) that was false. The Crown would also need to prove that the allegation were false (which requires proving, for instance, that an offence that was alleged to have been committed was not in fact committed or that a person alleged to have committed it did not in fact commit it). Finally, the Crown would have to prove the intent to mislead.

Public mischief would not be chargeable in cases where the Crown considers that the KGB statement was true and the recant at trial false, or where the Crown is uncertain or has insufficient evidence to prove the falsity of the KGB statements.