EVIDENCE OF THE FINANCIAL CRIME:

A POLICE PERSPECTIVE

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I. Introduction

This discussion paper will provide insight into financial investigations as they are conducted in Canada. Its purpose is to provide interested persons involved with development of laws, procedures or policies pertaining to financially motivated crimes some insight and assistance when developing their systems. It is intended that this paper be used as an instructional tool. It should also be noted the content is representative of experiences which I have encountered during my twenty-five years as an investigator and senior manager of the Royal Canadian Mounted Police. Practices as described or techniques portrayed represent personal experiences and any opinions expressed are those of the writer and do not necessarily represent policies of the RCMP.

Financial or economic crimes are founded in one human trait: greed. Whether the investigation originates from a white collar, drug or customs offences, the basic elements and characteristics of the successful investigation are all the same. This paper will discuss various pertinent aspects of

1. types of evidence;
2. methods of investigation;
3. protection of the evidence;
4. presentation of the evidence.

Finally it will provide an overview of some emerging trends.

BASIC RULE OF EVIDENCE:

Best Evidence:

> ... The crown or the state is obligated to provide to the court original documentation or bring to it, the witness who has direct knowledge of the event. If the "best evidence" is not available, the crown must explain what efforts have been made to produce the original form and why it is not available. The court will then decide whether to accept the lesser of the sources of evidence.

1. TYPES OF EVIDENCE

During any criminal investigation the existence of direct and circumstantial evidence will determine whether the investigation and ultimately the criminal prosecution will be successful. Canadian criminal law under our adversarial system places the burden upon the Crown to prove "beyond a reasonable doubt" that the subject person intentionally committed the alleged crime.

The judicial process, including the investigation, must be conducted within the requirements of the Canadian Charter of Rights and Freedoms (Charter)[1] and the common law that has evolved during the years since it's repatriation in 1982. One basic right articulated in the Charter has had a dramatic effect on Canadian policing.

> (S. 8) "...that everyone has the right to be secure against unreasonable search or seizure."

Should there be deemed an abuse of one's rights by an investigating officer or the crown, the evidence obtained shall be excluded from the trial process. One only exception to their right exists, that is, where it is deemed that exclusion of this evidence would not bring the administration of justice into disrepute.[2] This determination, however, is in the hands of the court and it is only

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[1] Canadian Charter of Rights and Freedoms is part of the Constitution Act, 1982.

[2] Section 24(2), Canadian Charter of Rights and Freedoms

under exceptional circumstances that it is invoked. Charter rights are fundamental to Canadian criminal law and their evolution have had a significant impact on the way police officers conduct their investigation. Much jurisprudence has evolved and many cases exist which have defined the allowable limits to which officers may proceed in the conduct of their case. Well trained officers follow these legal requirements and bring to the court two (2) primary types of evidence: a) physical and b) viva voce (verbal statements).

1.1. PHYSICAL EVIDENCE

Physical evidence has a broad meaning and for our purposes, I have included both tangible and intangible items. The commission of financial crimes most frequently significantly precede the criminal investigation. By the very nature of this type of offence, it automatically places the investigator in a disadvantaged position as they will be required to complete an "after the fact" investigation and seizure. Recovery of any stolen or defrauded assets becomes even more difficult. It is a rare occasion that a financial crime investigator will be in a position to affect an arrest of the suspect while in the commission of the offence, although it does happen. This means that investigators must be extremely well trained and tenacious in the pursuit of the evidence. Investigating officers will pursue an investigation and conduct searches and interview of various persons. The results provide evidence in the following forms:

a. Scenes of Crime - evidence incidental to arrest

In cases that involve drug/customs smuggling offences the opportunity to effect an arrest at the commission of the offence is significantly more likely. Normally, investigators of the substantive offence eg. drugs or customs smuggling, work in tandem with financial investigators from Proceeds of Crime Sections or designated financial investigators. In these instances, where evidence is located at the search or arrest site, investigators must be aware of its critical importance. Evidence such as notes, score sheets or correspondence will tie the criminals to the offence and potentially the location of related assets. Its relevance can be most significant because it may further link the suspect directly to the offence and an asset. Evidence obtained through basic police investigation such as drug traces, fingerprints, handwriting samples etc. may be the conclusive bit of evidence that provides the final element to convict the suspect.

b. Documentary

As most financial crimes investigation is reactive or historic in nature, documents generated prior to or during the commission of that offence are essential and normally make up

the majority of evidence. Bank records, accounting records, legal documents or instruments are normally the basis for the case. They may very well prove the circumstances around the alleged offence, but they may not necessarily provide all the essential elements of the criminal charge, eg. the intention of the subject. We must never overlook obvious personal records, items like correspondence , notes in day timers or mobile phone records, these may be the evidence needed to prove the element that was not readily apparent in the books and records.

Documentary evidence may be generated also from electronic records. Banks don't always keep hard copies, much is recorded on data bases. You must be prepared to download the necessary files and introduce them through appropriate legal means.[1]

1.2. VIVA VOCE EVIDENCE

The Canadian criminal justice system is founded on common law. A basic element of this system is the provision of live verbal evidence. This sort of evidence is deemed by the court to be fundamental and should be sought first in any given case. In only special cases will alternate methods of delivery of the evidence be allowed eg: dying declaration. Laws pertaining to the use of video or satellite links today have been amended to allow long distance or international hookups and further for those statements to be introduced into court. These changes are very new and as yet not commonly used.

The importance of this axiom is exemplified by the fact that even if a witness has given a statement to police, the witness must come to court to give their evidence before the court. The defendant must have an opportunity to cross examine all witnesses. Failure by the crown or the state to provide this evidence may lead to acquittal.

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[1]Sec.29 Canada Evidence Act, R.S.C. 1985, C-5 provides for the introduction of an affidavit from a financial institution employee who can state the records were business records made in the ordinary course of business affairs of the institution, made in usual and ordinary course of business and record was in custody or control of the financial institution.

1.2.a. Competence and Compellability

Gathering of evidence has two stages, one investigative and secondly, court. During the investigative stage police cannot compel a witness to cooperate. They may use reasonable pressure tactics eg. other outstanding criminal charges etc. but the witness or suspect is not obligated to speak to the investigator.[2] In administration matters such as Bankruptcy proceeding answers can be compelled. Should this situation lead to further criminal action, the statements made cannot be used against the suspect. Sec. 13 of the Charter protects individuals against self-incrimination.

Rules of evidence determine if a witness is "competent" to give evidence before the court. Marital status and mental capacity are but two elements considered in the competency tests. It is recognized that under certain circumstances a witness may not be capable of testifying. This is usually determined by legal or medical means. Once a witness has met the test standards and is deemed competent, the second test that of Compellability is applied. Here again legal criteria determines if the witness is capable of being compelled before the court. Often involved in this determination is the location and financial capability of the witness. When a witness is outside the legal jurisdiction of the court their attendance will be voluntary. Means exist however for the court to go to the witness when these previous factors prevail. This subject will be discussed in a later part of this paper.

1.2.b. Credibility / Influences on the Witness

Of significant concern to the investigators and prosecutors is the credibility of the witness. Often in high profile cases, particularly involving organized crime figures, witnesses are intimidated or threatened. Police are responsible for the initial evaluation of the threat against the witness and ultimately their protection as dictated by legislation, the Witness Protection Act , RSC 1997. Should the police and the prosecutor determine that the individual is of significant importance to the successful prosecution, several different factors must be evaluated. Often a significant distinction exists here, witnesses previously involved in criminal activities leading up to the prosecution and now agreeing to give evidence for the crown are much different from those witnesses involved in day to day cases. For the criminal turned witness a threat/risk investigation is conducted to determine the personal commitments and liabilities as well as the potential threat against their life. Also, family situations are considered as well as business involvements.

All witnesses interviewed by police and later by prosecutors, must be evaluated as to their credibility. We must be able to make a good determination as to whether or not that witness

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[2] Mutual Legal Assistance in Criminal Matters Act, R.S., 1985, c. 30 (4th Supp.) has an exception to this statement and can compel a witness to provide a statement.

is telling the truth. Reasons for the testimony are often challenged by the defence as and personal gain by the witness are all relevant, and will be addressed during the judicial process. The judge and/or jury will determine the credibility of a particular witness. Should they find the witness incredible, both the prosecution and the police investigator themselves would be criticized for poor judgement.

Police must determine if there are external pressures that are or may be applied. Motives for testimony must be evaluated. They can work for or against investigators, threats or extortion against a witness will affect any decision to use a witness. Likewise, does a witness have some underlying interest like revenge against an accused and will they lie to have that person convicted. In some cases, the witness may have to be protected. External forces are not the only pressures that may be applied to witnesses, there may be internal as well. The Crown may charge a person, then offer to withdraw the charge and offer extended immunity from prosecution of the offence. Granting of immunity is infrequent and can only be provided by the prosecutor. A more frequent occurrence is reduction of sentence for cooperation.

Defence counsel will always attempt to discredit the witness who has been granted immunity. It will be said that the witness has improper motives, is self serving and will be accused of being non-credible. This capability however to offer immunity can be a very effective tool to get necessary verbal and sometimes physical evidence to convict a more significant subject. The credibility issue is vital to effective witness management and the continued integrity of the judicial system. In Canada, however, where jail sentences are not viewed as a deterrent to crime, this tool is less effective and consequently accused persons are less inclined to take advantage of such offers.

2. METHODS OF GATHERING EVIDENCE

Various methods of gathering both physical and verbal evidence of criminal acts exist. Each is linked by a common thread, integrity. The evidence gathered must be pure and unaltered and it's continuity of possession from its acquisition to presentation in court unbroken and untouched. The process of evidence collection must be documented and evidence made available to certify its veracity. Collection of evidence and its related processes are broken down into several categories:

2.1. VOLUNTARY RELEASE FROM A WITNESS / SUSPECT

The victim of a crime most often provides the first point of contact. Normally the victim will provide investigators with a detailed written statement of their allegation and necessary supporting

documentation. In complex fraud or white collar crimes, the victim often provides accounting audit results and professional certification of the offence that is being alleged. The police, and ultimately the prosecutor, must review this evidence and determine its credibility. Investigators must always be prudent and remember there are two sides to every story. The investigator is obliged to be fair and objective in evaluation of the facts, from both sides. Should proper precautions not be taken at the outset of the investigation and significant evidence to the contrary be presented to the court once a charge has been laid, the case may not only be dismissed, the prosecutor and the police may be sued civilly for malicious prosecution and/ or negligent performance of duty.[1]

Police investigators undertake initial steps by collecting voluntary statements and physical evidence that witnesses will provide. This initial evidence normally establishes "grounds" for further investigation and some corroboration of the facts presented by the complainant/victim. Very often continued investigation will lead to new witnesses. They may be approached to provide evidence voluntarily or by execution of search warrants. Once a prima facia case has been established investigators may well want to avoid seeking release of documents by voluntary means because their continued possession in your presence will always be just that, voluntary.

2.2. SEARCH AND SEIZURE

[1] Ottawa police sued for negligent investigation.

The second step of the thorough investigation is the accumulation of evidence utilizing search warrants to secure evidence that is normally protected by certain privacy rights. Basic human privacy rights as protected in the Charter (S.8) require the search to be reasonable. The Criminal Code of Canada[1] requires the police to justify their request before an independent party or arbiter. Judges and Justices of the Peace as defined within the Criminal Code fulfill this role. The search of a person's home, business or dwelling is deemed to be one of our most invasive practices and is therefore tightly controlled. Before an investigating police officer will be granted the judicial order the following items must be clearly articulated in significant detail:

- nature of the offence
- the evidence that exists to support belief that the offence took place and what evidence exists that links the alleged suspect to the alleged offence
- what specific items he/she is looking for
- why the investigator believes that evidence is necessary and how it will add value to proving the offence alleged
- why he believes the items identified would be at the location he wishes to search

Searches can be conducted under several other statutory and common law conditions. Other federal statutes like the Controlled Drug and Substance Act[2], (CDSA); Customs Act, and the Excise Act all have search provisions. A person may also be searched incidental to arrest, likewise a vehicle, these searches however are to provide officer safety and preservation of evidence at the scene. Searches without warrants have strict limitations and are the exception rather than the rule. Wherever possible a search warrant is to be obtained. Evidence will be admitted from a search with or without a warrant when it will not "bring justice into disrepute"[3]. Much common law exists on this complex issue and is in itself a generous topic.

2.2.a. Preservation of Physical Evidence

Once granted, the search warrant must be executed by peace officers during the given period of time prescribed, and a report later returned to the issuing judge as to precisely what things were seized. The police from this time forward, are required to ensure

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1 Criminal Code, R.S.C. 1985, c. C-46

2 Controlled Drug and Substance Act, S.C. 1996, c. 19

3 Canadian Charter of Rights and Freedoms, Sec. 24(2)

preservation of the evidence. The Canadian Criminal Code Sec. 490.1, requires that after ninety days the officer return to the court and further justify why the seized goods should not be returned to the party from which they were seized. This is a continuing responsibility until such time as a charge is laid. During this initial short period police must undertake not only a specific identification processes, the evidence must be reviewed and evaluated. At this time documents that are to be kept are initialled or some unique identifying stamp or initial placed on each page of each document seized. Larger physical items like guns, computers and drugs go through similar identification and testing processes to verify their authenticity, content or value.

Exhibits are then secured in a compound or safe with only specially authorized and limited access. These processes are all necessary to retrace the continuity chain and provide evidence to the court of an unbroken series of contacts as to who had opportunity to touch the said exhibit and ultimately provide proof to the court of its integrity.

2.2.b. Preservation of Assets Derived from Crime

Determination of the existence of both tangible and intangible evidence resulting from the commission of the crime is also imperative to the successful criminal investigator. Our greatest deterrence of criminal activity today is our ability to remove the proceeds of the ill gotten gains by forfeiture.

Police have a valuable tool in the form of special search warrants and restraint orders. These legislation tools as provided within Part XII Criminal Code of Canada and the CDSA are designed to freeze or restrain assets that are allegedly derived from certain financially motivated crimes. Enterprise crime offences and designated substance offences provide the foundation and means for application to the court for orders blocking disposal or encumbrance of assets. Subsequent to the 1988 Geneva Convention against Money Laundering and Use of Psychotropic Substances Canada enacted legislation to forfeit assets derived as proceeds of crime. It was clearly the express intention of the Canadian legislature to permit freezing or restraining of assets that may be subject to forfeiture. This restraint tool provides time for police investigators to accumulate sufficient evidence to prove the criminal case and yet secure the asset and not have it disappear or be diminished in value. Canadian law, however, does not permit civil forfeiture and all restraint of assets must be founded in criminal law under the same burden of proof.

2.3. USE OF TECHNICAL AIDS

Financial crimes tend to be historic or reactive. That is to say the offence is usually committed at a point in the past and then reported some time in the present or future. In cases of money laundering or possession of proceeds of crime these offences are both reactive and proactive; for the most part, however, they are reactive. Despite this, the very nature of the substantive offence

eg. international drugs, the normal historic documentation often does not exist or if it does may be in some foreign jurisdiction. For such reasons most often a pro-active approach will be taken to them. Technical aids are instrumental in these investigations.

2.3.a. Reactive Investigations using Technical Aids

Investigation of historic offences like bank fraud, securities fraud, real estate fraud, advanced fee fraud or others require extensive research and compilation of data. Technical aids in these investigations will most often come from utilization of computer technology. Extensive software and hardware exists to allow police and their support experts to input, sort, analyse and produce link analysis charts to trace the history of the events. Very often complex fraud cases involving schemes of misrepresentations by many people through many companies, can be reduced to a simplistic diagram and effectively displayed before a jury. The investigators must be able to search databases either through the Internet or by subscribing to specific commercial information databases, like Lexis -Nexis. Success here obviously is predicated on the availability of such information. If the infra-structure is not in place then the investigator will have a much more difficult but not insurmountable task. Searches of data bases do not provide admissible evidence but leads to sources where that information can be sought out. Title searches in Florida or newspaper articles in Sal Paolo may provide the link to the suspect or the asset in the current criminal case. Police to police or government to government requests then would be undertaken to seek out the details.

Non-traditional investigations in white collar crime blend pro-active with the historic reactive types. Imaginative investors may use wiretap, audio bugs or surveillance camera capabilities to provide evidence. It is much more difficult, however, and takes extreme diligence on the part of the investigators.

2.3.b. Pro-active Technical Aids

In financial crime investigation, money laundering and proceeds of crime investigators are most frequently the ones that utilize these means. Sophisticated electronic and video surveillance equipment are often used. The information is compiled along with documents obtained during routine investigation and brought together in one large electronic database. The information contained therein can then be analysed and reports generated to provide links between the various elements of the offence. The input data into this large database is accomplished through electronic scanning and data dumps from one system to the other. Wiretap information is now also stored in digital form which can be interfaced directly with other scanned document databases. This integration gives a powerful technical aid to the investigator.

2.4. EXPERT EVIDENCE

2.4.a. Financial Forensic Accountants

As previously stated, the police are responsible for establishing proof of the offence and initially determining it's value. As the investigation progresses and evidence is gathered, financial data must be analysed. Basic financial accounting methods are not sufficient to prove the criminal case as proof must be presented that will show beyond a reasonable doubt that the accused intentionally committed the alleged offence.

The financial forensic expert in Canada relies extensively, if not completely, upon the integrity of the information provided to him. It is his responsibility to analyse the information and give an opinion.

That analysis is done through review of the seized documents, witness information and other circumstantial information. Depending upon the volume of information, through a combination of manual and technical means as outlined below, the forensic accountant will evaluate the financial and related information and provide his/her opinion.

The financial forensic expert is essential to a white collar or financially motivated crime. It is their opinion evidence that links the financial facts to the bigger substantive offence that really emphasises the impact of the illicit activity. Without this professional unbiased description of the magnitude of the ill gotten gains and extent of financial activities neither lay persons nor the judge would have an understanding.

The term Forensic Accountant was coined in the early 1980's by a Canadian firm who were leaders in investigative accounting. The term "Forensic" historically has applied to police or pathological researchers dealing in medical or clinical comparison analysis subsequent to commission of violent crimes; e.g. blood/ alcohol pathology, fingerprint analysis, etc.

This term today is applied to a different form of research or analysis, that of Financial records. In the end, both analysts provide opinion evidence as experts of the Court.

The Financial Forensic Accountant is a specialist in analysing financial transactions. Those transactions may be related to funds originating from known/ legitimate sources or unknown/ illegitimate sources. They may be further complicated by the co-mingling of the unknown with the known. The accountant's role is one of a tactical analyst reviewing statements, wire-tap information, documents and bank records. The investigator first briefs the accountant as to the alleged scheme and then provides a summary of evidence that he has collected. The accountant will provide guidance and recommendations as to other potential leads for investigation or identify shortcomings in the existing evidence that will have to be strengthened prior to laying charges.
It is easy for any investigator to neglect his responsibility and attempt to get the accountant to analyse all documents and provide the ultimate answer, this is not the accountant's role. The investigators must accept their responsibilities; their attempts to get the accountant to do their work, will only hinder ultimate success. The accountant is a counsellor or advisor and does not direct the investigation. He must remain at arms length from the police despite the close working relationship. His or her credibility will undoubtedly be challenged in court, and if independence cannot be demonstrated, his evidence may not be accepted as

being impartial.

The accountant is used in several differing capacities:

" providing net worth analysis
" undertaking business valuations of suspect companies
" assisting in conduct of criminal searches of business premises
" assisting in planning of searches/freezing of assets of businesses under investigation of money laundering
" providing in-house training to police personnel in accounting field
" providing audit function of covert businesses operated by police personnel

Differing models exist in Canada relating to hiring forensic accountants. Each of them has two things in common, impartiality and arms-length relationships. Hiring models that exist are:

" Per case contract with independent accounting firm;

advantages - as needed basis
disadvantages - potential conflict of interest
- costs
- lack of continuity

" Annual / multi-year service contract

advantages - availability
- fixed cost
- known entity
- termination clause
disadvantages - cost (higher than government salaried employees)

" Salaried external employee - alternate department

advantages - lower cost
- capable of returning employee to their own department if performance issues arise
disadvantages - lack of such resources
- perception of lack of independence / impartiality

In some jurisdictions within Canada, sufficient trained/skilled resources exist to redeploy accountants from one Federal department to the police for this forensic specialist duty. However, not all Provinces have this capability, thus, the differing models. Only the manager in charge can evaluate his availability of resources from within or without the public sector and then make an informed decision.

The Forensic Accountant, like any other expert, relies totally upon his credibility. To ensure fairness to the accused person, conservative and consistent approaches must always be undertaken. The underlying principles utilized must be clearly articulated in the written report. To ensure focus, written instructions should always be given to the accountant

before commencement of the task. Clear, concise directions and limitations must be put in place to limit the scope and ensure the right questions are answered in the opinion.

The report generated by the accountant must consist of instructions received, principles utilized, copies of evidence reviewed, working papers, charts and finally the opinion. In money laundering cases, we look for a strong conservative statement as to monies or asset values resulting from unknown sources leaving the inference to the court that those monies could have been derived from none other than illegal means. In various jurisdictions, the inference capabilities may differ and the need to have a direct nexus to the substantive offence may have to be established.

Tools utilized by the forensic accountant will vary upon availability. In Canada, all financial records are scanned electronically into a large database and then analysed by the accountant. This software tool although relatively expensive at $50,000.00 and $60,000.00 - $80,000.00 hardware. Notwithstanding the cost it is invaluable not only for the accounting research but for disclosure of information and evidence to the accused. Further analytical tools such as relational databases like MS ACCESS can also be very helpful.

To supplement and reduce data input time an assistant accountant may be required. This will not only save money in more effective use of the highly skilled and qualified accountant but it will provide a second resource to help analyse and make recommendations on missing information.

2.4.b. Expert Police Witnesses

The expert witness of today is not only restricted to forensics as other evidence now can be introduced by experience specialized police investigators. Police officers working in the drug or proceeds of crime field for many years accumulate specific types of information only available to a few people. The analysis of that information and its production in court can be very useful. Other than a drug dealer who would know how long it takes an ounce dealer to move from selling small quantities to pounds, kilos and tons of drugs. Who else could testify as to the value of such commodities, but the skilled and experienced investigator. His evidence is introduced often to establish the time frame in which dealers have been in business when specific direct evidence exists. These investigator experts also can testify to methods of money laundering. They can give opinion evidence as to methods of introduction of cash to the banking system and impacts that those activities have on the systems. Very few experts exist but to be expert only few should exist.

2.4.c. Laboratory Experts

Any financial crime requires conventional forensic examination as well. Searches will produce evidence that will require handwriting analysis, drug trace analysis or perhaps firearm testing. Support from the lab personnel should never be overlooked as it is but

another effective tool available to the skilled financial investigator.

2.5. HUMAN SOURCES

Evidence in a verbal form is available from four main sources. We have previously discussed the witness/victim statement provided at the outset of the investigation. Three others exist, undercover police officers, informants and agents. We differentiate them by the use of their verbal evidence which will be determined by their compellability, competence and availability.

2.5.a. Undercover Police Officers

Undercover police officers are agents of the Crown and their testimony compelled. Their actions are closely governed by legislation[1] and cannot normally commit illegal acts or direct others to commit same. Certain police procedures which if committed by anyone else would be deemed criminal, under certain circumstances these acts may be permitted. Purporting to sell drugs while having them in police possession, laundering money known or believed to be obtained by crime or allowing a controlled delivery of drugs or drug money to take place, may occur but only under specially approved circumstances. These laws have only been amended in Canada since 1997 which permit police officers to conduct these kinds of operations.

When permitted, an undercover officer may purport to be someone other than a police officer. Common law and police guidelines regarding "entrapment"[2] have been established through many criminal cases. Generally speaking, the accused person must have demonstrated the propensity, intent or desire to commit the offence. The undercover operator will be intensely cross-examined by the defence counsel, but as long as the officer has followed all the rules and given good credible evidence it will be accepted. Many countries do not allow this sort of police deception but more and more are coming to realize that it is one of the few methods available for infiltrating and overcoming sophisticated organized crime activities. Its success is totally predicated on the integrity of the police and approving body.

2.5.b. Informants and Agents

Neither of these types of information sources are directly associated to the Crown. They

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1 Canadian Criminal Code, Sec. 462.31.3, C-19,s. 70; c-18, s.28, 1997

2 Regina vs Mack SCC. (1988),44.C.C.C.3d,513

may, however, be deemed to have acted on the Crown's behalf and subsequently subjected to all scrutiny and tests that a police officer would. There is only a very fine line that distinguishes an agent from an informant but they are very significant.
An agent:

" is compellable

" is under police direction (not to commit an offence but provide information by going to certain places and meeting certain people)

The informant is one who provides information to the police and who does not come to court to testify. Should the police tell an informant to go somewhere and search out information on a specific person or group, the informant then becomes an agent, under direction, and is compellable. Both may receive payment, sometimes substantial, depending upon the value of the evidence or information obtained. Should either come to court and their security threatened the Crown may be obligated to provide protection and/or their relocation. Specific guidelines and policies exist for police officers to extend this sort of deal. Commitments like this represent substantial costs, therefore, a written contract must be entered into before it can be consummated. This has to be done during the evaluation process, and should include review of the evidence provided and the expected results. A significant cost benefit must exist.

These relationships are most treacherous, as by their very nature informants and those that become agents from the criminal world are not normally trustworthy. This type of evidence, however, when obtained legally is most compelling and will for the most part bring conviction.[1]

2.6. INTERNATIONAL INVESTIGATIONS

[1] Witness Protection Program Act, c-13, 1996

International investigations are essential in most major financially motivated crime. Globalization of economies and proliferation of electronic capabilities have resulted in the ease of international fund transfers. Inhibitors to effective law enforcement are created however when countries facilitate the financial transfer and do not equally support the international financial investigative responsibilities that follow. Many great steps have been taken by signatory nations to the 1988 Vienna Convention Against Use of Drugs and Psychotropic Substances. The many recommendations also of the Financial Action Task Force (FAFT)[1] and Asia Pacific Group on

Money Laundering[2] have established methods of assisting and promoting major international crime investigations. Signing of Mutual Legal Assistance Treaties and drafting of new laws compliant with the FATF recommendation are gradually creating level playing fields for international investigations.

2.6.a. Mutual Legal Assistance Treaties

Treaties are established between national legal competent authorities and have several key elements. The fundamental basis for the treaty creation is to facilitate international criminal procedures under the principle of reciprocity and rule of law. That is to say that should an international offence occur, for the treaty to be applied the nature of the occurrence must be an offence in each sovereign jurisdiction and the action requested by one nation would possible in the other. Five activities are specifically covered:

- conduct interviews under oath of persons in Canada on behalf of the requesting country
- arrest persons in Canada on behalf the requesting country
- exchange persons in custody for evidentiary purposes
- conduct searches and investigation
- freeze or restrain assets allegedly proceeds of crime (treaty specific)

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[1] The Financial Action Task Force (FATF) was established by the G-7 Summit in Paris in 1989 to examine measures to combat money laundering. In April 1990, the FATF issued a report containing forty Recommendations pertaining to needed measures of controls. The Recommendations provide a scheme of action against money laundering covering the criminal justice system, law enforcement, the financial system and its regulation and international cooperation. These Recommendations although not binding on the 26 signatory countries create significant peer pressure.

[2] Asia Pacific Group on Money Laundering is established to perform a similar role as the FATF but as yet do not have an internationally recognized mandate and do not form part of the 1988 Vienna Convention makeup. Most Asia-Pacific countries belong to the group including Australia, United States of America, Malaysia, Singapore, Thailand, New Zealand, Vietnam, Cambodia, Laos, Union of Myanmar, China, Korea, Japan, Philippines, Cook Islands, Fiji, Hong Kong, India , Indonesia, Macau, Nepal, Republic of Maldives, Samoa, Sri Lanka, United Kingdom, and Vanuatu.

Joint investigations may be conducted whereby investigators can travel to the foreign jurisdiction to assist in execution of search warrants, gathering of physical evidence or taking of witness statements. Great care must be executed by investigators however when operating outside their jurisdiction. Evidentiary requirements are often much different in a foreign territory. Consideration must always be given as to the expected use of the evidence being gathered. Should a statement be taken from a potentially accused person by foreign officers while the requesting investigators are present evidence rules of the homeland may be applied. If the necessary warnings and legal rights are not provided, that evidence may ultimately be excluded from the home court. Secondly, some investigative techniques may be violations of local law eg. undercover operations, and can further create an international incident or subject the foreign investigators to local sanctions.

2.6.b. Bilateral Agreements

For various political reasons governments may not wish to enter into encompassing permanent agreements. This does not however preclude governments of competent legal jurisdiction from entering into specific bilateral agreements. Examples of this may be a major financial fraud or money laundering case. Negotiations for long term agreements have many complexities and often take long periods to negotiate and ultimately ratified by the government. Changes in government or national economy can have major impacts on priorities placed on Treaty legislation. Short term (case specific) agreement often can bridge a gap and provide a stepping stone to a long term agreement having provided the trust and understanding between the two nations.

2.6.c. Letters Rogatory - Rogatory Commission

Letters Rotator continue to exist in law but are of diminishing use. The use of Letters Rogatory was most significant prior to establishment of Mutual Legal Assistance Treaties. The establishment of a Rogatory Commission is not only very cumbersome and expensive, it requires a charge to be laid. In Canada this creates a significant legal problem as the Supreme Court invoked Charter rights under Sec 11.b[1] when they decided that a person must be tried without undue delay. This decision laid out the rules as to how much time was reasonable for a person to wait before being tried. The laying of the charge starts the clock ticking and puts the burden on the Crown to proceed to trial.

Rogatory Commissions often take many months to establish as the Crown must take the court, judge and defence to the foreign jurisdiction, a costly and burdensome responsibility. This process is also founded on the requirement of a criminal charge being laid. If evidence is still being accumulated and the Crown is not ready to proceed with a trial, then this option is not available. Here the MLAT is the desired vehicle.

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[1] Regina v. Askov et al (1990), 37 C.C.C. (3d) 289 SCC

2.6.d. Asset Sharing

The *Seized Property Management Act*[2] , Seized Property Disposition Regulations[3] and Forfeited Property Regulations[4] define Canada's legal ability to manage and share in forfeited assets. As previously stated, assets can be restrained or seized subject to forfeiture. Once the criminal proceeding is complete and forfeiture ordered, Seized Property Management Directorate, an arm of the Federal Department of Supply and Services Canada can sell the assets and share in the net residual balance. A breakdown of principles of sharing is articulated in the *Act's* Regulations. The spirit of the Act is first to attempt to restore a victim to its original position with assets forfeited that were identified as proceeds of the crime, eg. Enterprise Crime, and secondly, to forfeit to the Crown all assets derived from specific designated substance offenses or those offenses that are non-victim related. Assets can be shared with any entity that has contributed in a significant way to the successful conclusion of the file. Assets are shared on a 10%, 50%, 90% basis after administration costs are withdrawn. When evaluating the contribution from a participant, input will be sought from the RCMP. In international files conducted between two countries, the Department of Justice will most often simply share the forfeiture equally. However, before this can be done an international sharing agreement must be in place. Domestically when sharing with Provinces the proceeds of the forfeitures can only be used for three purposes, Crime Prevention, Drug Awareness and Law Enforcement. The forfeited funds cannot be utilized to directly supplement police budgets but must be used for special projects on one time basis. These conditions are likewise part of Provincial /Federal Sharing Agreements. No conditions are placed on international uses.

2.7. INFORMAL EXCHANGE OF INFORMATION

Globalization of economies and related crime requires immediate response by police agencies. Police must be able to determine the veracity and credibility of complaints and when necessary, follow the evidence on very short notice. Facilitation of this need is first enhanced by domestic national police agencies being able to contact foreign police agencies to establish initial dialogue and corroborate certain facts that have been reported to them.

In Canada, police must be very certain to not overstep their legal authorities and misuse the power that has been vested in them. The informal process does not permit evidence gathered by this basis to be used in a Canadian criminal proceeding. Treaty processes must be followed should investigators wish to be successful. Results of improper conduct would likely mean a search warrant or affidavit could be dismissed as evidence.

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[2] Seized Property Management Act, 1993,c.37

[3] Seized property Disposition Regulations, SOR/94-303,April 1994

[4] Forfeited Property Sharing Regulations, SOR/95-76, January 1995

Even informal requests and information generated by them is required to be disclosed after charges are laid. Foreign police officers and judicial authorities directing investigations should be aware of this requirement before they pass the information along. They must be conscious of security of their informants or sources of confidential information. Canadian officers may not be able to protect its confidential nature.

One option available that has been effectively used in Canada to protect this information is an order sought under Section 37. (1) Canada Evidence Act where the police officer states in his affidavit that disclosure of said information would harm international relations. This technique of blocking access to foreign information is not done frequently and should be used under exceptional circumstances only.

The police to police process is usually the initial step to a formal MLAT request or Letter of Request whereby the evidence would be sought in admissible form. When police contact has been established the request should identify the police contact person so as to eliminate duplication of steps already completed by the foreign officers and ensure a more speedy conclusion.

3. PROTECTION OF THE EVIDENCE

3.1. INTEGRITY - CONTINUITY CHAIN

Long established common law rules of evidence and statutory guidelines require police to identify and secure evidence of a crime. The same basic rules apply to documents, cash, drugs or a murder weapon. Police are charged with the responsibility of identifying, safety storing, sampling, testing, tracing and then producing the evidence in court when required. Systems must be well established within the police departments and the courts to ensure the undisputed integrity of the evidence that is collected. The potential doubt created when the chain of possession is broken may be enough to cause an acquittal of the accused. The O.J. Simpson[1] case in Los Angeles is the perfect example of discrediting a witness and causing doubt.

3.2. DOCUMENT HANDLING AND IDENTIFICATION ISSUES

When a search warrant is obtained and executed, special handling procedures automatically are implemented. The search site must be mapped out, photographed and videoed and specific location of found items recorded. The finder of the item must make appropriate notes and turn those items over to the exhibit custodian. The custodian is then responsible for their identification, packaging and transport to the police storage facility. As stated, the same principles

[1] Credibility of the police witness Mark Furman was successfully challenged and was key to the eventual acquittal of the accused.

apply to documents as to murder weapons so the witness must be able to identify items found or provided for investigation.

Historically in Canada, police investigators went through a long labourious task of initialling and stamping special identification numbers on documents. Those processes have now been modernized and are done automatically while the documents are being scanned.

The underlying need for a unique identifying number has not changed, we have simply applied modern technology to the task. The Supertext[2] scanner prints the alpha numeric number on each page in red ink. That red coloured number provides identification codes for the unit, the investigator, the location of the search and the time and page number of the specific document.

eg: P/004/7/05/006/999
P = Proceeds of Crime Section
004 = Exhibit #
7 = Year (1997)
05 = Search location as per index
006 = Item #
999 = Page #

This system of identification provides reference should the document or group of documents be shuffled or moved out of order. Again it comes back to the integrity of the evidence. The numbering and stamp identifier provide undisputed evidence that the said document as identified comes from a given place at a given time.

The identification of the documents are but one issue; safe storage and their preservation is also equally important. Safe climate controlled conditions must be provided to allow the investigator to return the important documents to the court or ultimately to the person from whom they were seized. In all likelihood, these same documents will be required by someone to prepare income tax reports or annual reports to shareholders, and thus, the police being charged with their care are responsible.

The boxes of documents seized from a business that have been identified by the police (scanned or initialled) are stored in a secure vaulted area. Controlled access is provided to these documents and is registered by differing means, e.g. with an attendant or by signing in by hand or utilizing an electronic access card.

The documents are stored in boxes each marked with identifying names and sequential numbers of items contained within. When seizing large numbers of boxes of documents, organization and

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[2] Supertext is a trade mark software product owned and marketed by an Ontario based company called SuperGravity Incorporated. The product was purchased by RCMP to electronically manage scanned documents and further permit information analysis by way of a flat line database.

control of them is essential. In smaller cases, manual systems may be more practical but those determinations would have to be made based on the unique facts of the case and available resources.

Original documents that are to be presented in court or made available to be presented in court, are usually assembled in another unique fashion.

4. PRESENTATION OF EVIDENCE

As stated earlier, the use of viva voce evidence is always preferred; sometimes, however, documents may provide an even more compelling story as they record historic events.

4.1. DISCLOSURE

The evidence as is relevant to the case, is required to be provided to the accused person as soon after the laying of charges as is reasonably practical.

This practice of disclosure is an element of our fundamental Charter S.11.a., every person charged has the right to be informed without unreasonable delay of the specific offence[1].

Courts in the various regions of Canada apply this decision in slightly different ways but notwithstanding, all relevant material must be provided to the accused so he may make full and fair answer in his defence. Many cases in Canada have been lost for this failure to follow a very important principle.

Application of this principle in other foreign jurisdictions varies but many other countries have a similar practice. It is a widely held and applied belief of the rule of law that an accused person must be reasonably prepared to make response to allegations made by the State against him. Without knowing precisely what the State intends to introduce, the accused, it is argued, cannot defend himself.

In practical terms in Canada, we turn over copies, electronic or hard copies of all evidence, notes or correspondence pertaining to the case immediately after charges are laid. Any new evidence that is collected is further turned over on a continuing basis.

Canada, being a liberal democratic society in an adversarial legal system, does not require the defence to report its evidence or statements. This practice is advantageous for the defence as it allows them much opportunity to build arguments and "spring" them on an unprepared crown attorney. The court does not always allow for the crown to adjourn proceedings to answer these

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[1] Regina vs Stinchcombe (1991), 68 C.C.C. (3d) 1 SCC

defence arguments. Some people view this as being unfair, it certainly places an extreme pressure on the state to be well prepared for **all** questions. Worse, however, is the abuse of the court process that it causes without allowing the system to focus on the evidence from both sides and quickly get to the heart of the issue and not waste the time of the court and the state in hearing and preparing for non relevant issues.

4.2. COURT BRIEF PREPARATION

Standardization of the presentation of evidence surrounding the case is essential. The police are also charged with this responsibility and this alone is one of the prosecutor's biggest complaints. Presentation of facts must be achieved in well organized consistent methods. This will ensure that all relevant materials will be there to assist in evaluating the public interest of laying a charge and further prosecuting the individual.

A court brief, whether in electronic form or paper, should contain the following information:

" Synopsis of Facts

" Alleged Offences
-laying out essential elements to be proven.

" Details of the Accused
-biographical data and previous criminal convictions

" List of Witnesses
-and their biographical information. Distribution of biographical information will depend on various individual states as it sometimes is protected information under Federal Privacy laws.

" Statements Made
-Accused person and **all** others. Copies of original handwritten transcribed and typed must be included.

" Copies of any Expert Evidence
-Reports of findings of Forensic Accountants, lab reports, psychological reports

" Copies of Search Warrants and their Informations to Obtain (grounds for belief)

" Index of Evidence to be Produced
-ideally hyperlinked[2] to the synopsis

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[2] Technical term use to describe process of electronically linking two subjects. By clicking on one item it will automatically take you to the other, perhaps located in a different database or location within the bigger text file.

4.3. ORGANIZATION OF DOCUMENTS

The organization and presentation of documentary evidence is critical to the simple and clear presentation of the case in court. When preparing exhibits for the court brief, documents first presented should be those obtained from public sources eg. corporate documents or land title information. Others that can be introduced by the crown by affidavit should follow. After that, the organization of the documents should be agreed to by the prosecutor who presents the case. Essential elements in the criminal case have to be proven and each person may have his own view as to how best to achieve his goals. This is an onerous task and it should be accomplished within a spirit of cooperation and professionalism. There is no sense in independently undertaking a huge task when the prosecutor may view the matter in a completely different light. Organizational meetings are recommended with emphasis placed on cooperation. Some jurisdictions in Canada, despite the fact that the power is vested in the police to lay the charge, have taken back that power and the courts have insisted on charge approval lying with the prosecutor's office. Without cooperation and a spirit of open communication, this restraint of power can place a tremendous burden on the police, better to discuss and decide on charging and court brief properties jointly.

4.4. COURTROOM PRESENTATION

The Canadian system as previously discussed is adversarial in nature; however, some practices have evolved to streamline court proceedings. Like any other criminal case, the crown subpoenas its witnesses and has them available to testify. They will introduce various documents and speak to their authenticity and meaning. This way the crown will systematically go about proving its case. The documents that are relevant to the case for purposes of disclosure, may not all be introduced into evidence. Relevance is a "subjective" term and the documents may have more significance to the defence than the crown.

In a large documentary case, such as a fraud or proceeds of crime drug case, courts have approved the use within the courtroom of electronic document management systems. A small local area network can be set up and viewing screens provided to the judge, jury, defence and crown. Images of the exhibits can then be displayed for the court without laboriously handling each. This requires much preparation by the police and crown but overall efficiencies are enormous. Only some high profile cases have thus far utilized such a modern breakthrough.

Notwithstanding the ability to present the documents in electronic form, the crown must have the original documents available and in court for admission as evidence. Proof of the system, challenge of its integrity is always an initial hurdle, but for the most part, in major cases, defence counsel are quick to accept the highly advantageous system of document managing.

5. TRENDS / VISION

5.1. INTERNATIONAL INVESTIGATIVE STANDARDS

The continued expansion of Mutual Legal Assistance Treaties and International Requests for Assistance are driving standardization of investigative practices. World court systems differ and vary between adversarial common law systems in North America to civil law inquisitorial systems found in Europe and Asia. Notwithstanding the differences the common element of the search for truth prevails. We are establishing working relationships and ground rules for investigators to follow whereby their evidence will be admissible in their respective courts.

5.2. EXTRA TERRITORIAL IMPACT OF DOMESTIC LAWS

All nations are concerned over perceived attempts by others to extend extra territorial jurisdiction by imposition of new domestic laws. No one national system should prevail internationally. Maintenance of sovereignty rights continues to be a concern when dealing with such international issues. Perceived invasion into a countries banking laws and attempting to control their economy by imposing external standards will continue to be a topic of much future discussion. At the same time, however, when companies compete for international contracts, the rules must be fairly and justly applied. This can only be done standardizing banking rules and each institution applying similar “know your customer” policies. Likely in the end will come international standards set by the United Nations or some other international body.

Parallel to international banking concerns are corruption and bribery laws applications. Not all countries have or apply the same standard within the business world when dealing with these issues. The recent Organization for Economic Cooperation and Development (OECD) Convention recommendations strongly endorse implementation of expanded prosecutions of persons and corporations involved in international bribery or corruption incidents. All countries first must make bribery an offence and secondly, remove the corporate tax benefits from those who pay the bribe.

Standards are coming.

5.3. INFORMATION MANAGEMENT SYSTEMS - ELECTRONIC MEDIUMS

Evidence is constantly being affected by research developments. The analysis of DNA, the massage and manipulation of financial data during analysis, electronic scanning and management of information are but some of the great new trends in evidence presentation. Information management and its analysis will continue to be the cornerstone of change for the next millenium.

Investigators will increasingly rely on data input and manipulation to find key points for investigation follow-up. They will further be converting that evidence to electronic form for safer, more efficient storage and presentation. As time progresses and the Courts become more modernized that same evidence will be presented more and more frequently in electronic means within the courtroom itself. Software analysis tools help provide graphics and visual aids that assist the prosecutor prove his case and help the judge and jury understand the facts of cases put before them. The crown and police will rely more and more heavily on electronic means for providing disclosure.

5.4. PROLIFERATION OF SHARED INFORMATION FOR POLICE PURPOSES

At the time when investigators are relying more on technical aids, so do the criminals. As information is transferred electronically between international jurisdictions, police investigators must be likewise ready to respond quickly to seize or restrain the derivative criminal proceeds. Networks of contacts are being established between investigating police agencies world wide. Treaties are being extended to permit proactive investigations and the restraint of assets world wide. Pressures continue to be applied to banking institutions to cooperate with police requests and voluntarily come forward with information pertaining to money launderers and those believed to be in possession of proceeds of crime. International organizations like the Financial Action Task Force and the Asia Pacific Group on Money Laundering are key agencies working hard in applying peer pressure to level the international financial playing field. Implementation of their recommendations is gradually showing progress.