# Co-Operation as Mitigating Factor on Sentence[1]

> He that hath deserved hanging may be glad to escape with a whipping.
>
> Thomas Brooks

## Introduction

In Canada, co-operation by the accused with police and prosecutors has long been considered a mitigating factor in sentencing.[2] However, failure to co-operate with the authorities should not serve as an aggravating factor.[3] Co-operation is usually defined as the willingness of the accused to assist the authorities in the investigation or prosecution of others. The co-operation may take an infinite variety of forms, including, for example, participating in a "sting" operation or a controlled delivery of drugs or testifying for the prosecution in court, or providing information anonymously to the police concerning the criminal activity of others.

There are several ways to justify at a sentencing, the co-operation of an accused as a mitigating or ameliorating element. Co-operation, afterall, signifies remorse and the recognition of a sense of responsibility in the offender.[4] It is likewise a sign of the

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[1] By Patrick J. Ducharme, Ducharme Fox LLP. Prepared for The Law Society of Upper Canada, 5th Annual Six-Minute Criminal Defence Lawyer Series, June 4, 2005, Toronto, Ontario. On February 5, 2005, I had the privilege of participating in a panel discussion with Mr. Justice Bruce Durno of the Ontario Superior Court and John North, Senior Counsel to the Department of Justice, for the Ontario Bar Association's Continuing Legal Education Program. The program included this topic in the context of Drug Cases and I commend to you the paper prepared by John North for that program and available through the Ontario Bar Association.

[2] *R.v. C.N.H.* (2002), 170 C.C.C. (3d) 253 (Ont.C.A.); *R.v. Opyc* (1976), 1 W.C.B. 56 (Ont.C.A.);[1976] O.J. No.1110; *R.v. Doe* (1999), 142 C.C.C. (3d) 330 (Ont. S.C.); *R.v W. (C.T.)* (2000), 231 W.A.C. 318 (B.C.C.A.); *R.v. Hewlett* (2002), 167 C.C.C. (3d) 425 (Alta.C.A.); *R.v. Laroche* (1983), 6 C.C.C. (3d) 268 (Que.C.A.)

[3] *R.v. Rosen* (1976), 18 C.L.Q. 402 (Ont.C.A.); In rare instances our courts have referred to the absence of co-operation with the authorities in sentencing usually not so much as an aggravating factor but simply as an acknowledgment of the absence of mitigation. See for example: *R.v. M.N.* [2003] O.J. No. 406 (Ont.S.C.) and *R.v.Lawson* [2003] O.J. No. 5040 (Ont.S.C.).

[4] Section 718(f) of the *Criminal Code of Canada ("the Code")* R. S.C. 1985, Chap. C-46 as amended to date.

offender's rehabilitation,[5] even in circumstances where it may be construed as "more as a matter of expediency than principle".[6] In any event, courts will recognize the co-operation of an offender with or without evidence of the offender's contrition. And, the likely result is a reduction in the sentence imposed.

**The American Approach**

On January 12, 2005, the United States Supreme Court in *United States v. Booker*[7] held that the United States Sentencing Guidelines[8] are *advisory* only, not *mandatory*. In a series of complicated opinions, the court in *Booker* ruled that the Guidelines are constitutional but are advisory only. Before the decision many of the Federal Courts of the United States had ignored the ordinary connotation of the term "guideline" and had imposed sentences as though they were without discretion.

The U.S. Guidelines establish a central grid to be used in all sentencing. A judge can sentence over or under the Guideline's required sentence, but unless the judge can articulate important differences not contemplated by the Guidelines, the decision is likely to be reversed on appeal. Until *Booker* the only way to escape the Guidelines was under provision 5. K. 1, allowing an accused to provide evidence of "substantial assistance to authorities" to escape the mandatory grid calculation. In other words, co-operation was pivotal; it permitted authorities a "downward departure" from the grid.

Currently, the U.S. Guidelines consume about 500 pages and, since 1987, more than 600 amendments.[9] They are a dense, convoluted thicket. And although the original laudable goal was to eliminate uncertainty and disparity in sentencing, the sheer length

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[5] Section 718 (d) of *the Code.*
[6] *R.v.Doe*, *supra*, note 2 at para. 22.
[7] *US v. Booker* 2005 WL 50108
[8] In 1984 the United States Congress passed the *Sentencing Reform Act* authorizing a Commission to set guidelines for sentencing in Federal Courts. The Federal guidelines became effective November 1, 1987 in all Federal Courts.
[9] United states Sentencing Commissioned Report to the Congress: Downward Departures from the Federal Sentencing Guidelines, available at http:www.ussc.gov/departrpt03/departrpt03.pdf

and complexity of the Guidelines and the ever-expanding competing interpretations of particular provisions within them have rendered them a far less than ideal instrument of justice.

Moreover, every U.S. state has its own Sentencing Guidelines. And while State Sentencing Guidelines have frequently managed to avoid the complexities of their Federal counterparts, having, for example, always been considered *discretionary*, they too have occasionally fallen victim to the overzealous machinations of lawmakers intent on fixing and defining every single sentencing decision. Still, State Sentencing Guidelines, unlike the Federal, have not yet attempted to eliminate the discretion of the trial judge,[10] a longstanding and important difference between them and the Federal guidelines.

**The Canadian Approach**

The fundamental principle of sentencing in Canada is that a sentence must be proportionate to the gravity of the offence and to the degree of responsibility of the offender.[11] Because it is essential that the punishment fit the crime, proportionality requires individualized sentencing with inevitable variations imposed by judges exercising broad discretionary powers.

Canadian judges have great latitude of discretion in sentencing. Despite this, Canadian appellate courts recognize appropriate ranges of sentence for virtually all offences, so that each offence may now be categorized as having "an average range of sentence," sometimes referred to as the "tariff" for that offence. The lower end of the range is, of course, available to those offenders convicted of offences with less aggravating facts and more mitigating elements; the higher end of the range reserved for the more serious (repeat) offender with more aggravating facts. Subject to statutory

[10] American College of Trial Lawyers Report, 2004: United States Sentencing Guidelines: An Experiment that Has Failed at page 23.
[11] Section 718.1 of *the Code.*

exceptions, a sentencing court may prescribe different degrees or kinds of punishment, provided it does not exceed the maximum permitted by law.[12]

Any Canadian sentence imposed should also be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.[13] As I have said, the aim of the United States Federal Sentencing Guidelines has been to eliminate disparity in sentencing by eliminating judicial discretion. In Canada, judicial discretion is the very cornerstone of parity. Our appellate courts play a fundamental role in ensuring a broad parity of sentencing.[14] In Canada, subject to the fundamental purpose and principles of sentencing set out in sections 718 to 718.2, uniformity or parity of sentences is maintained by judicial discretion.

**The Value to the Offender of Co-operation**

Co-operation with the authorities has the inevitable effect of significantly reducing the sentence imposed. The proof is everywhere apparent. Indeed, Canadian sentencing cases reveal that co-operation with the authorities may have the single most important ameliorating influence on what would otherwise be the tariff sentence established for any particular offence. But the co-operation must be legitimate. Legitimate co-operation means full and frank co-operation on the part of the offender, whatever the motive. Legitimate co-operation means not merely convenient but beneficial disclosure to the authorities, disclosure amounting to more than the accused knows is already in the possession of the authorities.

[12] Section 718.3 of *the Code.*
[13] Section 718.2 (b) of *the Code.*
[14] *R.v. Stroshein* (2001), 153 C.C.C. (3d) 155 (Sask.C.A.), leave to appeal to S.C.C. refused 153 C.C.C. (3d) vi.

**The Reward of the Offender**

In a case involving two counts of breaking and entering, two counts of unlawful confinement and two counts of robbery the trial judge imposed a sentence of just over 11 years. On appeal, the Court of Appeal for British Columbia reduced the sentence to 7 ½ years because the accused had co-operated with the authorities. The accused provided statements and testimony leading to the conviction of the ringleader of the group for each of the offences and committed to being a witness in the trial of two other alleged participants.[15] In another case[16] the accused, convicted of 29 offences, including 19 charges of breaking and entering and assorted property offences, received a $1000 fine, probation for three years, and 120 hours of community service work. The Court of Appeal for Quebec dismissed the Crown's appeal against sentence based mostly on the accused's co-operation with the authorities. Referring to the accused's co-operation, Montgomery J. A. wrote:

> Respondent not only admitted his own participation in a series of crimes; he informed the police of the names of his accomplices, some of whom were older and more experienced as criminals, and he gave testimony that led to the conviction of several of them. Honour among thieves may appear noble to some, but if it be a virtue it is not one that the police and courts can afford to encourage. Respondent has performed a service to society which may not be without risk to himself. At the very least, it is unlikely that he would henceforth be trusted in criminal circles, and this is in itself some indication that he does not intend in the future to frequent such circles. I can imagine no stronger evidence of the desire to give a new direction to the life of a criminal than the denunciation of his associates,

[15] *R.v. C.T.W.* [2000] B.C.J. 1683 (B.C.C.A.)
[16] *R.v. Laroche* (1983), 6 C.C.C. (3d) 268 (Que.C.A.)

> followed by their conviction. With his record of co-operation with the authorities, it is altogether likely that confinement in prison would be extremely unpleasant, if not dangerous, for respondent.[17]

One way to measure the impact of co-operation with the authorities is to compare sentences imposed upon co-accused who did and did not co-operate. Here is one example: Upon a guilty plea to one count of robbery and one count of kidnapping arising from two unrelated incidents, the offender was sentenced to 4 years imprisonment on each count to be served consecutively.[18] He had served 21 months in pre-trial custody; his sentence was therefore considered to be the equivalent of 11 ½ years.[19] On appeal, he argued that sentence was excessive because three co-offenders received lighter sentences for similar conduct with similar pre-trial custody. The offender compared himself to the offender in *C.T.W.*[20] who had a similar sentence reduced to the equivalent of 7 ½ years on appeal. The appellate court, in rejecting this argument, referred to the fact that C.T.W. had given evidence resulting in the conviction of the ringleader of the group (this accused) and had agreed to give evidence against two other participants. In the court's view, C.T.W.'s co-operation with the authorities justified the disparity in sentencing.

In *Hewlett*[21] the accused was convicted of making and possessing child pornography for the purposes of distribution. The two co-accused had co-operated with the authorities and testified against him. One received a 15-month conditional sentence; the other received an 18-month conditional sentence, subsequently converted to imprisonment on appeal. Hewlett received a sentence of 5 years. At his appeal, the Court of Appeal for Alberta held that he was entitled to some parity but not to precise parity with his co-accused because they had co-operated with the authorities. His sentence was reduced to 3 ½ years.

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[17] *Ibid.,* at page 270.
[18] *R.v. J.L.* [2001] B.C.J. No. 1526 (B.C.C.A)
[19] *Ibid.,.* at para. 17.
[20] *Supra,* note 15.
[21] *R.v. Hewlett* (2002), 167 C.C.C. (3d) 425 (Alta.C.A.)

In *R.v. Dang*[22] the accused pleaded guilty to a charge of conspiracy to murder and a charge of manslaughter. Although the accused was not the mastermind of a plot to kill two associates, she had lured the two victims at the request of others, to an isolated area where they were killed. She was originally charged with two counts of first-degree murder. She was 27 and a Canadian citizen, having emigrated from Vietnam at the age of 22. She was also a prostitute. One of the victims was her pimp. During the Preliminary Inquiry, her counsel made a deal with the prosecution for the reduction of the charges but with no specific commitment from the prosecution as to the credit that she would be given for her co-operation with the prosecutorial authorities. She entered her guilty pleas, then testified as a Crown witness at the Preliminary Inquiry of her former co-accused.

Eventually, Ms. Dang was sentenced to 2 years and 7 months' imprisonment for the offence of manslaughter. But for her co-operation with the authorities her sentence would have been 8 years. She was also sentenced to 2 years to be served concurrently on the charge of conspiracy to commit murder. Without her co-operation, the court indicated, the appropriate sentence for that offence would have been one of 4 years. The court referred to the likelihood that she would be subject to protective measures while in custody that would render her incarceration much more difficult. Thus, because of her co-operation, she was entitled "to significant mitigation of punishment".[23]

In *R.v. Koebel*[24] Durno J. had the daunting task of sentencing two men who had committed the offence of common nuisance by failing to discharge a legal duty that resulted in harm to scores of victims in Walkerton, Ontario. Durno J.'s task was made all the more difficult because of the intense media interest in and publication of the proceeding. The record revealed that the two offenders failed to discharge their legal duties and thereby, according to the indictment, contributed to 7 deaths, 179 E. coli infections, 97 campylobacter jejuni infections, 25 HUS infections and 37 other bacteriological infections. The prosecutor urged the sentencing judge to impose upon Stan Koebel a sentence in the range of 2 years for his greater participation and

[22] *R.v. Dang* [2004] O.J. No. 338 (Ont. S.C.)
[23] *Ibid.*, at para. 49
[24] *R.v. Koebel* [2004] O.J. No. 5199 (Ont. S.C.)

responsibility in failing to advise the public of the tainted water and to impose upon Frank Koebel a sentence in the middle to upper reformatory range for his serious but less involved participation in the cover-up of information. Instead, Durno J. sentenced Stan Koebel to one year in prison and Frank Koebel to a 9-month conditional sentence. He decided on the more lenient sentences in part because each offender co-operated extensively in the Walkerton Inquiry, saving time and expense to the public. The court commented on their co-operation as concrete signs before a national audience that they had accepted responsibility for improper practices.[25]

Durno J. also demonstrated the value of co-operating with the authorities in a timely fashion in the case of *Tulloch.*[26] Tulloch pleaded guilty to conspiracy to defraud the government of $6.2 million. He and others conspired to make GST refund claims on false purchases of heavy equipment. The fraudulent scheme was uncovered by an investigation referred to as Project Phantom. The lead investigating officer gave evidence of Tulloch's co-operation. Mr. Tulloch provided a KGB[27] statement in which he told the officers everything they wanted to know. Before he co-operated, the police had no knowledge of the lead player in the criminal activity. The prosecutor had requested a sentence of 4-6 years' imprisonment and a restitution order of $6.2 million but the court sentenced the accused to a conditional sentence of 2 years less one-day and a restitution order in the amount of $300,000. Mr. Tulloch was handsomely rewarded for his assistance. But his co-operation was genuine and capable of being acted upon by the authorities.

By contrast, in *R.v. McTighe,*[28] the Alberta Court of Appeal converted a conditional sentence of 2 years less a day to an actual custodial term of the same length, finding that the trial judge had mistakenly characterized certain behaviour as co-operation when it was not. In that case, the accused pleaded guilty to the theft of $247,000 from a financial institution while working for an accounting firm in a position of trust. She

[25] *Ibid., at para. 87.*
[26] *R.v. Tulloch* [2002] O.J. No. 5446 (Ont. S.C.)
[27] *R. v. B. (K.G.),* [1993] 1 S.C.R. 740
[28] *R.v. McTighe* [2005] A.J. No. 64 ( Alta C.A.); (2005) 193 C.C.C. (3d) 522

committed 111 separate acts of fraud over seven years. The sentencing judge referred to her as being co-operative by taking "complete responsibility for her behavior and her actions" after the thefts were discovered.[29] But the Court of Appeal disagreed. O'Leary J.A. observed:

> The sentencing judge erred in characterizing the respondent's conduct as co-operative. He failed to mention the fact that after being confronted by her employer the respondent transferred the Jeep motor vehicle, which she knew was purchased with stolen funds, to her daughter for the obvious purpose of protecting it from seizure. That was a seriously aggravating circumstance and testifies to the moral blameworthiness of the respondent, her sense of responsibility and her level of remorse.[30]

Taking responsibility for one's actions, mere admissions of guilt by guilty plea, do not amount to co-operation with the authorities.

**Drug Importation Cases**

In drug importation cases the impact of co-operation with the authorities on sentencing has been particularity significant. In Ontario at least the range of sentence for first-offender couriers who help to import large quantities of hard drugs such as cocaine into Canada is 6-8 years in the penitentiary.[31] In *Hamilton and Mason,*[32] Doherty J.A. has said that imposing lengthy prison terms will encourage co-operation of the accused with the authorities, and that conversely, imposing sentences that are too lenient will discourage co-operation:

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[29] *Ibid.,. at para. 20.*
[30] *Ibid., at para. 21.*
[31] *R.v. Cunningham* (1996), 104 C.C.C. (3d) 542 (Ont.C.A.)
[32] *R.v. Hamilton and Mason* (2004), 186 C.C.C. (3d) 129 (Ont.C.A.)

> [T]he routine imposition of conditional sentences for offenders like the respondents who smuggle cocaine into Canada undermines significantly the possibility of gaining the co-operation of these persons in the investigation and arrest of higher-ups on the drug distribution chain. It is generally accepted that the flow of cocaine into this country can be curtailed if the authorities can get at those who hire the couriers and drug distributors. The chance of avoiding jail is usually the best thing that the authorities have to offer drug couriers in exchange for their co-operation. That co-operation has always been recognized as a very important mitigating factor. If couriers like the respondents can expect to receive conditional sentences, there is very little incentive for them to co-operate with the authorities in attempts to apprehend those who hired them.[33]

While co-operation with the authorities is the best chance to avoid jail, it is also the best way for the authorities to discover those in charge of the drug network. Consequently, absent co-operation, sentences for first-time drug couriers importing hard drugs into Canada range from 3 to 5 years for 1 kg more or less of cocaine[34] (or equivalent value or amount of other hard drugs) to the *Cunningham* range of 6 to 8 years for multiple kilograms of cocaine into Canada.

However, with co-operation, the resultant sentence is likely to be significantly less. In *C.N.H.*[35] the accused returned to Canada from Jamaica with 6 kg of cocaine worth approximately $600,000. The accused claimed that he was advised he was carrying marijuana. He was 19 with no criminal record, and he suffered from a learning disability. The trial judge accepted that the accused had co-operated with the police by providing

[33] *Ibid*., at para 149.
[34] *R.v. Madden* (1996), 104 C.C.C. (3d) 548 (Ont. C.A.)
[35] *Supra* note 2.

information about the principals of the importation scheme. The judge imposed a 1-year sentence coupled with 2 years' probation.

The Court of Appeal for Ontario concluded that in all the circumstances a sentence of 3 years would have been appropriate and that the sentence of 1 year was manifestly inadequate. The court offered this opinion based upon the principles it had enunciated in *Madden*[36] and *Cunningham*[37]. Acknowledging that the accused had served the portion of his custodial sentence, the court also determined that it was not in the interests of justice to re-incarcerate him. It did so in part based on his co-operation with the authorities as accepted by the trial judge. There had been a dispute about whether the information provided by the accused to the authorities was actually helpful. Nonetheless the court said that the reduction for co-operation, although "modest", should be "something in the range of one year".[38]

In *C.N.H* the court also rejected the notion that the information provided by the accused must always be of practical use or value in the sense that it can be acted upon by the authorities. Rosenberg J.A. suggested a more expansive approach, emphasizing the full, frank, truthful nature of the offender's disclosure:

> In my view, this is too narrow an expression of the circumstances in which credit should be given for assistance to the police. I prefer the somewhat broader view taken by the majority in *Cartwright* (1989), 17 N.S.W.L.R. 243 (C.C.A.) at 252-53: in order to ensure that such encouragement is given, the appropriate reward for providing assistance should be granted whatever the offender's motive may have been in giving it, be it genuine remorse (or contrition) or simply self interest. What is to be encouraged is a full and frank co-operation on the part of

[36] *Supra*, note 34.
[37] *Supra*, note 31.
[38] *C.N.H*. *supra*, note 2 at para. 45.

the offender, whatever be his motive. The extent of the discount will depend to a large extent on the willingness with which the disclosure is made. The offender will not receive any discount at all where he tailors his disclosure so as to reveal only the information which he knows is already in the possession of the authorities. The discount will rarely be substantial unless the offender discloses everything which he knows. To this extent, the inquiry is into the subjective nature of the offender's co-operation. If, of course, the motive with which the information is given is one of genuine remorse or contrition on the part of the offender, that is a circumstance which may well warrant even greater leniency being extended to him, but that is because of normal sentencing principles and practice. The contrition is not a necessary ingredient which must be shown in order to obtain the discount for giving assistance to the authorities. Again, in order to ensure that such encouragement is given, *the reward for providing assistance should be granted if the offender has genuinely co-operated with the authorities whether or not the information supplied objectively turns out in fact to have been effective.* The information which he gives must be such as *could* significantly assist the authorities. The information must, of course, be true; a false disclosure attracts no discount at all. What is relevant here is the *potential of the information to assist the authorities, as comprehended by the offender himself.*[Emphasis added][39]

[39] *C.N.H. supra*, note 2, para. 42.

The court explicitly rejected the contrary view expressed by Hill J. in *R.v. Doe.* [40] In *Doe*, Hill J. had held that "to be relevant, the accused/informer's information or assistance must be of practical assistance to the authorities in the sense that it can be acted upon".[41] He also said that "stale information, vague accounts, and disclosure of facts without real investigative relevance are unworthy of recognition".[42] But while this view was rejected by the Court of Appeal for Ontario, it is noteworthy that the reduction of sentence in *C.N.H.* was "modest" because in that case the "degree of co-operation was far different than the assistance provided in the *John Doe* case."[43] So, while it is not necessary for the offender to provide information that can be acted upon, when the offender actually delivers objectively useful information, the discount on sentencing will be greater.

*John Doe* illustrates well how information capable of being acted upon may lead to a dramatic reduction in sentence. Following his arrest and before sentencing, the offender Doe provided information to the police that led to the arrest of others involved in two separate, serious criminal transactions. Doe informed the police that a particular party would be importing cocaine. As a result, two individuals were apprehended jointly in possession of approximately ½ kilogram of cocaine. Doe also supplied information that enabled the police to arrest another person on a separate occasion for possession of a dangerous firearm and ammunition. Information he provided was information that could be and was acted upon successfully.

Doe himself had acted as a courier importing 1-½ kilograms of cocaine into Canada. He would have at least fallen within the recognized range of sentence of 3 - 5 years established in *Madden.*[44] But because his co-operation clearly fell within the category of information that could be acted upon, it led to a conditional sentence of 2 years less one-day. Similarly, in the companion cases of *A.B.* and *C.D.*[45] each accused

[40] *John Doe, supra,* note 2.
[41] *Ibid.,.* at para. 29
[42] *Ibid.,.* at para. 29.
[43] *C.N.H. supra note 2 at para. 45.*
[44] *Supra,* note 34.
[45] *R.v. A.B.* and *C.D.* [2004] O.J. No. 5220 (Ont. S.C.)

was sentenced to conditional sentences in circumstances where, absent their co-operation with the authorities, they would have received penitentiary terms.

A.B., a single mother in her twenties, was caught at the Toronto airport carrying in her luggage, pistons for a boat or aircraft. In the pistons the authorities found 2.2 kilograms of cocaine with an estimated street value of $331,000. A.B. volunteered to help identify the person for whom she had undertaken the importation. Preparations were made for her to participate in a controlled drug delivery to the person expecting delivery of the drugs. But the authorities were unable to replicate the motor parts and the delay occasioned by their efforts defeated a successful arrest. But for the failure of the authorities, A.B. would have been able to provide information and assistance that could be acted upon by the authorities.

C.D. was the mother of two children under the age of 12 years but both children were in the custody of her common-law husband at the time of her arrest. C.D. was also arrested at the Toronto airport with a collapsible bag in a false bottom to her luggage containing 955 g. of cocaine and 344 g. of cannabis resin with an approximate value of $150,000. She claimed that she had no knowledge that she was carrying cocaine, believing instead that she was importing hashish. While she was under arrest, her cellular phone rang constantly, leading authorities to place two suspicious individuals under surveillance in the airport terminal. C.D. advised the authorities that she was to be met at the airport by men who were to take her and the narcotics to another province where she resided. She also provided a videotaped statement under oath disclosing her knowledge of the unlawful importation and the involvement of others. C.D. undertook to give evidence for the prosecution in the trial of those arrested at the airport. She had a prior minor and unrelated criminal record. In the result, A.B. was sentenced to 2 years less one-day; C.D. was sentenced to 12 months' imprisonment, each sentence to be served conditionally.

Although the prosecution in both *A.B* and *C.D* did not recommend a particular disposition to the court, it did acknowledge that the assistance provided by each accused

would permit the court to depart “significantly downward” from applicable sentencing ranges.[46] The co-operation was "exceptional and mitigating" because it was timely and could be acted upon.[47]

Although the Court of Appeal for Ontario has made it clear that the co-operation offered to the authorities by an accused need only have the *potential* to assist, it is now manifest that if an accused provides full, frank disclosure that is objectively valuable to the authorities, the discount on sentencing will be even greater than information not objectively useful. The discount may be so significant that first-time couriers or couriers with minor and unrelated records will avoid lengthy prison terms and may receive conditional sentences. Some courts have expressly stated that valuable co-operation by the accused may lead to a reduction in sentence of one half to two thirds in what would otherwise be an appropriate sentencing disposition.[48]

**The Presentation of Evidence of Co-operation**

In Ontario, Hill J. has followed a particular procedure for dealing with evidence of co-operation while, at the same time, maintaining confidentiality. The method he endorsed was suggested in *R.v.X.*[49] He used it in *Doe*. The prosecutor presents documented evidence to the court providing details of the offender's assistance to the authorities. The court then seals the documented information. The sealed documentation thus allows for a reviewable record without endangering the safety of the offender or the offender's family members. Although the trial judge is not obliged to articulate a distinct and quantifiable discount for informer assistance, according to Hill J. "such an approach is highly desirable".[50]

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[46] *Supra,* note 45 at para. 16.
[47] Given the nature and weight of the prohibited substance imported in each case, *A.B.* would normally have been in the 6-8 year penitentiary range and *C.D.* would have been in the 3-5 year range.
[48] *R.v. King* (1985), 7 Cr. App. R. 227 at p. 230; *R.v. Sehitoglu and Ozakan,* [1998] Cr. App. R. 89 at p. 95; *R. v. Perrier and Richardson* (1990), 59 Cr.App. R. 164 at p.172.
[49] *R.v. X*. [1999] 2 Cr. App. R. 125 (C.A.)
[50] *John Doe, supra* note 2 at para. 41.

Even if the defence disagrees with the contents of the sealed document the defence is not entitled to challenge or cross-examine the author of the document. The rationale for the inability to cross-examine is based on the notion that the document, although supplied by the police/prosecutor, is supplied *at the request of the offender*.[51] The onus is upon the offender to put forward evidence establishing material co-operation and there is a clear obligation on the prosecution to assist in this regard.[52]

A copy of the document is given to the defence. It is given to the defence not to challenge is contents but to ensure that there is no room for any unfounded suspicion that the sentencing judge has been provided with information adverse to the offender without the offender's knowledge.[53]

Our courts have used a variety of other methods to protect the identity of the offender and the contents of information he or she provides. These include orders under section 486 of the Code excluding members of the public from the courtroom, orders of non-publication, orders based upon the court's common-law jurisdiction to control its own process, sealing orders and the use of pseudonyms. Often to protect the accused, counsel provides the information of co-operation in chambers rather than in open court. This strategy however, sometimes leads to an inadequate record of the co-operation, or at least to an inadequate record in a reviewable form. Hill J. believes the police-prepared, sealed document method will prevent the problem of having to rely upon "bald statements of offender assistance made by defence and prosecuting counsel"[54]in chambers or even in open court. He also believes that a sealed document obviates the necessity of a partial or full *in camera* sentencing.

[51] *Ibid., at para. 40.*
[52] *R.v. Cartwright* (1989), 17 N.S.W.L.R. 243. (C.C.A.)
[53] *John Doe, supra note 2* at para. 40.
[54] *Ibid.,* at para. 38.

**A Cautionary Note: Beware the Problems Created by the Prosecution's Insistence on Timely Disclosure**

The fact that the greatest discounts on sentencing are afforded those who provide objectively useful information *in a timely fashion* has a dangerous potential to alter the dynamics of a sentencing where co-operation with the authorities is a factor. It is perfectly understandable that the investigating authorities want objectively useful information and that they want it now. Hill J. outlined the reasons in *A.B.* as follows:

> While co-operation with the authorities months or years after the offence may, in a specific case, 'be such as could significantly assist the authorities', that is very much the exception in drug importation cases. In the experience of this court, illicit narcotic enterprises attempt to preserve impenetrability with ever-changing locations, phone numbers and transient contact persons. Not infrequently, in a judicial pre-trial in this court, a year and a half or two years after the airport arrest of the drug courier, counsel relates to the presiding judicial officer that his or her client wishes to provide information to the investigating officer as part of a potential plea bargain. More often than not, when attempts are made to follow-up on such details as the offender is still able to recall, the passage of time in such instances defeats any real opportunity 'as could significantly assist the authorities'. That is generally the nature of the drug trade-- old information amounts to no information and does little more than detour valuable and limited police resources from more pressing assignments.[55]

[55] *R.v. A.B .supra,* note 45, at para. 24.

But whether or not the information is objectively useful enough or timely enough will often depend upon the position taken by the prosecutor in consultation with the investigating authorities. The defence, of course, is always able to present evidence on its own about the information or assistance the accused offered. But the effectiveness of co-operation often relies upon police action and execution.[56] And sufficient evidence of co-operation allowing the court to give proper credit relies upon police candour in providing the evidence of the co-operation. In fact, Hill J. noted that "substantial weight should be given to the government's evaluation of the usefulness of the offender's assistance, and the government's recommendation as to the extent of departure should be the starting point for the court's analysis though not determinative of the appropriate leniency".[57]

If substantial weight is to be given to the government's evaluation of the co-operation, then a significant advantage or bargaining tool in the sentencing process rests almost entirely in the hands of the prosecution. The measure of the co-operation provided effectively engages a critical assessment of the quality and quantity of the information by the prosecutorial team. Meanwhile, the court is left to assess only what the prosecution deems worthy of assessment. It is for the prosecution to advise the court whether or not the information provided was already within the knowledge of the investigating authorities, or whether, without the help of the accused, other crimes would have been detected. The peril thus created is that the exercise of discretion may subtly shift from the judge to the prosecutor. Curiously, many trial lawyers in the U.S. claim to have witnessed the same shift there in the implementation of the federal Guidelines. The American College of Trial Lawyers, in a paper published in September, 2004 argued that the federal Guidelines "have created a sentencing system wherein the power to make decisions about sentencing has effectively been transferred from the judge to the prosecutor."[58] The American trial lawyers contend that the imbalance occurs in a number of ways, including the following:

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[56] In *C.N.H. supra*, note 2 the court made reference to the fact that the trial judge found that the police were only mildly interested in the information provided by the accused and took few investigative steps, despite the fact that the accused had provided all the information that he was capable of providing.
[57] *R.v. A.B.,.supra*, note 45 at para. 32.
[58] *American College of Trial Lawyers: United States Sentencing Guidelines 2004: An Experiment That Has Failed* at p. 14

1. By using the severe sentences prescribed by mandatory minimums and the Guidelines as a lever, prosecutors can compel defendants to co-operate in exchange for the only exception to a Guidelines sentence that has a potentially unlimited effect, a 'substantial assistance' downward departure under Section 5K1.1 of the Guidelines authorized only on motion of the prosecution.
2. Prosecutors control the 'facts' that may be presented to the court at the time of sentence by negotiating with the defendant the arguments that the defence may make to mitigate sentence, if the defence wishes to accept the government's plea proposal. According to common practice, the government will only allow pleas, on relatively favourable terms, if the defendants agree to forego those arguments, such as minor roles, diminished capacity and family circumstances, which might lead to downward departures under the existing guidelines provisions. The court is thus denied the opportunity to even consider arguments that the defendant might otherwise put forth were the defendant not pressured 'to accept' the government's plea requirements.
3. By controlling the facts presented to the court, prosecutors can make use of the Guidelines' requirement that the court take into account 'relevant conduct' in determining the applicable range. 'To the extent that the prosecutorial discretion is exercised with reference to some and not to others, and to the extent that some are convicted of conduct carrying a mandatory minimum penalty while others who engage in the same or similar conduct are not so convicted, disparity is reintroduced.'[59]

The same concerns about "prosecutorial discretion" should exist in Canada. Afterall, as I have sought to show, our courts have urged harsher ranges of sentence because the routine imposition of lighter sentences such as conditional sentences "undermines significantly the possibility of gaining the co-operation of these persons in

[59] *Supra,* note 58 at pp. 15-16.

the investigation and arrest of higher-ups on the drug distribution chain."[60] And our courts have permitted significant downward departures from those suggested ranges of sentence where there is evidence of co-operation.

If the starting point in Canada is that substantial weight should be given to the assessment of the co-operation by the prosecutorial authorities, as suggested by Hill J., the resulting shift in sentencing discretion away from the court and into the hands of the prosecutor will occur here. The government's assessment of the value of the co-operation should not be afforded any more weight than the assessment offered by the defence and the government's evidence of co-operation should always be subject to challenge. Any challenge to the prosecutorial assessment of co-operation must be done in a way that it does not compromise future trials and ongoing investigations, but there must surely be a method. The most appropriate method of challenge has always been cross-examination. In these circumstances the cross-examination of the author (usually a police officer) of the government's document on co-operation would likely have to take place *in camera* so as to protect the offender or others innocently affected by the offender's disclosure and to ensure the integrity of any ongoing investigation or upcoming trial or the public interest. The offender should also be permitted to call his or her own evidence in support of the claim of co-operation.

It should be expected that in appropriate cases the defence will challenge the author of the document filed with the court by way of cross-examination. Furthermore, section 723 of the Code provides an offender with an opportunity to make submissions with respect to "any facts relevant to the sentence to be imposed". Even if the police or prosecutor is not forthcoming with evidence of the accused's co-operation, the court, on its own motion, pursuant to section 723 (3) of the Code, after hearing argument, may require the production of evidence to assist in determining whether there was co-operation. And the court is statutorily empowered to hear evidence presented by either party on *any relevant facts* including the accused's co-operation with the authorities.[61]

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[60] Per Doherty J.A. in *R. v. Hamilton* (2004), 186 C.C.C. (3d) 129 (Ont.C.A.) at para. 149.
[61] Section 724 (2) (b) of the Code.

**Possible Problems for Defence Counsel**

The elements of useful, timely information and assistance present other potential difficulties for defence lawyers. Accepting the basic premise that substantial reductions in sentence may encourage detainees to co-operate in a timely fashion, one can imagine the pressures placed upon them to provide information immediately. Although the detainee must be provided an opportunity to seek the advice of counsel in accordance with section 10 (b) of the Charter,[62] he or she will no doubt ask for counsel's advice about whether or not to co-operate.

This advice is likely to be sought at or near the time of arrest when counsel know little if anything about the evidence against the accused. The decision to co-operate effectively ensures that the accused is foregoing the right to trial and is proceeding directly to sentencing. The advice is also likely to be based upon the information from the accused only, since there is often a natural reluctance on the part of the investigating authorities to share too much information with counsel for the accused at such an early stage and without intervention or advice from a prosecutor. The advice may be sought before counsel is properly retained. Counsel will not know if the co-operation contemplated will place the accused in jeopardy financially, emotionally or physically.

Most experienced lawyers would not think of negotiating with a prosecutor on any aspect of any criminal matter without full knowledge of the case the accused must meet at trial. Arguably, to provide advice on such serious matters as giving up the right to remain silent, giving up the right to the presumption of innocence and giving up the right to trial without full knowledge of the case against the accused simply because the court may later place a premium on useful, timely information and assistance is at best problematic and at worst professional negligence.[63] It should be anticipated that most lawyers will decline to provide any advice on the detainee's decision to co-operate. Consequently, detainees may

[62] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act R.S.C., 1982.*
[63] *Folland v. Reardon* [2005] O.J. No. 216 (Ont.C.A.), at para. 35 Doherty J.A. suggests the standard of care required by counsel on a criminal matter is that of a reasonably competent counsel, and not, as suggested by some courts, the more forgiving standard of an egregious error by counsel.

be left on their own to make the decision. Once the decision is made, the path of the accused will likely be unalterable.

**Conclusion**

In their efforts to dismantle organized crime the police rely importantly on informer information. Without the incentive of a significant discount on sentencing many offenders would have no interest in assisting the police. Co-operation with the police from the perspective of a person involved in crime carries many negative aspects. Those who have an interest in maintaining the code often consider co-operation with the police in the underworld of crime as a breach of a code worthy of reprisal. Periods of incarceration may lead to reprisal even from persons not directly connected to the criminal activity that the informer/accused discloses. Fear of reprisal because of a breach of the code may require that the informer be placed in protective custody or be removed to a place of incarceration away from those who might know or speculate on the assistance provided by the informer/accused.

In cases where the informer's identity can be ascertained because the co-operation is public or in those instances where the informer testifies in open court revealing the co-operation, the danger to the informer and his or her family may continue long after the assistance offered and provided. Informers must be meaningfully encouraged to co-operate with the authorities. Usually the incentive offered is immunity from prosecution or a significant reduction in sentencing together with police protection commensurate with the perceived danger.

Defence counsel should thus make the following arguments where applicable:

1. The information or assistance provided was of practical assistance to the authorities and was capable of being acted upon by the authorities;

2. The information or assistance relates to or reveals the criminal responsibility of others more involved in criminal activity than the informant or more highly placed in the criminal organization or hierarchy;
3. The information or assistance provided was truthful, complete and accurate;
4. The information or assistance provided was genuine and given in the spirit of remorse or contrition;
5. The information or assistance led directly to prosecutions or convictions, or, in the event of a failed prosecution, the failure resulted not from the quality of the information provided but from unrelated deficiencies or errors;
6. Prosecutions or convictions would not have been possible but for the assistance of the informant/accused;
7. The information provided was not already within the knowledge of the authorities;
8. The information or assistance was timely so as to allow the authorities to maximize its benefit;
9. The information or assistance was provided despite specific actual or potential dangers or risks to the informant;
10. The specific dangers or risks were heightened by the public nature of the disclosures or assistance, particularly in circumstances where evidence is provided in open court by the informant/accused;
11. The information or assistance has led to the recovery of stolen property, proceeds of crime, dangerous firearms, missing persons or has provided answers the absence of which might haunt victims forced to live without the specific knowledge about how, when or why they were victimized or has allowed for the gaining of a valuable intelligence;

These arguments shape and define the highest level of co-operation with the authorities.