

Witness protection program: The repentant experience in Québec, Canada*

The witness protection program Quebec, is part of a broader process that, as a rule, provides for the use of *repentant witnesses* in the fight against certain types of major crime, particularly organized crime and terrorism. *Repentant witnesses* are seen as a necessary tool for infiltrating criminal networks and their protection from their former relationships, an inevitable consequence of their participation in the administration of justice.

It must be remembered that, in Canadian judicial system, the prosecuting attorney has considerable discretionary powers regarding the laying of charges and the conduct of prosecutions. Nothing in law prohibits negotiating various agreements for dropping or partially abandoning prosecution in exchange for information from a suspect or accused (including when the charges involve a co-accused or accomplice). The prosecution can reach agreements with an individual when it is of the opinion that the individual's testimony against his or her former accomplices serves the public good. In other words, there are no limitations, legislative or in principle, regarding the type of collaboration that can be anticipated from the suspect, or regarding the types of offences that can be involved (in the agreement or investigation). Jurisprudence, however, ensures that the treatment given collaborators of justice does not encourage perjury or a miscarriage of justice. Furthermore, the citizen's right not to collaborate with the police provides them with means for negotiating collaboration with the authorities, particularly the suspect's right to remain silent once arrested and detained, and protection against self-crimination under sections 7, 11(c) and 13 of the *Canadian Charter of Rights and Freedoms*, which preclude the accused from being called as a prosecution witness at his or her own trial.

The concept of witness protection as addressed in this presentation will have a limited technical meaning, used particularly by squads fighting major crime. The same applies to the related expression, "witness protection program. **Collaborator of justice**" means any person who faces criminal charges, or was convicted, of having taken part in an association of criminals or other criminal organisation of any kind, or in organised crime offences but agrees to co-operate with criminal justice authorities, particularly by giving information on the criminal association or organization or any criminal offence connected with organised crime. Understood in this way, the expression "collaborator of justice" is not very precise and can refer to both a civilian undercover agent and a repentant witness, as we will define them. In some cases, it could also include informers.

The present presentation is focus on the singular experience of contract between the prosecution service of Québec and a repentant. I will decline the legal bases of this contract and the limitations. You will have an insider look of the negotiation, the signing process, the clauses and the protection conditions.

Certain terminological clarifications must be made to eliminate any confusion regarding this presentation. This is necessary because the world of police information has its own vocabulary, which sometimes differs from vocabulary used by other stakeholders in the justice system or by legal observers and commentators. Furthermore, the vocabulary used by the various stakeholders changes over time due to mutual influence, particularly due to discussions with stakeholders from other countries.

Police and legal language in Quebec refers to police “informers” or “informants” to refer to an individual, criminal or not, who provides information to the police on a regular or timely basis, free or for remuneration. Police informants operate with a guarantee that their identities will not be revealed. Jurisprudence recognizes and protects the secrecy of an informant’s identity. The terms “**informer**” and “**informant**” are to be considered synonymous, but preference is given to the more common “informant”.

The terms “**civilian undercover agent**” and “secret agent” refer to an individual, criminal or not, who in return for certain benefits, is prepared to act as an undercover agent to provide the police with information or assist the police in collecting evidence of the commission of crimes. A civilian undercover agent is supervised by a police investigator, known as a controller, who directs or controls the civilian’s undercover activities. Insofar as individuals are acting on behalf of and under the supervision of the State, their identity is not, with some exceptions, protected by police informant privilege.

The expressions “**agent-source**” [secret agent] and “agent civil d’infiltration” [civilian undercover agent] are considered synonymous, but preference is given to use of the newer expression “agent civil d’infiltration”, which is more in line with the spirit of the French language.

Police forces also use the concept of “**special witness**”. A special witness is, in their terminology, an individual whose safety, or that of his family, is at risk because of the testimony the witness has agreed to give in a criminal case. Unlike a repentant witness, a special witness has not usually participated in the commission of a criminal act or been part of or associated with a criminal organization.

We clearly see that the concept of “**witness**” must also be explained. In common language, a witness is an individual who sees or has personal knowledge of something, including having directly suffered consequences as a victim. In the context of police

activities a witness is an individual who provides or agrees to provide information or evidence in an investigation or court proceedings.

These clarifications being given, it must be remembered that an individual who collaborates with authorities may also have played various roles. For instance, an individual who was initially a police informant may have been a civilian undercover agent and, finally, a repentant witness. It is also useful to remember that terminological confusion is sometimes the result of the fact that there is sometimes no specific equivalent distinction in English as there is in French, between informer, civilian undercover officer and repentant witness. The English words *informer* and *informant* are generally used synonymously to describe the three realities, with the term "*agent*" sometimes being used to differentiate between a civilian undercover agent and an agent provocateur.

As a general rule, *repentant witnesses* come forward following a police search or the discovery of their precarious position within the group. They may then decide to benefit from collaboration.

If *repentant witnesses* or civilian undercover agents seem reliable and provide an investigator with important information, the latter may be tempted to promise certain benefits in order to obtain the most information possible. Once the investigation is completed, witness protection services have to deal with the promises made by investigators. It is thus important that practices be implemented to clearly establish a distinction between the investigation and protecting the collaborator. The latter must fully understand that the investigators with whom they are dealing are not responsible for their protection once the proceedings are over and that a totally separate service will be responsible for assessing the threat that they may then face and the level of protection that may be provided. In this regard, the collaborator must understand that the promises that may be made by the investigators are not binding on witness protection services. This clear division between the investigation and protection is an essential practice. Investigation and protection activities must be as independent as possible if we want to clearly establish that protection is not a compensation for collaboration and avoid future complaints. Directives governing police forces in Quebec are clear in this regard. They clearly indicate that protection of *repentant witnesses* is the responsibility of the protection unit, not the investigation unit. We must emphasize the importance of these directives and the care that must be taken by anyone applying them. Investigators who work with collaborators of justice should be regularly reminded of the existence of these directives.

Although the directives that govern police when working with *repentant witnesses* are clear, the situation is not so clear when the police are working with civilian undercover agents. It seems we have sometimes lost sight of the fact that a civilian undercover

agent is, in fact, a higher level of repentant. For the police, a civilian undercover agent differs from a *repentant witness* in that the information provided is more reliable than that provided by a *repentant witness*. Throughout the investigation, the accuracy of the information provided by a civilian undercover agent can be verified, when the information is provided by a *repentant witness*, this can only be done after the fact, by corroboration of his or her statements, which is difficult and costly. This being said, this distinction in no way explains the difference in how the two types of collaborators are treated and protected after the investigation in question. Civilian undercover agents provide investigators with information in exchange for certain benefits. As long as they infiltrate a criminal organization, they are at real risk. The sometimes considerable economic benefits that are granted to them constitute payment for the information provided and for the risk incurred. The investigators also have an interest in ensuring that their agent is protected so as not to compromise their investigation. Once the evidence is disclosed, when this is not at the time of the raid, the criminals arrested understand the role played by the civilian undercover agent. Generally, the latter's testimony will also be needed in order to obtain convictions. In all cases, civilian undercover agents should benefit from some form of protection. Their expectations in this regard are sometimes even greater than those of *repentant witnesses*. They are often recruited to assist in an investigation because they "are part of the investigation team" and because, more often than not, promises have been implicitly or expressly made regarding protection. The personalities of individuals ready to act as civilian undercover agents are infinitely complex, which necessarily leads to great complexity in providing protection.

Some witnesses who agree to collaborate with justice are more vulnerable or more subject to intimidation than others, and the Quebec legislator has recognized the reality of protecting witnesses in the *Police Act*. The Act does not define the support services involved in "witness protection", but we can assume that this expression is used in the relatively limited sense accorded it by the police sector. The concept of protection at issue here does not refer to protection in the broader sense or the consideration to which all witnesses should generally be entitled. It does not refer to measures that may be taken at the hearing to protect or encourage the individual testifying, but to specific measures that must be taken for certain witnesses who are likely to be subject to intimidation or who could be the target of retaliation, particularly by organized crime, and whose safety could be in serious jeopardy because they have collaborated with authorities. Thus, this is a type of extrajudicial protection of witnesses who are particularly vulnerable or subject to intimidation. It should be mentioned, however, that witness protection programs include the witnesses and individuals with whom they have close relations and who, as such, also require protection.

As a general rule the process of achieving a contract with a repentant follows this singular path: after the candidate has express his will to be a collaborator of justice, he will meet with the police to give a series of statements about his life in criminal activities.

Those statements are induced and videotaped. Then the police force will make a report on its ability to gather independence evidence to all the criminal activities of the candidate. Those evidences will allow the prosecution service to position itself on the infractions that will face the candidate into the negotiation process. If the independent evidence arise after the contract has been signed, the prosecution service will keep his capacity to prosecute under those infractions. A special mention in the contract will refer to this possibility.

A field prosecutor assigned to the case will make a proposition as to the sentence that could be fit to this perpetrator regardless of his collaboration. The prosecutor responsible will also make comments on seriousness of the offence, the nature of the evidence already on hand, the truthfulness and necessity of the repentant version, the ability to have corroboration and finally the repentant profile. The candidate will have to perform a polygraph test and to agree on a mental health inquiry.

Next step will be the pre-committee which has as goal to take the position of the repentant in terms of sentence and financial advantages. The candidate will meet with correctional services on security. And the representing official of the prosecution service will give the position of the State on sentence and advantages in order for the candidate to be prepare for negotiation.

Then it is the final negotiation with the Board. The members of the Board are a chief prosecutor representing the DPP, an officer for the police force and the candidate. He may be represented by lawyer. Ultimately, the objective is to conclude an agreement. Of course, the proposition that the DPP has to offer in terms of sentence is decisive. It is often a decision that the candidate has to take to withdraw or to sign. As for the financial aspect, the main goal for the DPP is to have the candidate understand that there is no Shangri-La. The amount of money we give is to be alimony. It is usually a monthly payment for duration of two years in order for the candidate to find a new way of life after his release. Also as alimony, we will give a monthly sum during the detention for the cantina.

As a general rule, we do not give absolutely immunity of prosecution. Usually we agree on a lesser important infraction, except on significant murder case. We also add to the contract a complete prohibition to receive royalties from criminal involvement of the candidate. He cannot receive money from movie scenarios, books or interviews. He cannot publish books or articles about his criminal involvement. No media interview of any kind. The negotiation will also include the possibility of re-localisation, changes of identity, psychologist support, tattoo removal and work integration. For the society, the aim is to have the candidate integrate his new community without the support of the DPP after two years.

Protection of collaborators of justice in Quebec falls within the context of Canadian federalism, where the distribution of powers regarding the administration of criminal justice is quite complex. This must be taken into account when proposing any measures aimed at improving the management of collaborators of justice in Quebec. It must be acknowledged that some elements are simply not under Quebec jurisdiction. Administration of criminal justice in Canada is the responsibility of the provinces. In principle, with some exceptions, only the provincial Attorney General conducts criminal prosecutions and decides on the use of collaborators of justice in proceedings. In most cases, the collaborator is identified by a provincial police force during the investigation. Again in principle, protection of the collaborator of justice should be the responsibility of the same provincial police force once the proceedings have ended. However, it is not that simple. First, most collaborators of justice who have confessed to crimes are sentenced to more than two years in prison, which are served in federal institutions. Protecting such collaborators during their sentences then becomes the responsibility of federal correctional authorities, just as the National Parole Board is responsible for their conditional release. No matter what agreement was entered into with provincial authorities when the “informant contract” was drawn up, the federal government will be responsible for the inmate. A certain level of federal-provincial co-operation is thus necessary in order to successfully carry out protection agreements. It should simply be noted here that the federal government is neither a signatory nor stakeholder in what is known as “informant contracts”. Furthermore, when protection of a collaborator of justice requires the extreme measure of a change in identity, federal provincial co-operation is again needed, whether the police force requesting the change in identity is federal or provincial. In our society, the fundamental elements of legal identity and its attributes and the issuance of essential documents for living in society are the responsibility of two levels of government. We need only note that the name, marital status, health care registration and driver’s licence are provincial jurisdictions, while the social insurance number, criminal record, citizenship certificate and Canadian passport are the jurisdiction of the federal government. Harmonises management of collaborators of justice thus requires close co-operation between the appropriate federal and provincial authorities and is made easier through clear federal-provincial agreements.

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* This document is largely made from extracts of the report to the Minister of Public Safety: Protection of Collaborators of Justice: Quebec Policy Update by Anne-Marie Boisvert.