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CRIMINAL SECTION

THE LAW OF INFORMER PRIVILEGE
FINAL REPORT OF THE WORKING GROUP

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INTRODUCTION

[1] Informer privilege is a rule that prevents disclosure of an informer's identity when the said informer agrees to provide information to the police and in exchange the police promise to protect the informer's identity. In the criminal context, this rule is subject to one exception – namely, where the innocence of the accused is at stake.

[2] The Supreme Court of Canada in *Named Person v Vancouver Sun*[1] *and R v Basi*[2] set certain procedural guidelines for litigating informer privilege. However, despite this guidance a number of practical questions and considerations exist.

[3] These questions led the Public Prosecution Service of Canada (PPSC) to propose, at the 2014 meeting of the Uniform Law Conference of Canada (ULCC), a resolution that Justice Canada examine and, as necessary, develop a legislative framework governing the issue of informer privilege with a view to possibly amending the *Canada Evidence Act* (CEA). An amended resolution was adopted at the 2014 meeting establishing a ULCC Working Group to examine these issues.

[4] A Working Group was established with representatives from the defence bar, the Canadian Bar Association and provincial (Alberta, Saskatchewan, Ontario, Quebec, New Brunswick, Newfoundland and Labrador, and the Yukon) and federal (Justice Canada and the Public Prosecution Service of Canada) levels of government.

[5] Over the course of the Working Group's mandate, it has examined the law of informer privilege. It has also examined the operational challenges that can exist when litigating informer privilege cases in Canada.

[6] The results of the Working Group's activities are summarized in this paper, which is divided into four parts. Part 1 provides an overview of the law governing informer privilege in Canada today. Part 2 highlights how other jurisdictions address informer privilege issues. Part 3 canvasses some of the practical challenges associated with invoking informer privilege in cases today. Part 4 sets out the Working Group's recommendations and conclusions.

SHORT SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

[7] The Working Group has concluded that no specific legislative amendments are required at this time. Although the Working Group acknowledges that the practical challenges that can

[1] *Named Person v Vancouver Sun*, 2007 SCC 43, [2007] 3 SCR 253 [*Vancouver Sun*].
[2] *R v Basi*, [2009] SCC 52, [2009] 3 SCR 389 [*Basi*].

arise in informer privilege cases are not without consequence, it believes that the advantages of law reform would be outweighed by the risks. Accordingly, the Working Group recommends that efforts be made to improve awareness raising and/or training for Crown counsel and the police on the law of informer privilege and on how to mitigate the possible challenges that arise in informer privilege cases. Justice Canada has also agreed to continue to monitor trends in the law of informer privilege. Should the law evolve in a way that fails to provide sufficient clarity to those involved in litigating informer privilege claims, the issue of law reform could be revisited. As it now stands, however, the Working Group concludes that the law provides sufficient guidance and appropriate safeguards that protect the identity of the informant, on the one hand, and respect the fair trial rights of an accused, on the other.

PART I – THE CURRENT STATE OF CANADIAN LAW: THE FRAMEWORK GOVERNING INFORMER PRIVILEGE

1. The Scope of the Privilege: Examining Canadian case law on Informer Privilege

(a) What is informer privilege?

[8] Informer privilege is a rule that protects a police informer's identity from revelation to third parties.[3] The rule is predicated on a rationale of interrelated concessions – namely, a give-and-take relationship whereby guaranteeing the protection of an informer's identity creates a climate of trust and security so that individuals come forth and give police much needed information without fear of repercussion from others.[4] The rule has two policy objectives: (1) to protect the identity of those who come forward to the police with needed information; and, (2) to encourage others to do the same.

(b) When does the privilege apply?

[9] Informer privilege does not extend to the context where an individual provides information to the police and merely hopes that his or her identity will remain secret. Rather, protection is afforded when confidentiality is sought by the individual providing the information, and there is express or implicit acceptance by the police. As stated by the Supreme Court:

> The privilege arises where a police officer in the course of an investigation, guarantees protection and confidentiality to a prospective informer in exchange for useful information that would otherwise be difficult or impossible to obtain [emphasis added].[5]

[3] Robert W. Hubbard, Susan Magotiaux & Suzanne M. Duncan, *The Law of Privilege in Canada* (Toronto: Thomson Reuters, 2012) (loose-leaf release 28) ch 2 at 2 [Hubbard].
[4] *Ibid.* See also T.G Cooper, *Crown Privilege* (Aurora: Canada Law Book Inc., 1990).
[5] *Basi*, *supra* note 2 at para 36.

[10] This position was reaffirmed in *R v Barros* when the Court stated:

> Of course, not everybody who provides information to the police thereby becomes a confidential informant. In a clear case, confidentiality is explicitly sought by the informer and agreed to by the police [emphasis added].[6]

[11] The rule of informer privilege was "created and enforced as a matter of public interest rather than contract."[7] The lack of contractual elements such as offer and acceptance are not automatically determinative, especially when it can be argued that the individual would otherwise be in a situation of serious potential danger.

[12] The promise of confidentiality need not be explicit; rather, it must be determined whether, objectively speaking, the conduct of the police would have led someone, standing in the shoes of the potential informer, to reasonably believe that his or her identity would be protected.[8]

[13] In *R v Named Person B*,[9] the Supreme Court considered whether informer privilege status granted by one police force could be binding on another. In this case, B approached a police force to give information about violent crimes and was promised confidentiality. Two days later, the police force that had granted B informer privilege status transferred the information he had provided to the Sûreté du Québec (SQ). B continued to provide information to that force over a period of five years, until the SQ, upon request from the Crown, tried to get B to sign a waiver of privilege form. The Crown did not think B was a confidential informant and sought pre-trial determination so that disclosure could be properly completed. Ultimately, the Court in *Named Person B* found that the nexus between the two police forces in their handling of B, as well as the continuity of B's relationship with both forces, and the overwhelming circumstantial evidence that B had reasonable grounds to believe that the protection promised by the first police force would continue with the ongoing information he provided to the SQ, was sufficient for B to have a reasonable expectation of continued confidentiality.

[14] The fact that one police force grants informer status to an individual does not *a priori* mean one has informer privilege protection with another police force.[10] However, it is clear that a promise of protection and confidentiality can be either express or implicit.[11]

(c) Characterizing the scope of the privilege and the information protected?

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[6] *R v Barros*, [2011] SCC 51, [2011] 3 SCR 368 at para 31 [*Barros*].
[7] *Ibid* at para 32.
[8] *R v Named Person B*, [2013] SCC 9, [2013] 1 SCR 405 at para 18 [*Named Person B*].
[9] *Ibid*.
[10] *Named Person B*, *supra* note 8 at para 23.
[11] *Ibid* at para 18. See *Barros*, *supra* note 6 at 31. See also *Bisaillon v Keable*, [1983] 2 SCR 60 at para 93 [*Bisaillon*].

[15] Informer privilege extends beyond the criminal setting and can be invoked in civil cases and administrative proceedings.[12] The difference between these settings is that in civil and administrative proceedings, because the innocence of an accused is not at issue, the protection is absolute.[13] For example, the Saskatchewan Court of Appeal in *Royal Canadian Mounted Police v Saskatchewan (Commission of inquiry into the death of Leo La Chance)* maintained the absolute nature of the privilege in civil contexts, refusing to broaden the only informer privilege exception.[14]

[16] The scope of the information protected extends far beyond the actual name of the informer, and includes all the details that might reveal the informer's identity:

> There may be cases where the informer and his circumstances are known, in which the court can be certain that what remains of an informant document after editing will not reveal the informer's identity. When, however, as in the case at bar, it is impossible to determine which details of the information provided by an informer will or will not result in that person's identity being revealed, then none of those details should be disclosed, unless there is a basis to conclude that the innocence at stake exception applies.[15]

[17] Informer privilege is not akin to an exclusionary evidentiary rule because such rules, result in evidence being kept only from the trier of fact. Informer privilege keeps the information from society at large: "the mischief is not that the trier of fact might rely on unreliable evidence, but rather that anti-social members of society might seek retribution against the informer."[16] Hence, it could more appropriately be referred to as a principle of "immunity" or "secrecy" because unlike private privileges, such as that relating to communications passing between solicitor and client, this rule of secrecy belongs not uniquely to any private party but rather to both the Crown and the informer. Neither is free to waive it without the consent of the other.[17]

[18] In *Barros*, the Alberta Court of Appeal rejected the argument that informer privilege is something that only exists inside the courtroom.[18] The suggestion that this privilege is only part of a court procedure, and does not bind anyone outside the courtroom, misconstrues the underpinnings of the rule because it "incorrectly assumes that the informer privilege rule is

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[12] *Bisaillon*, *supra* note 11 at para 93, the Court stated "there are no exceptions in proceedings other than criminal". See also *Cadillac Fairview Corp v Standard Parking of Canada Ltd*, [2004] OJ No 37 at para 15 [*Cadillac*].
[13] Hubbard, *supra* note 3 at ch 2 at 18.
[14] *Royal Canadian Mounted Police v Saskatchewan (Commission of Inquiry)*, [1992] 6 WWR 62, 75 CCC (3d) 419.
[15] *R v Leipert*, [1997] 1 SCR 281, 143 DLR (4th) 38 at para 32 [*Leipert*].
[16] *R v Barros*, [2010] ABCA 116, 254 CCC (3d) 50 at para 52 [*Barros* ABCA].
[17] A.W Bryant, S.N. Lederman & M.K. Fuerst, *The Law of Evidence in Canada*, 3rd ed (Toronto: Butterworths, 2009) at paras 15.2, 15.72.
[18] *Barros* ABCA, *supra* note 16 at para 28. The Alberta Court of Appeal's decision was varied by the Supreme Court of Canada on several points of law and fact. However, not on this finding.

primarily connected to trial fairness and procedure, whereas its roots are in broader considerations of public policy."[19]

> It is artificial to suggest that information that cannot be spoken of in the courtroom, but can be freely discussed anywhere else, is "secret". Further, the whole point of the privilege is to protect the informer. The informer is not at risk of anything happening to him inside the courtroom; the risk lies entirely outside the courtroom. The whole point of the privilege is to prevent the informer's identity from getting into the hands of members of the community who would seek retribution against the informer. Apart altogether from the lack of any authority on the point, this position is illogical [emphasis added].[20]

[19] As noted by the Court, it is counterintuitive and diametrically opposed to the privilege's foundational underpinnings to say that informer privilege is respected as long as confidentiality is maintained within the courtroom, despite the fact that the privileged information is widely distributed outside the courtroom. The scope of physical dangers to which confidential informants are exposed is vast, but such physical danger almost always exists predominantly outside the inner circle of a courtroom.

(d) How to trigger the first stage hearing without publically revealing the nature of the hearing?

[20] In *Basi*, the Court explained the procedure to be followed when informer privilege is claimed.[21] The Court stated that "when the privilege appears to arise, its existence must be determined by the court *in camera* at a 'first stage' hearing. Even the existence of the claim cannot be publicly disclosed".[22] That being said, it remains unclear in the Court's remarks how the Crown would trigger a first-stage hearing without publically revealing the nature of the inquiry to be held.

[21] In *R v Lucas*, the Ontario Court of Appeal expanded on some of the principles enunciated in *Basi* – most notably, the Court reiterated that a first stage hearing to determine whether privilege applies must always proceed on the assumption that the privilege applies and this is because the primary concern in such cases is the protection of the identity of the putative confidential informer.[23] Moreover, the Ontario Court of Appeal reiterated the broad discretion that the trial judge has in crafting appropriate procedural safeguards that protected both the underlying informer privilege and the accused's interests.[24]

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[19] *Ibid*.
[20] *Ibid* at para 50.
[21] *Basi*, *supra* note 2 at para 38.
[22] *Ibid*.
[23] *R v Lucas*, [2014] ONCA 561 at para 61.
[24] *Ibid* at para 66.

[22] Ordinarily in such proceedings, only the Crown and the informant would appear before the judge, however the court may appoint an *amicus curiae* in instances where the interests of the informant and the Crown converge. [25]

(e) What is the exception to the rule?

[23] In Canada it is now well-established law that the informer privilege rule is near absolute. The privilege has no exception in civil proceedings and can yield only when innocence is at stake in criminal matters.[26]

[24] From its earliest days, the common law rule of informer privilege affirmed the paramountcy of the principle "that an innocent man is not to be condemned when his innocence can be proved" by allowing an exception where innocence is demonstrably at stake. [27] In *Bisaillon v Keable*, the Supreme Court of Canada noted that the informer privilege "rule is subject to only one exception, imposed by the need to demonstrate the innocence of an accused person".[28]

[25] This was reaffirmed and emphasized in *R v Leipert* where the Court stated that informer privilege can only be breached when there exists a basis to conclude the protected information is necessary to establish that the accused's innocence is at stake:

> Informer privilege is of great importance. Once established the privilege cannot be diminished by or "balanced off against" other concerns relating to the administration of justice. The police and the court have no discretion to diminish it and are bound to uphold it. The only exception to the privilege is found where there is a basis to conclude that the information may be necessary to establish the innocence of the accused [emphasis added].[29]

[26] The near absolute nature of informer privilege does not allow for an exception so that an accused can make full answer and defence, nor does it allow an automatic *de facto* right of disclosure under *R v Stinchcombe*.[30]

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[25] *Basi*, *supra* note 2 at para 38.
[26] *Ibid* at para 17.
[27] *Marks v Beyfus*, [1890] 25 QBD 494 (CA).
[28] *Bisaillon*, *supra* note 11 at para 93.
[29] *Leipert*, *supra* note 15 at para 28.
[30] *Vancouver Sun*, *supra* note 1 at para 28.

[27] The near-absolute nature of the privilege commands that judges have no discretion in deciding to afford the protection where a person properly invokes this privilege. [31] As such, it is clear that *Stinchcombe* does not require disclosure where informer privilege applies.

[28] As stated by the Court in *Leipert*: "[i]nformer privilege is of such importance that once found, courts are not entitled to balance the benefit ensuring from the privilege against countervailing considerations".[32]

(f) When the privilege does not apply?

i. Persons who provide information to civil parties

[29] The class privilege does not extend to persons who provide information to civil parties.[33] For example, in *Cadillac Fairview Corp v Standard Parking of Canada Ltd.*, the Court did not extend the informer privilege status to whistleblowers that provided information to a party in a civil action:

> When the protection is sought for persons who inform on criminals, not to law enforcement agencies for the purpose of bringing criminals to justice, but to private litigants who use that knowledge to commence civil proceedings for damages, the absolute protection afforded by police informant privilege should not be automatically available. Rather, such requests should be dealt with on a case-by-case basis so that the factors in the *Wigmore* test can be considered in the context of the particular circumstances of each situation [emphasis added]. [34]

ii. The "informant" who acts as an agent

[30] Informer privilege has no application in contexts where an informant "enters the field and becomes an agent of the police as an active participant in the events leading to charges."[35] In *R v Davies*, the issue was whether a longstanding police informer of the Royal Canadian Mounted Police (hereinafter RCMP) could be protected by informer privilege after entering the field of investigation. Ultimately, the Court held:

> In my view, Bud (police informer) does not come within the standard classification of police informant. His role was more closely linked to that of an agent provocateur. After Bud's introduction to the appellant, apparently under general instructions from the

[31] Hubbard, *supra* note 3 at ch 2 at 8.6.
[32] *Leipert*, *supra* note 15 at para 12.
[33] Hubbard, *supra* note 3 at ch 2 at 18.
[34] *Cadillac*, *supra* note 12.
[35] Hubbard, *supra* note 3 at ch 2 at 38.

> R.C.M.P., Bud posed as agent for the purchasers of a large quantity of cocaine. Once the agent provocateur goes into the field, he loses the protection of his "cover" [emphasis added].[36]

[31] A key distinction between an informer and an agent is that an informer simply furnishes information to the police, while an agent acts on the direction of the police by going into the field and participating in the transaction in some manner (i.e., acting in an evidence gathering capacity by wearing a wire).[37] This distinction was explained in *R v Y. (N.)*, where the Court stated:

> A confidential informant is a voluntary source of information to police or security authorities and is often paid for that information, but does not act at the direction of the state to go to certain places or to do certain things. A state agent does act at the direction of the police or security authorities and too, is often paid. The state agent knows that if charges are laid, his or her identity may be disclosed to the defence and he or she may be required to testify. A major distinction is that the confidential informant is entitled to confidentiality (subject to the innocence at stake considerations) and may not be compelled to testify. A state agent is not afforded a shield [emphasis added].[38]

[32] In practice, this determination may not be as cut and dry, as informers may often be more than passive observers who tender information to the police. In certain contexts, such informers may of their own initiative actively pursue leads, police objectives or ambitions of police handlers.[39] In these cases the categorization of the individual will always hinge on determining whether the individual acted at the direction of the police. Where an informer crosses the line and becomes an agent for the police, the privilege still applies for the period in which he/she acted as an informer.

[33] Another relevant factor in making such determinations is the existence or lack thereof of a formal letter of agreement setting out the relationship between the agent and the police. Given the sizeable difference in protection offered to informants and agents – namely, a practically absolute shield to a condition of nonexistent protection, the court in *R v Y.(N.)* decided that the lack of an agreement is indicative that the confidential informant has not become an agent of the state.[40] Finally, it remains important to note that the fact that an individual can be a police agent in one case and a confidential informer in another.[41]

iii. The "informant" as the accused

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[36] *R v Davies*, [1982] OJ No. 146 at para 11.
[37] *R v B, G, et al*, [2000] 146 CCC (3d) 465, [2000] OJ No 2963 (QL) at para 10.
[38] *R v NY*, [2012] ONCA 745, 113 OR (3d) 347 at para 122 [*NY*].
[39] Hubbard, *supra* note 3 at ch 2 at 38.4.
[40] *NY*, *supra* note 38 at para 120 & 124.
[41] *Ibid* at paras 29-36.

[34] An informant cannot obtain the benefit of the privilege when he/she commits a crime on his/her own behalf. The Quebec Court of Appeal in *R v Hiscock* noted:

> Le privilège de l'informateur ne saurait être interprété et appliqué pour accorder une licence de commettre des actes criminels dans le seul intérêt du prévenu. Il est de nature à couvrir des actes illégaux, voire même criminels, pourvu qu'il demeure orienté vers la fonction de mise en application des lois. Si l'on acceptait l'argument des appelants, le privilège que l'on invoque se trouverait complètement détourné de sa finalité, puisqu'utilisé pour une fin et des intérêts contraires à ceux qui le justifient dans le droit public canadien. Il n'y a donc pas eu d'erreur dans la décision du premier juge de rejeter le moyen tiré du privilège de l'informateur. Ce grief d'appel doit aussi être écarté.[42]
>
> The rule governing informer privilege could not be interpreted and applied in a fashion that grants an accused a license to commit criminal acts in his/her own self-interest. The privilege does extend to illegal acts, even criminal acts but only as long as those acts are oriented towards the enforcement and application of the law. If we accepted the argument of the appellants, the privilege we invoke would be completely undermined as it would be used to accomplish interests and a result contrary to that of Canadian public law. There is thus no error in the decision of the trial judge to reject the claim of informer privilege. This ground for appeal must also be rejected [Translation].

[35] While criminal or tortious acts of the informer are tolerated and even protected by privilege when the informer is helping the state, privilege does not extend to criminal acts that are committed for the sole benefit of the individual informant. In *Named Person B*,[43] B was an informant for the SQ for a duration of five years. Almost all of B's statements to the SQ were preceded by an undertaking that the SQ was not to use the information to prosecute B, with the exception of perjury. The undertaking also contained a note that charges could be brought against B in relation to statements B made to the SQ if supported by external or independent evidence. In the course of the five years that B was an informant for the SQ, the SQ found independent evidence in relation to one of B's violent crimes and B pleaded guilty and was sentenced in relation to the commission of that offence.[44]

iv. Procedure governing the exception to the rule

[42] *R v Hiscock*, 72 CCC (3d) 303, 1992 CanLII 2959.
[43] *Named Person B*, *supra* note 8.
[44] *Ibid* at para 8.

[36] In *R v Klymchuk*[45] the Ontario Superior Court of Justice applied the *McClure*[46] and *Brown*[47] tests routinely used in determining the innocence at stake exception in solicitor-client privilege cases to the informer privilege context. The Court noted the following:

> The Supreme Court of Canada has developed evidentiary and procedural standards in respect to the determination of whether informer privilege or solicitor-client privilege must yield to the "innocence at stake" exception in a given case. Those standards consist of a threshold question and a two stage determination as follows:
>
> For the matter to be further considered, the accused must establish that:
> - The information sought is not available from any other source; and
> - The accused is otherwise unable to raise a reasonable doubt as to guilt.
>
> The "innocence at stake test", to be applied when the threshold conditions are satisfied, possesses the following two stages:
> - Stage 1: The accused seeking production must provide an evidentiary basis to conclude that the informer possesses information that could raise a reasonable doubt as to the accused's guilt;
> - Stage 2: If such evidentiary basis exists, the trial judge should examine the available information to determine whether, in fact, it is likely to raise a reasonable doubt [emphasis added].[48]

[37] Similarly, in *R v Deol*, the Manitoba Court of Appeal stated:

> The procedural and evidentiary standards to be followed when an accused seeks to invoke the innocence at stake exception are set out in *R v McClure*, and explained more fully in *R v Brown*. While both of these cases deal with solicitor-client privilege, the standards apply to informer-privilege because they are premised on the innocence at stake exception to informer privilege [emphasis added].[49]

[38] The same two-tiered test used in *McClure* and *Brown* for governing the innocence at stake exception in solicitor-client privilege cases was used in *R v Marshall*,[50] an informer privilege case. Ultimately, the Ontario Court of Appeal upheld the trial judge's decision not to order disclosure affirming that the *McClure* and *Brown* test permits the release of privileged information "only when it is shown the applicant has no other defence and the requested

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[45] *R v Klymchuk*, [2006] CanLII 34719 (ONSC) [*Klymchuk*].
[46] *R v McClure*, [2001] SCC 14, [2001] 1 SCR 445.
[47] *R v Brown*, [2002] SCC 32, [2002 2 SCR 185.
[48] *Klymchuk*, *supra* note 45 at para 20.
[49] *R v Deol*, 2006 MBCA 39, [2006] 208 CCC (3d) 167 at para 27.
[50] *R v Marshall*, [2005] OJ No. 3549, 77 OR (3d) 81.

information would make a positive difference in the defence case."[51] Moreover, the Court noted that such orders should "only be made as 'a last resort'".

v. The Informer as a witness

[39] Authors Hubbard, Magotiaux and Duncan suggest "[i]t is difficult to call someone as a witness who is also an informer in relation to the events relevant to the proceedings and still expect to keep secret the informer status of the witness".[52] This is because once called to testify the informer status of a witness is at risk of being exposed. The problem, practically speaking, is informers are frequently witnesses to the crimes they report. The question then becomes: are all informers who have witnessed a crime automatically precluded from protection afforded by informer privilege because they are a material witness? Cromwell J. in dissent in *Named Person B* paints the difficulties of having a confidential informer testify and arrives at the conclusion that it may be impossible to do so and realistically expect to maintain the informer's right to secrecy:

> So far as I am aware, there is no hard and fast rule that a confidential informer cannot become a witness to testify regarding the very information he provided to police in confidence. However, as a practical matter, such situations would be extremely rare. It is hard to see how an informer could testify about certain things without making it obvious that he was a source of the police knowledge about those things. In other words, such testimony could only rarely if at all be given without creating a risk that the informer's identity as the purveyor of the privileged information would be discovered, an outcome, I would emphasize, the Crown is under a legal obligation to do all in its power to avoid. As a practical matter, unless both the Crown *and* the witness agree to renounce it, informer privilege must be seen as barring, for all practical purposes, the Crown from calling an informer to testify at trial about the very information provided to the police in confidence. The two roles are almost invariably incompatible.[53]

[40] The Court in *Vancouver Sun* suggests that a better manifestation of the rule is one that categorizes situations where the informer is a material witness to a crime as falling within the innocence at stake exception.[54]

(g) Who Owns the Privilege?

[51] *Klymchuk*, *supra* note 45 at para 24.
[52] Hubbard, *supra* note 3 at ch 2 at 42.2.
[53] *Named Person B*, *supra* note 8 at para 140.
[54] *Vancouver Sun*, *supra* note 1 at para 29.

[41] The Supreme Court of Canada stated in *Leipert* that the privilege belongs to the Crown.[55] However, neither the Crown nor the police can "waive the privilege without the consent of the informer."[56] Hubbard, Magotiaux and Duncan have noted that if "the Crown must invoke the privilege and cannot waive the privilege without the informer's consent, the privilege, properly speaking, belongs to the informer."[57] This view seems to accord with the ideological underpinning of the privilege – namely, "the purpose of the privilege, being protection of those who provide information to the police and the encouragement of others to do the same."[58]

[42] Despite this, the Supreme Court of Canada has made it clear in Canadian law that the privilege belongs to both. For instance, in *Vancouver Sun* the Supreme Court notes "the informer himself or herself cannot unilaterally decide to 'waive' the privilege."[59] This statement was reaffirmed by the Court in *Basi* where the Court states that "the informer privilege belongs jointly to the Crown and to the informant. Neither can waive it without the consent of the other."[60]

(h) Bill C-44 and CSIS Human Sources

[43] In *Canada v Harkat*[61] the Supreme Court of Canada stated there is no common law class privilege. As such, CSIS human sources do not benefit from a common-law class privilege similar to that which protects police informants. The Court reasoned that the law recognizes a very limited number of class privileges and "that it is it is likely that any further expansion of class privileges would be created through legislative action."[62] The Supreme Court did note, however, that such a finding would not necessarily mean that CSIS sources will be revealed during court proceedings. The Court went on to note that the *Immigration and Refugee Protection Act* already provides mechanisms to protect the identity of human sources by precluding the public disclosure of information that would be injurious to national security.

[44] Following, the Supreme Court of Canada's decision in *Harkat*, a new statutory scheme was enacted – namely, Bill C-44, *An Act to amend the Canadian Security Intelligence Service Act and other Acts*. The Bill governs the protection of the identity of CSIS human sources and created a new section 18.1, which provides that the identity of human sources or information that would disclose their identity be "kept confidential in order to protect their life and security and to encourage individuals to provide information to the Service". Similar to the police informer

[55] *Leipert*, *supra* note 15 at para 15.
[56] Federal Prosecution Service, Department of Justice Canada, *The Federal Prosecution Service Deskbook* at VII-36.4, online: <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch36.html>.
[57] Hubbard, *supra* note 3 at ch 2 at 22.2.
[58] *Leipert*, *supra* note 15 at para 15.
[59] *Vancouver Sun*, *supra* note 1 at para 25.
[60] *Basi*, *supra* note 2 at para 40.
[61] *Canada (Citizenship and Immigration) v Harkat*, [2014] SCC 37, [2014] 2 SCR 33.
[62] *Ibid* at para 87. See also, *R v National Post*, [2010] SCC 16, [2010] 1 SCR 477 at para. 42.

privilege context, the identity of a human source may be disclosed in a criminal proceeding where it is essential to establish the accused's innocence.

[45] In *Attorney General of Canada v Almalki et al.*[63], the Federal Court (Trial Division) ruled that the human source statutory privilege did not have retrospective application in law. In the Court's view, the application of section 18.1 would affect the substantive and vested rights of the respondents (i.e., it limited the scope of disclosure otherwise permitted in their proceedings).[64] The Court noted that pre-existing human sources continue to be protected by s 38 of the *CEA*, which requires a balancing of interests (i.e., whether disclosure would cause injury to one of the protected national interests and, if so, whether the risk of that harm outweighs the public interest in disclosure). A similar conclusion was reached in the subsequent decision, *Korody v Canada*.[65]

2. Informer Privilege and the interplay of the Common Law & Section 37 of the Canadian Evidence Act (CEA)

a. Does informer privilege qualify as an aspect of public interest privilege?

[46] Hubbard, Magotiaux and Duncan have suggested that informer privilege is a distinct type of privilege, which ought not to be classified as public interest privilege.[66] Informer privilege, properly construed, "is a class privilege distinct from the category of public interest privilege."[67] The Supreme Court of Canada has noted:

> The secrecy rule regarding police informers' identity has been confused with Crown privilege, but this in my view is a mistake. The reason for the mistake may be that the secrecy rule regarding police informers' identity and Crown privilege have several points in common: in both cases, relevant evidence is excluded in the name of a public interest regarded as superior to that of the administration of justice; in both cases the secrecy cannot be waived; finally, in both cases it is illegal to present secondary proof of facts which in the public interest cannot be disclosed. However, these points in common should not be allowed to hide the specificity of the set of common law provisions applicable to secrecy regarding police informers' identity, which distinguishes it from the set of rules governing Crown privilege.[68]

[63] *Canada (Attorney General) v Almalki*, [2015] FC 1278.
[64] When a rule of evidence impinges on either substantive or vested rights it is presumed not to have immediate effect unless Parliament has clearly expressed its intent to the contrary.
[65] *Korody v Canada (Attorney General)*, [2015] FC 1398.
[66] Hubbard, *supra* note 3 at ch 2 at 10.
[67] *Ibid* ch 3 at 4.
[68] *Bisaillon*, *supra* note 11.

[47] On the other hand, Canada's highest Court has accepted the use of section 37 *CEA* as a fail-safe mechanism when a judge orders production of documents that might tend to reveal an informer:

> The "specified public interest" at issue in this case is the protection of the identity of informers, more generally known as the "informer privilege". The informer privilege is a class privilege, subject only to the "innocence at stake" exception. It is not amenable to the sort of public interest balancing contemplated by section 37(5):
>
> When section 37 is invoked to protect the informer privilege – a relatively rare occurrence, since the claim of privilege will usually be settled under the common law alone – its strictness is not relaxed.[69]

b. Differences between Informer Privilege and Public Interests Privilege?

[48] Informer privilege and public interest privilege, under section 37, vary on certain elements – most notably, unlike informer privilege, public interest privilege involves a balancing of competing public and private interests in accessing information. By contrast, informer privilege is a class-based privilege that does not permit such weighing of interests. Furthermore, from a more practical point of view, public interest privilege is dependent on an affidavit or otherwise presented evidence outlining the reasons why there is a government interest in withholding information, whereas informer privilege can be invoked merely because a confidential informer is involved.[70] Lastly, public interest questions are decided by a court examining the contested evidence and deciding whether its production would be contrary to the public interest. No similar production is required with informer privilege.[71]

c. Which framework governs the law of informer privilege: section 37 CEA or the common law?

[49] Although informer privilege claims are generally commenced under the common law regime, section 37 can be invoked to litigate informer privilege claims. Indeed, the number of cases where the Crown has successfully invoked section 37 of *CEA* to protect an informer's identity appears to be on the increase.[72] The obvious practical reason for resort to section 37 is the availability of an interlocutory appeal. Although such an appeal can be disruptive and cause delay, the Crown is bound never to reveal informer identity, so an order to produce information that would tend to identify an informer cannot be complied with and later appealed. Immediate

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[69] See especially *Basi*, *supra* note 2 at paras 22-23.
[70] Hubbard, *supra* note 3 at ch 2 at 10.
[71] *Ibid*.
[72] Veronica Ashenburst, "Litigating Informer Privilege under Section 37 of the *Canada Evidence Act*: A Critique of *R v Basi*" (2013) 38:2 Queen's LJ at 626.

routes to reconsideration are required. Section 37 provides a statutory framework for the procedure and analysis used to assess informer claims.

[50] The practical result of the availability of section 37 is twofold – (1) the law of informer privilege remains largely governed by the common law rubric; and, (2) when a judge orders disclosure of information that might identify the informer, Crown counsel can use section 37 *CEA* to appeal that decision.

PART II – COMPARATIVE RESEARCH: THE LAW GOVERNING INFORMER PRIVILEGE IN OTHER JURISDICTIONS

a. Australia

[51] In Australia, informer privilege is currently subject to judicial balancing of interests.[73] This has not always been the case, as 19th century case law advocated an absolute rule:

> [I]n a public prosecution, a witness cannot be asked such questions as will disclose the informer, if he be a third person. This has been a settled rule for fifty years, and although it may seem hard in a particular case, private mischief must give way to public confidence... [W]e think the principle of the rule applies [also] to the case where a witness is asked if he himself is the informer, and therefore that the question could not be asked [emphasis added].[74]

[52] Nowhere in this judgement is there a discussion or statement of principle that this "rule may give way to the accused's interest... [t]he principle is stated as a blanket rule".[75] Eventually, the informer privilege rule evolved to incorporate the near-absolute rule with a similar limited exception approach currently used in Canada:

> I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of the opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proven is the policy that must prevail [emphasis added].[76]

[73] Henry Mares, "Balancing public interest and a fair trial in police informer privilege: A critical Australian perspective" (2002) 6 Int'l J. Evidence & Proof 94 at 110-112 [Mares].
[74] *Attorney-General v Briant*, [1846] 15 M& W 169.
[75] Mares, *supra* note 73 at 99.
[76] *Marks v Beyfus* [1980] 25 QBD 494 at 498.

[53] Based on this, the rule as it had taken shape in the 19th century "was not expressed as a weighing exercise; this is something that emerged only in the 20th century".[77] However, with informer privilege over the years being seen by Australian courts as a subset or aspect of public interest immunity, more recent judgements began revealed the introduction of weighing tests:

> The various classes of excluded relevant evidence may for ease of exposition be presented under different colours. But in reality they constitute a spectrum, refractions of the single light of public interest which may outshine that of the desirability that all relevant evidence should be adduced to a court of law [emphasis added].[78]

[54] More specifically,

> It may be suggested that the notion of a balancing of relevant factors pointing in one direction against relevant factors pointing in the other is not consistent with the proposition that identity must be disclosed if there is good reason to think that disclosure may be of substantial assistance to the defendant. To say that in such a case no balance is called for is to say that, whatever the strength of the case in favour of non-disclosure, it cannot prevail. But a balancing has still been carried out, and effect has been given to an overriding principle that the "right" to a fair trial must not be substantially impaired... [emphasis added].[79]

[55] Hence, under Australian common law, in determining whether the general public interest immunity will apply in favour of preventing disclosure, the public interest will be balanced against upholding the need for disclosure, and the final determination will favour the side with greater weight.[80] In the realm of confidential informers, the public interest that would militate against disclosure would be the underlying fear that disclosure will serve as a disincentive for others wishing to provide information in the future.[81] Moreover, the witness' interest in anonymity, most notably for his/her safety and the safety of his/her family, friends or associates are also factors that support the suppression of disclosure. On the other hand, factors that favor disclosure include the public interest in open justice, and the need to ensure a fair trial considerations.

[56] In *Jarvie v Magistrates' Court of Victoria at Brunswick*, Brooking J stated that disclosure would be favored once it had been demonstrated that "there is a good reason to think that disclosure of the informer's identity may be of substantial assistance to the defendant in

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[77] See especially, *Cain v Glass (No.2)*, [1985] 3 NSWLR 230 at 248.
[78] *D v National Society for the Prevention of Cruelty to Children*, [1978] AC 171 at 233.
[79] *Jarvie v Magistrates' Court of Victoria at Brunswick,* [1995] 1 VR 84 at 90 [*Jarvie*].
[80] *Sankey v Whitlam*, [1978] 142 CLR 1 at 39.
[81] *National Society for the Prevention of Cruelty to Children*, *supra* note 78 at 191.

answering the case against him"[82] noting that "slight assistance to the defence is not sufficient to outweigh the public interest in non-disclosure".[83] Qualitative factors that provide "substantial assistance to the defendant in answering the case against him" include that mere disclosure of the identity of the informer will help show the accused is innocent and such disclosure is necessary to adduce evidence of information that will help show the accused is innocent or that disclosure would lead to the production of other evidence that would have the aforementioned effects.[84]

[57] In 1995, there was a legislative remodelling of informer privilege via the *Evidence Act 1995* (hereinafter *EA*).[85] The *EA* applies in federal courts, in New South Wales, and in the Australian Capital Territory. In these jurisdictions the common law informer privilege rule was continued *inter alia* through section 130 of the *EA*, which states:

> 130 Exclusion of evidence of matters of state
>
> (1) If the public interest, in admitting into evidence information or a document that relates to matters of state, is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.
>
> (2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).
>
> (3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.
>
> (4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would:
>
> (e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State,

[58] Section 130 is intended to reflect the common law position, which requires a weighing of factors – namely, balancing the advantages of non-disclosure versus the disadvantages.[86] Moreover, subsection 130 (3) allows the court to inform itself in any way that it thinks fit in making its decision, while subsection 130 (5) provides a list of factors that must be taken into account:

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[82] *Jarvie, supra* note 79 at 90.
[83] *Ibid.*
[84] *R v Derbas,* [2012] NSWCCA 14 at para 27.
[85] *Evidence Act* 1995 (NSW), s.130 (1), (4)(d).
[86] *R v Smith*, [1996] 86 A Crim R 308 (NSW CCA). Section 130 of the *Evidence Act 1995* appears now to require a weighing of competing interests.

(5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters:

(a) the importance of the information or the document in the proceeding,
(b) if the proceeding is a criminal proceeding-whether the party seeking to adduce evidence of the information or document is a defendant or the prosecutor,
(c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding,
(d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication,
(e) whether the substance of the information or document has already been published,
(f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is a defendant-whether the direction is to be made subject to the condition that the prosecution be stayed.

[59] Despite this, even if section 130 requires a balancing of interests it does appear that substantial weight in practice ought to be given to one side as in *Smith* the Court found it to be an error not "to take account of the substantial weight the law on this subject has given, and gives, to the public interest on keeping confidential police sources of information."[87]

b. United Kingdom

i. England

[60] Similar to a *Stinchcombe*[88] type disclosure in Canada, all prosecutions at common law include a duty on the Crown to disclose any material that can have a bearing on the offence being prosecuted.[89] As is the case in Canada, informer privilege operates to restrict what can be disclosed.

[61] Informer privilege in England is not a class-type privilege. In England, it is well established "that the judge's task in considering informer privilege claims is to balance the desirability of preservation of the public interest against interests of justice".[90] In fact, courts "balance the safety of the informant and the potential future assistance to the police against the

[87] *Ibid* at 312. See also *Attorney General v Kaddour and Turkmani*, [2001] NSWCCA 456 at para 19. The prosecutor's appeal against disclosure was upheld. See especially, Mares, *supra* note 73 at 112 "This outcome is consistent with the general tendency for judges in this area to weigh crime control interests over the fair trial principle".
[88] *R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1.
[89] Alice Harrison, "The Law Relating to Informer Privilege" (2010) 4 Galway Student L Rev at 49 [Harrison].
[90] *Ibid* at 52. See especially *R v Ward* [1993] 2 All ER 577 at 603 [*Ward*].

right of the accused to challenge the evidence before him".[91] As such, in England, informer privilege has been incorporated into the concept of public interest immunity.

[62] In *R v Keane*, the Court adopted the "relevant or possibility relevant" test[92] for determining what information is to be disclosed –a broad test "which allows for the possibility that evidence, which is technically relevant to the accused, without being of great importance, will be disclosed" where the balancing exercise operates in favour of the defendant.[93] Despite this, in *R v Turner* the Court of Appeal declared that judges ought to carefully scrutinize disclosure applications by considering whether the informant's role "so impinges on an issue of interest to the defence, present or potential, as to make disclosure necessary".[94] In practice, when a judge is presented with "material which is relevant and has been withheld by the prosecution, he or she must perform the balancing exercise between the public interest in non-disclosure and the importance of the documents in the trial of the accused.[95] Where the disputed material tends to establish the defendant's innocence or might tend to avoid a miscarriage of justice, the balance will favour disclosure. In the alternative where the disputed information would not be of significant assistance, and likely assist the prosecution, the weighing will usually tip in favour of non-disclosure.[96]

[63] *R v Ward*,[97] on the other hand, stands for the proposition that it is up to the courts and not the prosecution to conduct the balancing exercise – namely, to make determinations of "whether or not relevant evidence should be withheld on the grounds of public interest immunity".[98]

[64] The *Criminal Justice Act 2003*,[99] which updated the *English Criminal Procedure and Investigation Act 1996*[100] has led to courts in England now imposing a single test for disclosure: Disclosure is required where the disputed information can reasonably be considered "capable of undermining the case for the prosecution against the accused".[101] As Harrison notes, "Although no part of the act explicitly amends the law on legal privilege, it renders questionable the ability of the court to get involved in balancing the interests at stake until the defence applies for

[91] Harrison, *supra* note 89 at 49. See especially *Ward*, *supra* note 90 at 603. The Court states that where the Crown believes that documents are protected by some sort of immunity, like informer privilege for instance, the rule is that the Crown should assert that the documents are immune so that the judge can weigh the relevant interest and determine where the balance of public interest lies.
[92] *R v Keane*, [1994] 1 WLR 746 at 752 [*Keane*].
[93] Harrison, *supra* note 89 at 52.
[94] *R v Turner*, [1995] 1 WLR 264 at 267.
[95] *Keane*, *supra* note 92 at 752.
[96] *Ibid* at 753. See also Harrison, *supra* note 89 at 52.
[97] *Ward*, *supra* note 90.
[98] Harrison, *supra* note 89 at 52.
[99] *Criminal Justice Act*, Chapter 44.
[100] *English Criminal Procedure and Investigation Act 1996*.
[101] Harrison, *supra* note 89 at 53.

judicial review, and in such a way, restricts the overall involvement of the court in claims of informer privilege".[102]

c. New Zealand

[65] In New Zealand, informer privilege is regulated by statute in sections 53, 64 and 67 of the *Evidence Act* 2006.

53 – Effect and protection of privilege

(1) A person who has a privilege conferred by any of sections 54 to 59 in respect of a communication or any information has the right to refuse to disclose in a proceeding –

(a) the communication; and
(b) the information, including any information contained in the communication; and
(c) any opinion formed by a person that is based on the communication or information.

(2) A person who has a privilege conferred by section 60 or 64 in respect of information has the right to refuse to disclose in a proceeding the information.

(3) A person who has a privilege conferred by any of sections 54 to 59 and 64 in respect of a communication, information, opinion, or document may require that the communication, information, opinion, or document not be disclosed in a proceeding –

(a) by the person to whom the communication is made or the information is given, or by whom the opinion is given or the information or document is prepared or compiled; or
(b) by any other person who has come into possession of it with the authority of the person who has the privilege, in confidence and for purposes related to the circumstances that have given rise to the privilege.

(4) If a communication, information, opinion, or document, in respect of which a person has a privilege conferred by any of sections 54 to 59 and 64, is in the possession of a person other than a person referred to in subsection (3), a Judge may, on the Judge's own initiative or on the application of the person who has the

[102] *Ibid.*

privilege, order that the communication, information, opinion, or document not be disclosed in a proceeding.

(5) This Act does not affect the general law governing legal professional privilege, so far as it applies to the determination of claims to that privilege that are made neither in the course of, nor for the purpose of, a proceeding.

64 – Informers

(1) An informer has a privilege in respect of information that would disclose, or is likely to disclose, the informer's identity.

(2) A person is an *informer* for the purposes of this section if the person –

(a) has supplied, gratuitously or for reward, information to an enforcement agency, or to a representative of an enforcement agency, concerning the possible or actual commission of an offence in circumstances in which the person has a reasonable expectation that his or her identity will not be disclosed; and
(b) is not called as a witness by the prosecution to give evidence relating to that information.

(3) An informer may be a member of the Police working undercover.

67 – Powers of Judge to disallow privilege

(1) A Judge must disallow a claim of privilege conferred by any of sections 54 to 59 and 64 in respect of a communication or information if satisfied there is a prima facie case that the communication was made or received, or the information was compiled or prepared, for a dishonest purpose or to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence.
(2) A Judge may disallow a claim of privilege conferred by any of sections 54 to 59 and 64 in respect of a communication or information if the Judge is of the opinion that evidence of the communication or information is necessary to enable the defendant in a criminal proceeding to present an effective defence.
(3) Any communication or information disclosed as the result of the disallowance of a claim of privilege under subsection (2) and any information derived from that disclosure cannot be used against the holder of the privilege in a proceeding in New Zealand.

[66] A judge may order disclosure where the information is "necessary to enable the defendant in a criminal proceeding to present an effective defence". Hence, the rule is where there exists a proper basis for granting informer privilege – it is granted – without balancing competing interests but only if the defendant's right to a fair trial would not be compromised by non-disclosure.

d. United States of America

[67] What is usually referred to as informer privilege across the world is, in the United States of America, a Government's privilege "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of the law".[103]

[68] In the United States, like England and Australia, the Government's privilege is subject to judicial balancing of interests. In weighing the government's interest in confidentiality versus the interest the defendant may have in disclosure, the Court must apply a three-pronged test in order to determine if disclosure is warranted on a case-by-case basis – First they must examine the level of the informant's participation in the alleged criminal activity. Next, the Court must consider the helpfulness of disclosure to any asserted defense. Finally, the government's interest in nondisclosure will be considered (the "*Roviaro* factors").[104]

[69] With reference to the first factor, American courts have held that the greater the participation of the confidential informer in the crime, the likelier that the balancing scale will tip in favour of disclosure of identification.[105] In the *United States v Diaz* the Supreme Court of California stated clearly that courts ought not to weight in favour of disclosure where the confidential informant is merely a tipster, or has a minimal level of participation in the criminal activity reported.[106]

[70] The second factor regarding the helpfulness of disclosure to any asserted defense weighs in favour of disclosure where revelation of the confidential informer would be helpful to the accused's defence.[107] In this vein, American case law supports the finding that fishing expeditions, conjuncture or speculation about the possibility of relevance do not warrant disclosure.[108]

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[103] *Scher v United States*, 305 US 251.
[104] *United States v Cooper*, 949 F.2d 737 at 749 (5th Cir. 1991).
[105] *United States v Ayala*, 643 F.2d 244 at 246 (5th Cir. 1981).
[106] *United States v Diaz*, 655 F.2d 580 at 587-89 (5th Cir. 1981).
[107] *Davis v United States*, 181 L. Ed. 2d 784, 2012 U.S. LEXIS 533 (U.S., Jan. 9, 2012).
[108] *United States v Toombs*, 497 F.2d 88, 90 at 93 (5th Cir. 1974). "Much more than speculation is required. There must be a compelling reason for the disclosure".

[71] Whenever the identity of an informant is requested in the American context, there is no rule adopted which requires the district court judge to hold an *in camera* hearing.[109] In fact, where it is concluded precipitously that the information could not possibly be helpful to the accused's defence no such in camera proceedings will take place. Such an approach may be seen to be consistent with Canadian law in that there is no obligation to disclose information to the defence that is clearly irrelevant.

[72] With reference to the third factor, American courts will consider the evidence presented by the prosecution with reference to the continued usefulness of the confidential informant and the potential danger in disclosing his/her identity.[110] As was the case in *Davis* where the first two factors do not establish a case for disclosure, the court will not generally consider the third factor.[111]

PART III - PRACTICAL CHALLENGES IN INFORMER PRIVILEGE CASES

a. First-Stage Hearing/Involvement of Defence Counsel

[73] Some confusion has arisen regarding the appropriate procedures to follow when seeking a judicial determination that informer privilege applies in a given case. This confusion stems, in part, from the decision of the Supreme Court of Canada in *Basi* where it appeared, on first blush, to provide conflicting guidance on how to resolve informer privilege cases.

[74] The Court held, when determining whether the privilege exists, a court must conduct a "first stage" hearing and that hearing must be conducted in camera. In *Named Person*, the Court previously held that such hearings must also be *ex parte*. The Court went on, in *Basi*, to note that at this first-stage, the existence of the claim cannot be publicly disclosed.[112] It continued that in hearings to resolve a claim of privilege, the accused and defence counsel should only be excluded when the identity of the informant cannot be otherwise protected.[113] The Court also noted that all reasonable measures should be taken to permit the defence to make meaningful submissions regarding what might occur in their absence.

[75] On first blush, it would appear that the Court's guidance in this area contradicts itself. On the one hand, it has suggested that first-stage hearings must be conducted in camera and *ex parte*. On the other hand, it has suggested that defence counsel should only be excluded if the identity of the confidential informant cannot otherwise be protected. The Court's latter point recognized

[109] *Ibid*. See also *Basi*, *supra* note 2 at para 38.
[110] *United States v Davis*, 443 Fed Appx 9; 2011 U.S. App. LEXIS 19702.
[111] *Ibid*.
[112] *Basi*, *supra* note 2 at 38.
[113] *Ibid* at para 53.

the dangers associated with *ex parte* hearings when the person who is excluded may face criminal conviction.[114]

[76] A close examination of these passages, as well as the jurisprudence that has evolved since these decisions, however, provides sufficient clarity to help guide these matters. The guidance provided can be distilled into the following key principles:

(1) There is an absolute need to protect the identity of confidential informants (subject to the innocence at stake exception).
(2) Until a claim of privilege has been determined, the privilege is presumed to exist.
(3) At the first-stage hearing, no one outside of the circle of privilege may access information over which the privilege has been claimed.
(4) Defence counsel must, therefore, be excluded from the proceeding if the identity of the putative informant cannot otherwise be protected.
(5) In such cases, the courts should use their broad discretion to craft procedures that ensure the interests of the accused are protected including, as appropriate:
    a. Allowing defence to submit questions that can be raised during the hearing;
    b. Providing defence with a redacted transcript of the proceeding; or,
    c. Appointing *amicus curiae* to provide assistance to the court in determining whether the privilege applies.

[77] All of the above suggests that, at least theoretically, defence counsel might be permitted to attend at a *Basi* hearing, or at least part of one. Their participation could, for example, involve making submissions in the presence of the Crown on the law of informer privilege generally or the types of questions that they would like to be put to any witness. In reality, however, it may prove impossible for defence to fully participate in a *Basi* hearing. In such cases, as the jurisprudence has already recognized, it is critical that the courts take efforts to ensure that the interests of those not present during the *Basi* hearing are appropriately represented and that once the privilege has been established, the remainder of the proceedings protect and advance, to the greatest extent possible, fundamental principles of Canada's justice system including the open court principle.

b. The Informer as Witness

[78] As noted earlier, while there is nothing that explicitly prevents a confidential informant from being called by the Crown as a witness in a criminal proceeding, it may be almost impossible, in practice, to do so in cases where they will testify on matters that may overlap with their activities as an informer. This is because it is difficult to know before-hand whether particular lines of questioning will be advanced and which would, if answered, cause the witness

[114] *Ibid* at para 54.

to be identified as a confidential informant. Even in cases where the witness may be expected to testify on matters unrelated to their activities as a confidential informant, it is impossible to know with certainty that their identity will be protected. As such, generally, the role of the witness and that of an informant are seen as incompatible.[115]

[79] The Crown's legal obligation to protect the identity of confidential informants means that absent agreement (by both the Crown and the informant) to waive the privilege, informer privilege must be seen as barring, in practice, the Crown from calling an informer to testify at trial about the very information provided to the police. While there is technically no impediment to calling a confidential informant as a witness, it may be virtually impossible to do so and realistically expect to maintain the informer's right to secrecy.[116] The unavailability of the informant's evidence may result in a stay of proceedings in certain cases.

[80] The Working Group considered this issue and whether law reform should be recommended. The option considered was amending the law to permit defence counsel to be included in the circle of privilege, either in all cases or on a case-by-case basis, on the promise not to disclose the identity of the informant to their client. Including defence counsel in the circle might help to ensure that a witness would not be questioned in a way that would reveal their identity as a confidential informant. Nevertheless, it was recognized by the group that such a scenario would likely be fundamentally inconsistent with the role of defence as advocate for their client. For one, it could prevent defence from pursuing a line of questioning that they would otherwise pursue. It could also result in a situation where defence counsel could appear to be not following her/his client's directions.

[81] No obvious advantage for the defence in such a scheme could be identified. These concerns have been highlighted by the courts, including the Supreme Court of Canada. As it noted in *Basi*, allowing defence counsel into the circle of privilege would place them "in an awkward and professionally undesirable position" because respecting a court undertaking not to disclose the identity of the confidential informant would strain the relationship between counsel and their accused client.[117] Finally, withholding information from the client, could be seen as contrary to the defense lawyer's ethical obligation to act at all times in the best interests of his/her client.

c. Appeal Routes and the Absence of Interlocutory Appeals at common law

[82] Although informer privilege is a class privilege that can be invoked in its own right, there are certain instances where invoking the common law privilege fails, and the Crown is obliged to

[115] *Named Person B, supra* note 8 at 140. Cromwell in dissent paints the difficulties associated with calling an informer as a witness.
[116] *Ibid.*
[117] See *Basi, supra* note 2 at 45.

protect the identity of a confidential informer *via* a statutory claim of public interest privilege (i.e., section 37 of the *CEA*).

[83] Some have noted to accept that section 37 of the *CEA* can be invoked to protect a confidential informant is to ignore a provision of law duly enacted by the Parliament of Canada; it is tantamount to accepting that Parliament has agreed to modify the absolute nature of informer privilege in favour of a balancing scheme or to accepting that Parliament intended to disregard the procedure set at subsection 37(5) of the *CEA*, when informer privilege applies.[118]

[84] The Supreme Court of Canada in *Basi* appears to have adopted the latter approach, noting that while the common law was usually adequate to protect an informer's identity, section 37 of the *CEA* could also operate as a means of protecting a confidential informant during a criminal trial. However, under this rubric the strictness of the protection is not relaxed (i.e., innocence at stake is the only exception).

[85] The Working Group considered the possibility of amending the *CEA* to codify the ruling in *Basi* and to clarify appeal routes in cases where a judge's ruling would risk disclosing the identity of a confidential informant. However, the Working Group was of the view that such legislative amendments would not add anything substantive to the law on informer privilege; it would merely be a codification of the *status quo* given that the Supreme Court of Canada has already acknowledged that section 37 of the *CEA* provides a statutory right to an interlocutory appeal in the context of informer privilege.

d. Non-Disclosure on Basis of Privilege and Notification to Defence

[86] A final issue considered by the Working Group involved the procedures to follow when a prosecutor is disclosing information, partially-redacted, in order to protect the identity of a confidential informant. In many cases, such a scenario will pose little difficulties for the prosecuting authority and they will be able to inform the defence why the information is being withheld without revealing the identity of a confidential informant. In other cases, however, it will be impossible for the Crown to indicate on what basis the information is being withheld without, at the same time, revealing the identity of the confidential informant. An example provided to illustrate the point would include a witness who indicates at some-point during their interview to the police that they are a confidential informant. In such cases, the redaction of this statement is, of course, permissible but it is impossible to disclose why the information has been redacted without revealing the identity of a confidential informant. Given the near absolute protection applicable in informer privilege cases, this means that the entirety of the evidence cannot be disclosed and, consequently, cannot be used as evidence at trial.

[118] See especially Louis Belleau, "L'immunité de divulgation sous le régime de l'article 37 L.P.: des secrets biens gardés" (2008) 13 :1 Can Crim L Rev 19 at 40-3. See Ashenburst, *supra* note 72 at 638-44

[87] The Working Group considered the advisability of legislating procedures to deal with such situations. One scenario canvassed was whether it would ever be appropriate for the Crown to edit the information disclosed but not inform the defence that the editing was done (or the reason why the editing was done), either with or without advance judicial approval. Ultimately, this idea was rejected by the Working Group. It has also been rejected by the courts. In the 2015 decision of *R v Unnamed Person*,[119] Justice Gray rejected the *ex parte* application by the Crown who was seeking permission to edit certain information and to be able to disclose that information to the defence without revealing that it had been edited, in order to protect the identity of a confidential informant who was also co-accused in the trial (their role as a confidential informant had no bearing on the trial itself).

PART IV: CONCLUSIONS AND RECOMMENDATIONS

[88] The rules governing informer privilege are complex and deeply rooted in the common law. The Working Group recognized that attempting to codify parts of the privilege may have undesirable and unintended impacts on the entire regime. It was also felt that the common law provides the necessary flexibility to address the myriad complexities that can arise in informer privilege cases.

[89] In light of these considerations, the Working Group agrees that:

(1) No law reform is required at this time.
(2) Defence counsel should not be included in the circle of privilege and care must be exercised by the courts to balance the interests associated with protecting the identity of the informant and respecting the fair trial rights of the accused.
(3) Section 37 provides sufficient recourse for appeal decisions regarding the status of confidential informants.
(4) Enacting a legislative regime to permit the editing of evidence to protect the identity of confidential informants would be inappropriate.
(5) Law enforcement should seek to clarify the status of any potential witness as a confidential information as early as possible in an investigation.
(6) Care should be taken, as early as possible, to clearly delineate between confidential informants, on the one hand, and witnesses, on the other.
(7) Where possible, the police should seek to obtain evidence from sources other than the confidential informant.
(8) Consideration be given to the development of training tools, guidelines and policies to better address key practical challenges that emerge when invoking informer privilege or

[119] [2015] OJ No. 3014 (ONSC).

trying to protect the identity of a confidential informant. These tools will be useful for Crown prosecutors, as well as law enforcement officials.

(9) Justice Canada will continue to monitor trends in the law of informer privilege. Should the law evolve in a way that fails to provide sufficient clarity to those involved in litigating informer privilege claims, the issue of law reform could be revisited?

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