**12.** To ensure that the reliability of the interception capability is at least equal to the reliability of the public telecommunications service carrying the communication which is being intercepted.

**13.** To ensure that the intercept capability may be audited so that it is possible to confirm that the intercepted communications and related communications data are from, or intended for the interception subject, or originate from or are intended for transmission to, the premises named in the interception warrant.

**14.** To comply with the obligations set out in paragraphs 5 to 13 above in such a manner that the chance of the interception subject or other unauthorised persons becoming aware of any interception is minimised.

---

## EXPLANATORY NOTE

*(This note is not part of the Order)*

Part I of the Regulation of Investigatory Powers Act 2000 ("the 2000 Act") contains provisions about the interception of communications transmitted by means of public postal service or a public telecommunications service. Interception is permitted under the 2000 Act by certain public authorities who obtain an interception warrant. This Order sets out the obligations which it appears to the Secretary of State reasonable to impose on the providers of public postal services or a public telecommunications services ("service providers") for the purpose of securing that it is and remains practicable for requirements to provide assistance in relation to interception warrants to be imposed and complied with.

These obligations are set out in the Schedule to the Order. The obligations in Part I of the Schedule relate only to persons who provide, or propose to provide, a public postal service. The obligations in Part II of the Schedule relate only to persons who offer, provide, or propose to provide a public telecommunications service to more than 10,000 persons in any one or more parts of the United Kingdom, other than service providers who only provide a public telecommunications service in relation to the provision of banking, insurance, investment or other financial services.

Article 3 enables the Secretary of State to ensure compliance with the obligations by providing that he may give a service provider a notice requiring it to take the steps described in the notice. The notice may only contain steps which appear to the Secretary of State necessary for securing that that service provider has the practical capability of meeting those obligations set out in the Schedule which apply to that service provider.

Article 4 specifies the period within which a person served with a notice may refer it to the Technical Advisory Board.

This Order was notified in draft to the European Commission in accordance with Directive 98/34/EC, as amended by Directive 98/48/EC.

**Public Interest Immunity And Disclosure Of Evidence**

The applicants in *Botmeh and Alami v the United Kingdom* (App No 15187/03), [2007] All ER (D) 40 (Jun) are Palestinian nationals who were arrested and charged with having participated in the conspiracy to make, place, and detonate bombs. They were convicted in December 1996 and sentenced to 20 years' imprisonment and recommended for deportation. They complain that the Court of Appeal's approach to issues of **public interest immunity** and disclosure of evidence, which resulted in the non-disclosure of relevant evidence, was incompatible with Art 6 (right to a fair trial). The ECtHR noted that the undisclosed material was first considered by the Court of Appeal in an *ex parte* hearing.

However, following this hearing, and well in advance of the of the appeal hearing, the Court of Appeal disclosed a summary of the withheld information as well as an account of the events which resulted in the undisclosed material not being placed before the trial judge. The applicants had also been given the opportunity to make submissions. Given the extent of that disclosure, the fact that the court was able to consider its impact on the safety of the applicants' conviction and that the undisclosed material was found by the court to add nothing of significance to what had already been disclosed at trial, the ECtHR was satisfied that the failure to place the undisclosed material before the trial judge had been remedied by the subsequent procedure before the Court of Appeal. Accordingly, there had been no violation of Art 6.

Department of Justice Canada | Ministère de la Justice Canada

Canada



# The Federal Prosecution Service DESKBOOK

[ Previous | Table of Contents | Next ]

## Part VII
## POLICY ON CERTAIN EVIDENTIARY ISSUES
## Chapter 36

## Table of Contents



## 36 THE "POLICE INFORMER" PRIVILEGE

### 36.1 Introduction

This chapter describes the rule and exceptions to the rule protecting the identity of police informers in prosecutions (hereinafter, the "informer privilege"). It also sets out policy on protecting the identity of such informers.

### 36.2 The Importance of the Privilege

The modern statement of the privilege dates back to *Marks* v. *Beyfus*[1]. The leading case in Canada is the Supreme Court's decision in *R.* v. *Leipert*[2], which contains a number of significant statements on the scope and application of the rule. The judgment stresses the significance of the rule:

> A court considering this issue must begin from the proposition that informer

> privilege is an ancient and hallowed protection which plays a vital role in law enforcement. It is premised on the duty of all citizens to aid in enforcing the law. The discharge of this duty carries with it the risk of retribution from those involved in crime. The rule of informer privilege was developed to protect citizens who assist in law enforcement and to encourage others to do the same.[3]
>
> In summary, informer privilege is of such importance that it cannot be balanced against other interests. Once established, neither the police not the court possesses discretion to abridge it.[4]

### 36.3 Statement of Policy

Crown counsel has a duty to protect the identity of police informers[5]. Where the privilege applies, unless there is some other evidentiary basis to make an objection, Crown counsel must object to disclosure of information tending to reveal an informer's identity or status as an informer.

Crown counsel should discuss with the investigative agency whether there is likely to be any issue regarding use of informers in a proceeding. Informer issues arise not only during court proceedings, but also affect pre-trial disclosure obligations.

Early discussions with investigators will also be beneficial in that counsel can learn the extent of any risk to the informer if disclosure is ordered by the court, determine whether it may be necessary to have a certificate prepared under section 37 of the *Canada Evidence Act*, or gather any other evidence to support the Crown's objection. (A selective list of authorities is attached to help in developing supporting arguments.)

Sometimes courts may, contrary to the position taken by the Crown, order the informer's identity revealed or order the informer to appear. Crown counsel has several options which may vary depending on the level of court at which the issue arises:

a. comply with the judge's ruling. Before doing so, counsel should consult with the police and the informer, where possible, to determine if the informer is likely to be subject to retribution if the judge's ruling is followed and, if so, whether the police can provide protection;

b. invoke section 37 of the *Canada Evidence Act*. Crown counsel can assert this claim personally[6]. However, it is preferable for a senior police officer to do so, as occurred in *R.* v. *Archer*[7];

c. stay and re-commence proceedings. This was done in *R.* v. *Scott*[8]. The Supreme Court found this procedure justifiable in the unusual circumstances of the case, but it is clearly an extraordinary recourse and should be used only rarely and in compelling situations[9]; or

d. stay the proceedings where necessary.

### 36.4 Operation of the Privilege

The privilege belongs to the Crown, but the Crown (including the police) cannot waive the privilege without the consent of the informer[10]. Even if Crown counsel does not assert the rule, the court must apply it of its own motion.

### 36.5 Scope of the Privilege

The privilege protects more than the informer's name. *R.* v. *Leipert* makes it clear that it protects information which may tend to reveal the identity of the informer[11]. Thus, a witness

cannot be asked questions which narrow the field of possible informers in a way that makes giving the informer's name redundant.

The privilege is closely related to the rule protecting disclosure of police investigative techniques, such as the location or type of audio or video surveillance equipment and the manner of surreptitious entry to install it[12].

### 36.6 Situations Where the Privilege Might Not Apply

In *R.* v. *Leipert*[13], the Court confirmed that the only exception to the privilege occurs where the accused's innocence is at stake. In *R.* v. *Scott*[14], the Supreme Court of Canada identified three situations[15] in which the informer's identity or status as an informer may have to be disclosed:

a. where the informer is a material witness to the crime[16];

b. where the informer has acted as an *agent provocateur*; that is, he or she played an instrumental role in the offence[17]. This exception could properly apply to cases where the accused intends to rely on the "defence" of entrapment; however, in order to rely on this exception, the accused will as a general rule be required to establish some evidentiary basis for the defence; and

c. where the accused seeks disclosure of the materials filed in support of a search warrant or wiretap application to establish that the search was not undertaken on reasonable grounds and therefore contravened section 8 of the *Charter of Rights and Freedoms*[18].

In each instance, an accused must show "some basis" to believe his or her innocence is at stake. If that basis is shown, the court should "only reveal as much information as is essential to allow proof of innocence"[19].

### 36.7 Distinguishing Agents from Informers

One of the most difficult problems in this case of the law is determining when the privilege applies to the actions of persons cooperating with the police. The informer privilege does not apply when the information-provider is characterised as a "state police agent" or "*agent provocateur*", rather than an "informer".

The leading case on the distinction between informers and agents is the Supreme Court's decision in *R.* v. *Broyles*[20], in which the following statement occurs:

> In determining whether or not the informer is a state agent, it is appropriate to focus on the effect of the relationship between the informer and the authorities on the particular exchange or contact with the accused. A relationship between the informer and the state is relevant for the purposes of s. 7 only if it affects the circumstances surrounding the making of the impugned statement. A relationship between the informer and the authorities which develops after the statement is made, or which in no way affect the exchange between the informer and the state is such that the exchange between the informer and the accused in materially different from what it would have been had there been no such relationship should the informer be considered a state agent for the purposes of the exchange. I would, accordingly, adopt the following simple test: would the exchange between the accused and the informer have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?

Since the relationship between the police and the informer/agent is crucial to the determination of the person's status, it is essential that Crown counsel obtain a full understanding of the nature of that relationship from the police. Counsel may also wish to discuss the matter with the Prosecution Group Head or another experienced practitioner.

### 36.8 References

***(i) Statements of the Rule***

*R.* v. *Leipert* (1997), 112 C.C.C.(3d) 385 (S.C.C.)

*Bisaillon* v. *Keable* (1983), 7 C.C.C. (3d) 385 (S.C.C.)

*R.* v. *Scott* (1990), 61 C.C.C. (3d) 300 (S.C.C.)

*Marks* v. *Beyfus* (1890), 25 Q.B.D. 494 (C.A.)

*R.* v. *Hunter* (1987), 34 C.C.C. (3d) 14 (Ont. C.A.)

*Solicitor General of Canada v. Royal Commission of Inquiry into Confidentiality of Health Records in Ontario*, [1981] 2 S.C.R. 494

*Roviaro* v. *U.S.* 353 U.S. 53 (1956)

***(ii) Exceptions to the Rule***

*R.* v. *Davies* (1982), 1 C.C.C. (3d) 299 (Ont. C.A.)

*R.* v. *Hunter*, supra

*R.* v. *Garofoli* (1990), 60 C.C.C. (3d) 161 (S.C.C.)

*R.* v. *Parmar* (1987), 34 C.C.C. (3d) 260 (Ont. H.C.)

*Re Chambers and The Queen* (1985), 20 C.C.C. (3d) 440 (Ont. C.A.)

*R.* v. *Chiarantano*, [1991] 1 S.C.R. 906

*R.* v. *Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.)

*R.* v. *Ramirez* (1996), 97 C.C.C.(3d) 353 (B.C.C.A.)

*R.* v. *Barzal* (1993), 84 C.C.C.(3d) 289 (B.C.C.A.)

*R.* v. *Kelly* (1995), 99 C.C.C.(3d) 367 (B.C.C.A)

***(iii) Section 37 Canada Evidence Act***

*R.* v. *Archer* (1989), 47 C.C.C. (3d) 567 (Alta C.A.)

*Goguen and Albert* v. *Gibson*, [1983] 1 F.C. 872; aff'd 10 C.C.C.(3d) 492 (F.C.A.)

*Re Kevork and The Queen* (1984), 17 C.C.C. (3d) 426 (F.C.T.D.)

*Bailey* v. *RCMP*, (19 December 1990) (F.C.T.D.) [unreported]

*R.* v. *Richards* (1997), 115 C.C.C.(3d) 377 (Ont.C.A.)

*A.G. Canada* v. *Sander* (1994), 90 C.C.C.(3d) 41 (B.C.C.A.)

***(iv) No Disclosure at Preliminary Inquiry***

*A.G. Canada* v. *Andrychuk, Prov. J. and Hickie*, [1980] 6 W.W.R. 231 (Sask. C.A.)

*R.* v. *Johnston* (1970), 38 C.C.C. (2d) 279 (Ont. H.C.)

*Re Chambers*, supra

*U.S.* v. *Bonilla* 615 F. 2d 1262 (1980, 9th Circ.)

*R.* v. *Phillip* (1991), 66 C.C.C.(3d) 140 (Ont.Ct. (Gen. Div.))

***(v) What Defence Counsel Needs to do to Establish an Exception to the Secrecy Rule***

*R.* v. *Leipert*, supra

*R.* v. *Collins* (1989), 48 C.C.C. (3d) 343 (Ont. C.A.)

*R.* v. *Scott*, supra

*R.* v. *Garofoli*, supra

*U.S.* v. *McManus* 560 F. 2d 747 (1977, 6th Circ.)

*In Re U.S.*, 565 F. 2d 19 (1977, 2d Circ.)

*Alvarez* v. *U.S.*, 529 F. 2d 980 (1976, 5th Circ.)

*U.S.* v. *Tucker*, 552 F. 2d 202 (1977, 7th Circ.)

*Rugendorf* v. *U.S.*, 376 U.S. 528 (1964)

***(vi) Protection of Secret Police Techniques***

*R.* v. *Durette* (1994), 88 C.C.C.(3d) 1 (S.C.C.)

*R.* v. *Finlay and Grellette* (1985), 23 C.C.C. (3d) 48 (Ont. C.A.)

*R.* v. *Playford* (1987), 40 C.C.C. (3d) 142 (Ont. C.A.)

*R.* v. *Johnson*, [1989] 1 All E.R. 121 (C.A.)

*Rogers* v. *Home Secretary*, [1973] A.C. 388

*Re Cadieux and Director of Mountain Institution* (1984), 13 C.C.C. (3d) 330 (F.C.T.D.)

*R.* v. *Thomas* (1998), 124 C.C.C.(3d) 178 (Ont. Ct. (Gen. Div.))

***(vii) Academic Works***

L.E. Lawler, "Police Informer Privilege: A Study for the Law Reform Commission of Canada", (1986), 28 Crim. L.Q. 92

T. P. McCollum, "Sketching the Parameters of the Informer Privileges" (1975), 13 Am. Crim. L.R. 117

B.A. MacFarlane et al, *Drug Offences in Canada*, 3d ed. Aurora : Canada Law Book, 1996, ch. 18.

1 (1890), 25 Q.B.D. 494.

2 (1997), 112 C.C.C. (3d) 385.

3 *R.* v. *Leipert*, at p. 390.

4 *R.* v. *Leipert*, at p. 392.

5 *R.* v. *Leipert*, at 392-393; *R.* v. *Stinchcombe* (1991), 68 C.C.C.(3d) 1 at 14 (S.C.C.).

6 *R.* v. *Meuckon* (1990), 57 C.C.C. (3d) 193 (B.C.C.A.).

7 (1989), 47 C.C.C. (3d) 567 (Alta. C.A.). See also Part VII, Chapter 37, "Protecting Confidential Information under the *Canada Evidence Act*".

8 (1990), 61 C.C.C.(3d) 300.

9 Counsel considering this option should consult with the Prosecution Group Head or the Regional Director, who may wish to consult with the appropriate Headquarters officials.

10 *R.* v. *Leipert*, at pp. 392-393.

11 *R.* v. *Leipert*, at pp 393-394.

12 *R.* v. *Durette* (1994), 88 C.C.C.(3d) 1 at 29, 54 (S.C.C.); *R.* v. *Johnson*, [1989] 1 All E.R. 121 (C.A.); *R. v. Finlay and Grellette* (1985), 23 C.C.C. (3d) 48 (Ont. C.A.); *R.* v. *Playford* (1987), 40 C.C.C. (3d) 142 (Ont. C.A.); *R.* v. *Richards* (1997), 115 C.C.C. (3d) 377 (Ont.C.A.). See also Part VII, Chapter 37, "Protecting Confidential Information under the *Canada Evidence Act*."

13 *R.* v. *Leipert*, at 394-395.

14 See note 8.

15 See B.A. MacFarlane et al, *Drug Offences in Canada*, 3d ed. Aurora : Canada Law Book, 1996 (looseleaf), at s. 18.900ff, in which the possibility of a fourth category, i.e., "where the informer is known to the defence", is discussed.

16 *R.* v. *Scott,* note 8, at 315; See also *R.* v. *Davies* (1982), 1 C.C.C. (3d) 299 (Ont. C.A.); *Roviaro* v. *U.S.*, 353 U.S. 53 (1956). This exception may apply where, for example, the informant attends a meeting between an undercover officer and a drug trafficker.

17 See *R.* v. *Scott,* note 8, and *R.* v. *Davies,* note 16. This exception may apply where, for example, the informer knowingly introduces an undercover officer to a drug trafficker or makes a purchase of drugs at the request of the police to further an investigation.

18 See *R.* v. *Leipert*, at 396-397; *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 (S.C.C.); and *R.* v. *Scott,* note 8.

19 *R.* v. *Leipert*, at 398.

20 (1991), 68 C.C.C.(3d) 308 at 318-319.

[ Previous | Table of Contents | Next ]

Department of Justice Canada | Ministère de la Justice Canada | Canada



# The Federal Prosecution Service DESKBOOK

[ Previous | Table of Contents | Next ]

## Part VII
## POLICY ON CERTAIN EVIDENTIARY ISSUES
## Chapter 37

### Table of Contents



## 37 PROTECTING CONFIDENTIAL INFORMATION UNDER THE CANADA EVIDENCE ACT

### 37.1 Introduction

The Supreme Court of Canada has observed that "all government must maintain some degree of security and confidentiality in order to function"[1]. This need for confidentiality can arise in many different ways, and can involve information coming to or prepared by government. For example, national security agencies sometimes receive information from foreign governments about terrorist groups in Canada. In some instances, the information may come from within the terrorist group itself. Similarly, law enforcement agencies receive information on criminal activity. It is in the public interest to protect this information and its sources. In addition, within government Ministers regularly receive recommendations on various issues, then seek related legal advice. It is also in the public interest that those seeking legal advice be able to do so in confidence.

In criminal cases, Crown counsel can expect an accused or defence counsel to seek disclosure

of this type of confidential information. Sections 37, 38 and 39 of the *Canada Evidence Act* can sometimes be used to support an objection to disclosure. This chapter sets out the policy and procedures for objections raised under these sections during a federal prosecution. These objections are most commonly raised in the following situations:

- where federal Crown counsel is prosecuting and a federal official objects to the disclosure;
- where federal Crown counsel is prosecuting and a provincial or municipal official objects to the disclosure; or
- where federal Crown counsel is prosecuting and objects to the introduction of evidence sought to be adduced by defence counsel.

### 37.2 Statutory Framework

Section 37 of the *Canada Evidence Act* (the *C.E.A.*) sets out when objections can be made to the disclosure of certain information. Section 37 states:

> 37. (1) A Minister of the Crown in right of Canada or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.
>
> (2) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a superior court, that court may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.
>
> (3) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a court, person or body other than a superior court, the objection may be determined, on application, in accordance with subsection (2) by
>
> a. The Federal Court -Trial Division, in the case of a person or body vested with power to compel production by or pursuant to an Act of Parliament if the person or body is not a court established under a law of a province; or
>
> b. the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.

Subsections (4) to (7) set out the time limits for making such applications and define appeal rights.

Section 38 sets out the procedure for objecting to disclosure under section 37 on the grounds that the disclosure would be injurious to international relations, or national defence or security. The Federal Court is the forum for determining such objections. Section 39 sets out the right to object to the disclosure of confidences of the Queen's Privy Council for Canada.

### 37.3 Statement of Policy

Reliance on sections 37, 38 and 39 of the *C.E.A.* should be the exception, not the rule. If disclosure of the information can be prevented on some other basis, such as relevance or a common law objection[2], that approach should be tried first. Alternatively, steps may be taken to adduce the evidence without endangering the interest at risk. The *C.E.A.* is therefore an avenue of last resort.

Where Crown counsel expects that an issue of this nature may arise, it is important to confer with investigators and interested departments or agencies before the proceedings begin. A plan

can then be developed that takes into account the following issues, among others:

- the nature of the public interest to be protected;
- what other objections have been or may be raised;
- the competing public interests in disclosure and non-disclosure;
- whether non-disclosure would compromise the prosecution;
- the effect the objection may have on the proceedings (for example, will the objection be determined by a court other than the trial court?);
- whether the claim of privilege grounding the objection is justified in the circumstances and not overreaching[3]; and
- who should advance the objection[4].

### 37.4 Guidelines for Application of this Policy

#### 37.4.1 Objections under section 37 involving a public interest other than international relations, national defence or security

Objections under section 37 may be made orally[5] or in writing by certifying[6] that information should not be disclosed on the grounds of a "specified public interest". Public interest objections under section 37 are "content-based", not "class-based"[7]; Crown counsel therefore cannot maintain the privilege grounding the objection by arguing that the information is of a class which, by definition, merits non-disclosure. It will always be necessary to identify the actual injury or harm that will result from disclosure. Accordingly, a certificate filed under this section cannot make a blanket claim for non-disclosure. Instead, it should offer a convincing rationale, explaining how the information came into existence, why non-disclosure is important, and the nature and gravity of the injury or harm that will occur if it is disclosed.

The criteria needed to establish a specified public interest are not set out in the *C.E.A.* However, Crown counsel may wish to assess the validity of the claim of privilege grounding the objection by measuring it against, among other criteria, those established by Wigmore[8]:

1. the communications must originate in a confidence that they will not be disclosed;
2. this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. the relation must be one which in the opinion of the community ought to be sedulously fostered;
4. the injury that would enure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Objections under section 37 of the *C.E.A.* will usually be made by a senior public official who has some responsibility in relation to the specified public interest. For example, the official may be a senior police officer concerned about the possible disclosure of police techniques and methods of investigation[9], such as the location of observation sites[10] or the identity of police informers[11]. Another concern may be the provision of legal advice by Crown counsel to the police[12]. The official may also be a federal or provincial government official.

Where an interested person raises the objection, Crown counsel should consider whether it would be in the person's best interests to instruct another lawyer to advance the objection. This will sometimes be preferable because Crown counsel conducting the trial may have a

conflict of interest regarding such an objection. For example, the disclosure of the information may benefit the Crown's case, or failure to disclose may result in a judicial stay of proceedings. As well, Crown counsel may occasionally be compelled to oppose an objection to disclosure[13].

### 37.4.2 Objections under section 37 regarding information the disclosure of which would harm international relations, national defence or security

The procedure for objections under section 37 regarding information which would be harmful to international relations or national defence or security if disclosed are set out in section 38 of the *C.E.A.* An objection under this section is determined, on application, by the Federal Court.

Many of the guidelines set out in the preceding section apply to these types of objections as well. However, Crown counsel must be particularly sensitive to the need to protect such information from disclosure. Therefore, any prosecution which involves the possible disclosure of this type of information requires a special consultative process. For example, in practice, Crown counsel does not disclose information emanating from a CSIS investigation without the consent of CSIS. This approval is sought through the General Counsel of the CSIS Legal Services Unit. The General Counsel can obtain the proper clearance and any additional instructions from the executive level of the CSIS.

Where an objection is proposed to be made under section 37 about information which would be injurious to international relations or national defence or security if disclosed, Crown counsel shall advise the Prosecution Group Head and Regional Director or Senior Regional Director, who in turn shall notify the Assistant Deputy Attorney General (Criminal Law). The latter will consult with the appropriate responsibility centres within the Government of Canada, including the Assistant Secretary to the Cabinet (Security and Intelligence), where appropriate.

Where it is proposed to object to disclosure on these grounds, it will sometimes be preferable for the objection to be advanced by counsel other than Crown counsel conducting the trial. Crown counsel may have a conflict of interest (as outlined in the preceding section) or the information involved may be so specialized that a lawyer more familiar with it should handle the objection.

### 37.4.3 Objections under section 39[14]

Only a Minister of the Crown or the Clerk of the Privy Council can raise an objection under section 39 of the *C.E.A.* If an accused wants disclosure of information which may be a confidence of the Queen's Privy Council,[15] Crown counsel shall notify the Prosecution Group Head and Regional Director or Senior Regional Director who shall bring the matter to the attention of the Assistant Deputy Attorney General (Criminal Law). The latter will consult with the Assistant Secretary to the Cabinet (Legislation and House Planning) to allow the Minister or the Clerk of the Privy Council to consider raising an objection under section 39 or obtaining an Order in Council releasing the information[16].

Objections under section 39 must be made in writing, certifying that the information constitutes a confidence of the Queen's Privy Council for Canada. Although the court is not entitled to go behind a proper certificate filed under this section, the court can review the certificate to determine if, on its face, it complies with section 39[17].

### 37.5 Where the Court Orders Disclosure

Despite objections under section 37 or 38, courts may order disclosure[18]. When this occurs, Crown counsel should again consult with the interested parties and determine which of the following options is most appropriate:

i. comply with the court's ruling. Before doing so, counsel should consult the client department or investigating agency to determine the extent of the harm that will occur

on disclosure and assess whether the harm can be minimized in a way that is still consistent with the court's ruling;

ii. appeal the court's ruling, where possible. This decision should be made in consultation with the Prosecution Group Head, Regional Director and client department or investigating agency;[19] or

iii. stay the proceedings. This option may be used when there is no other way to protect the information and the importance of keeping it in confidence outweighs the public interest in pursuing the charges[20].

---

1 *R.* v. *Thomson*, [1992] 1 S.C.R. 385. See also *Minister of Employment and Immigration* v. *Chiarelli*, [1992] 1 S.C.R. 711 regarding the need for confidentiality in national security cases.

2 For example, the common law rules preventing disclosure, such as solicitor/client privilege, or the secrecy rule regarding the identity of police informers. A claim of privilege does not preclude resort to s. 37*: Canada (A.G.)* v. *Sander* (1994), 90 C.C.C.(3d) 41 (B.C.C.A.); *R.* v. *Richards* (1997), 115 C.C.C.(3d) 377 (Ont.C.A.).

3 If unfounded or overly broad claims of privilege are made, courts may over time begin to accord less weight to certificates filed under section 37 when balancing the competing interests in disclosure and non-disclosure.

4 In many cases involving an interested party that is a federal department or agency, lawyers from the Civil Litigation Section advance the objection on behalf of that party. Counsel should also consider who should prepare the certificate as discussed in s. 37.4.1, and see *R.* v. *Lines* (1986), 27 C.C.C.(3d) 377 (N.W.T.C.A.).

5 *R.* v. *Meuckon* (1990), 57 C.C.C.(3d) 193 (B.C.C.A.). When the objection is made orally, care should be taken not to unduly restrict the grounds of the objection or to preclude the right to file a certificate.

6 A certificate, not an affidavit, is called for by the *C.E.A.* There is generally no right to cross-examine on the certificate, except in exceptional circumstances: *Re Kevork and The Queen* (1984), 17 C.C.C. (3d) 426 at 437-40 (F.C.T.D.); *Mohammad* v. *Canada* (1988), 12 A.C.W.S. (3d) 424 (F.C.T.D.).

7 A class based objection is one grounded on a privilege recognized at common law and for which there is a *prima facie* presumption of inadmissibility: *Gruenke* v. *R.* (1991), 67 C.C.C. (3d) 289 at 303 (S.C.C.).

8 Wigmore, *Evidence in Trials at Common Law* (McNaughton rev. 1961), vol. 8, at 527; approved by the Supreme Court of Canada in *Slavutych* v. *Baker* (1975), 38 C.R.N.S. 306 at 311-12 and *Gruenke* v. *R., supra*, note 7.

9 *R.* v. *Meuckon* (1990), 57 C.C.C. (3d) 193 (B.C.C.A.); *Mickle* v. *R.* (1987), 19 B.C.L.R. (2d) 266 (B.C.S.C.); and see generally *R.* v. *Durette* (1994), 88 C.C.C.(3d) 1 (S.C.C.); and *R.* v. *Playford* (1987), 40 C.C.C.(3d) 142 (Ont.C.A.).

10 *R.* v. *Richards* (1997), 115 C.C.C.(3d) 377 (Ont. C.A.); *R.* v. *Johnson,* [1989] 1 All E.R. 121 (C.A.); *R. v. Rankine,* [1986] 2 All E.R. 566 (C.A.); *R.* v. *Thomas* (1998), 124 C.C.C.(3d) 178 (Ont. Ct. (Gen. Div.)).

11 *Re Regina and Jensen* (1984), 15 C.C.C. (3d) 532 (Nfld. S.C.); *R.* v. *Archer* (1989), 47 C.C.C. (3d) 567 (Alta. C.A.); and see generally *R.* v. *Leipert* (1997), 112 C.C.C.(3d) 385) (S.C.C.) and Part VII, Chapter 37, "The "Police Informer" Privilege".

12 *R.* v. *Gray* (1993), 79 C.C.C.(3d) 332 (B.C.C.A.); *Canada (A.G.)* v. *Sander*, *supra*, note 2. And see generally *R.* v. *Shirose* (1999), 133 C.C.C.(3d) 257 (S.C.C.).

13 Every effort should be made to avoid this where a federal government department or agency is advancing the objection. In general, consultation between affected parts of the Government of Canada (see Part IX, Chapter 45, "Consultation with Responsibility Centres") will avoid this prospect.

14 Because this situation arises rarely in prosecution matters, counsel dealing with such matters may be assisted by the more expansive discussion of this subject in the *Civil Litigation Deskbook* in the chapter on "Privilege".

15 See subsection 39(2) of the *C.E.A.* for the definition of "confidence of the Queen's Privy Council", which includes, for example, documents submitted for the consideration of Cabinet, or minutes of Cabinet committee meetings.

16 Where, for the purposes of a prosecution, Crown counsel seeks to disclose information which may be a confidence of the Privy Council, permission to do so may be obtained in this manner as well. In respect of an Order in Council releasing such information, it should be noted that there is a precedent for such a release only in cases where a Minister of the Crown has been charged and that Minister had a conventional right of access as a Minister to the information at issue in the prosecution.

17 See *A. G. Canada* v. *Central Cartage Company*, [1990] 2 F.C. 641 (C.A.); *Smith, Kline and French Laboratories Ltd* v. *Attorney General of Canada*, [1983] 1 F.C. 917 (T.D.).

18 Where a certificate is filed under section 39 certifying that the information constitutes a confidence of the Queen's Privy Council, a court must refuse disclosure of that information without examination or hearing of the information: see s. 39(1) *C.E.A.*

19 In accordance with Part V, Chapter 22, "The Decision to Appeal".

20 In rare and compelling circumstances, it may be appropriate to stay proceedings and then re-commence them in accordance with subsection 579(2) of the *Criminal Code*. See for instance: *R.* v. *Scott* (1990), 61 C.C.C. (3d) 300 (S.C.C.). Before taking this extraordinary approach, however, the matter should be discussed with counsel's supervisors, and ultimately with the Assistant Deputy Attorney General (Criminal Law).

[ Previous | Table of Contents | Next ]

Date Modified: 2008-04-04

From Canadian Criminal Code

24

## INTERCEPTION OF COMMUNICATIONS

Interception

**184.** (1) Every one who, by means of any electro-magnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Saving provision

(2) Subsection (1) does not apply to

(*a*) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;

(*b*) a person who intercepts a private communication in accordance with an authorization or pursuant to section 184.4 or any person who in good faith aids in any way another person who the aiding person believes on reasonable grounds is acting with an authorization or pursuant to section 184.4;

(*c*) a person engaged in providing a telephone, telegraph or other communication service to the public who intercepts a private communication,

(i) if the interception is necessary for the purpose of providing the service,

(ii) in the course of service observing or random monitoring necessary for the purpose of mechanical or service quality control checks, or

(iii) if the interception is necessary to protect the person's rights or property directly related to providing the service;

(*d*) an officer or servant of Her Majesty in right of Canada who engages in radio frequency spectrum management, in respect of a private communication intercepted by that officer or servant for the purpose of identifying, isolating or preventing an unauthorized or interfering use of a frequency or of a transmission; or

(*e*) a person, or any person acting on their behalf, in possession or control of a computer system, as defined in subsection 342.1(2), who intercepts a private communication originating from, directed to or transmitting through that computer system, if the interception is reasonably necessary for

(i) managing the quality of service of the computer system as it relates to performance factors such as the responsiveness and capacity of the system as well as the integrity and availability of the system and data, or

(ii) protecting the computer system against any act that would be an offence under subsection 342.1(1) or 430(1.1).

Use or retention

(3) A private communication intercepted by a person referred to in paragraph (2)(*e*) can be used or retained only if

(*a*) it is essential to identify, isolate or prevent harm to the computer system; or

(*b*) it is to be disclosed in circumstances referred to in subsection 193(2).

R.S., 1985, c. C-46, s. 184; 1993, c. 40, s. 3; 2004, c. 12, s. 4.

Interception to prevent bodily harm

FILE NO. 937-1

(25)

National Executive Institute Associates,
Major Cities Chiefs' Association &
Major County Sheriff's Association
Leadership Bulletin

January 2001

# PUBLIC INTEREST PRIVILEGE--a Canadian Perspective

by Inspector Gordon B. Schumacher
Legal Counsel – Winnipeg Police Service
and
Christopher Mainella
Crown Prosecutor – Department of Justice (Canada)[1]

## Introduction

It is well established in the Canadian criminal justice system that police intelligence and informant information is crucial to the detection and eventual prosecution of criminals, particularly sophisticated offenders. This is predominantly the case in drug related investigations where, through misguided ingenuity, traffickers often take extreme measures to protect themselves from the efforts of law enforcement officials to interdict the flow of controlled substances in Canadian communities. As a matter of public policy and as a rule of evidence before the Courts, Canadian law has recognized that if police are to efficiently enforce the law, safeguards must be in place to protect the identity of informants and to a lesser extent, police intelligence records. Mr. Justice Cory of the Supreme Court of Canada made the following germane comments in 1990 in the *Scott* decision, which aptly addresses the foundation of police informant privilege:

> Trafficking in narcotics is a lucrative enterprise. The retribution wreaked on informers and undercover officers who attempt to gather evidence is often obscenely cruel. Little assistance can be expected from informers if their identity is not protected. There can be no relationship of trust established by the police with informers without that protection. If the investigation of drug related crime is to continue then, to the extent it is possible, the identity of informers must be protected.[2]

In the police realm, non-operational intelligence files have long been protected as being outside the reach of third parties or those accused. However, times have changed and the rules of disclosure interpreted through case law have made it extremely difficult to protect information once held by law enforcement agencies as outside their responsibility to disclose, even to the Crown.

---

[1] The thoughts expressed in this paper are those of the writers and are not meant to represent the views of either the Winnipeg Police Service or the Department of Justice.

[2] *R. v. Scott* (1990), 61 C.C.C. (3d) 300 (S.C.C.), at p. 314

The *Canada Evidence Act* has codified some of the common law with respect to the limited immunity available to law enforcement in protecting confidential information such as intelligence files, which is not otherwise covered by informant privilege. The common law in its current state has appropriately seen fit to clearly protect those who provide confidential information to police. However, intelligence files not related to informants, including those that tend to identify investigative techniques, intelligence operations, other targets who are subject to investigation and relationships with other police or security agencies have seemingly been cast in the shadows of obscurity, leaving the Crown or law enforcement with the obligation to show the court, pursuant to Section 37 of the *Canada Evidence Act*, that the information falls into the category of "specified public interest" and on balance should not be disclosed.

This paper discusses the legal status of informant privilege and other public interest privileges as they relate to police intelligence records and the *Canada Evidence Act*.

**What is Informant Privilege?**

Police informant privilege, also known as the secrecy rule, is a rule of evidence for judicial proceedings and of public policy generally. It prevents disclosure of informant information inside and outside of court. In terms of the rules of evidence in court, the rule applies to any proceeding - criminal, civil or administrative. The privilege applies to both documents provided by an informant and oral communications to police.

When a witness is testifying in court, the rule mandates that the witness cannot be required to answer questions seeking to disclose the identity of an informant. The privilege prevents not only disclosure of the name of the informant, but any information, which might implicitly reveal his or her identity. It is well established that even the smallest innocuous facts might disclose the identity of an informant.[3] The rationale for the rule is to encourage citizens to report crime without fear of retaliation. Justice McLachlin of the Supreme Court of Canada (as she then was) explained this rationale in the *Leipert* decision:

> It is premised on the duty of all citizens to aid in enforcing the law. The discharge of this duty carries with it the risk of retribution from those involved in crime. The rule of informer privilege was developed to protect citizens who assist in law enforcement and to encourage others to do the same.[4]

It is important to understand the privilege belongs to the Crown and the informant and that the Crown cannot waive the privilege without the informant's consent. The Crown and the police are under a duty to assert the

---

[3]. *R. v. Leipert* (1997), 112 C.C.C. (3d) 385 (S.C.C), at p. 393. The effect of the informant privilege is that defence counsel's ability to narrow the roster of potential informants through cross-examination is limited - *R. v. Picard* (1997), 120 C.C.C. (3d) 572 (Que. C.A.), at p. 576 and *R. v. Gray*, (1997) O.J. 1601 (QL) (C.A.)

[4] ibid at p. 390

privilege whenever it applies; the importance of the privilege exists far beyond a specific case.[5] It is well established that confidentiality of police informants is a value in and of itself that needs to be sedulously guarded.

The rule is absolute in Canada. A judge has no discretion to abridge the privilege; the only exception recognized at law to allow for an order disclosing the identity of the informant is when the accused can demonstrate that disclosure is required to establish his innocence.[6]

**Exceptions to Police Informant Privilege**

As mentioned, the only exception to the police informant privilege is if the accused's innocence is at stake.[7] The leading case on this exception is the decision of the Supreme Court of Canada in *R. v. Scott*.[8]

In *Scott*, the Supreme Court of Canada faced a situation where an undercover officer in Ontario acting on informant information contacted the accused. Over several months, the undercover officer made a number of cocaine purchases. During their dealings, the accused offered to front the officer cocaine. The officer declined indicating he had access to money to buy ounces of cocaine and didn't need credit. It was then suggested that he could supply the officer with larger quantities of cocaine (a pound) if the officer would loan him money up front. The loan was made on generous terms. The accused failed to deliver the pound of cocaine as promised and when it was felt the accused had the cocaine but was not going to come through with the delivery, the project was ended. Police executed a search warrant, which relied on information from the initial informant who the undercover officer used to contact the accused in the first place. Efforts of defence counsel to cross-examine police officers about the identity of the informant, perhaps to establish a defence of entrapment, allowed the case to reach the Supreme Court of Canada.

The Supreme Court held that if disclosure of the identity of the informant was needed to demonstrate the innocence of the accused then the informant privilege was vitiated and disclosure should be ordered by the Court. The Court held that the identity of an informant should be revealed in three instances:

1. The informer is a material witness to the crime;
2. The informant acted as an agent provocateur and played an instrumental role in the crime;
3. The accused seeks to establish a search was not undertaken on reasonable grounds.

In the particular facts of *Scott*, the Supreme Court ruled that the informant was not a material witness. There was no evidence to suggest the informant had ever been in a position to hear the conversations between the undercover officer and the accused. There was also no evidence to suggest the informant was an agent provocateur.

---

[5] *Bisaillon v. Keable* (1983), 7 C.C.C. (3d) 385 (S.C.C.)
[6] *supra* note 3 at p. 392
[7] *Marks v. Beyfus* (1890), 25 Q.B.D. 494 (C.A.), at p. 498 and *Bisaillon*, at p. 93.
[8] *supra* note 2

> Section 37 does not say what particular matter may fall within the words "specified public interest". No particular communications are excluded. What particular interest deserves protection is left for decision on a case-by-case basis.[11]

The specified public interests usually relied upon by police can for the most part be broken down into four categories, in each case it must be asserted that disclosure of information in the documents would:

1. identify or tend to identify human sources of information;
2. identify or tend to identify individuals other than the informant in the action who were or are the targets of investigation;
3. identify or tend to identify methods of operation utilized by the police agency in the investigation of criminal activity;
4. identify or tend to identify relationships that the police agency maintains with police and security forces in Canada and elsewhere and disclose criminal intelligence received in confidence from such forces.

**Identify or Tend to Identify Human Sources of Information**

In the investigation of crime, police agencies rely upon the cooperation of people who agree to provide information or assistance on the assurance of confidentiality. This is a vital investigative aid used by all police agencies. Many investigations would be difficult or impossible to investigate without the assistance of those willing to come forward and provide information. This is particularly true with investigations involving narcotic or organized crime offences where covert means are predominantly utilized. Fortunately, as mentioned previously, the Supreme Court of Canada has seen fit to clearly protect this type of information as privileged with the exception being where the innocence of the accused is at stake.[12]

**Targets of Criminal Investigation**

Many records maintained by police agencies may tend to identify targets or potential targets of criminal investigations. Awareness by those involved or their associates could easily thwart an investigation causing irreparable damage and immeasurable costs to the enforcement arm of the justice system.

Disclosure of the identity of those who are or have been the subject of a criminal investigation may provide information that could enable a suspect to assess the sophistication and depth of resources, as well as the extent of the knowledge and expertise possessed by investigators. This information, without question, could compromise criminal investigations.

Criminal targets must not be compromised and the argument put forward on a Section 37 certificate must clearly indicate that any attempt to obtain information of a pre-emptive nature would be nothing more than a fishing trip

---

[11] ibid.
[12] *supra* at note 3

and inappropriate to disclose. Targets of past investigation may also fall into this category as pertinent information of a past target may supplement a future investigation.

## Methods of Operation

The methods of operation involved in gathering intelligence information take many forms and are essential to the detection of criminal activity. This is especially the case in the investigation of drug related offences where covert means are predominantly utilized. Covert operations in the gathering of intelligence may involve electronic devices or techniques unknown to those being targeted. It is essential that the methods of operation including the type of equipment being used remain unknown to be effective.[13]

Disclosure of operations or techniques may easily provide individuals involved in criminal activity with the type of information required to enable them to devise ways to counteract investigations thus prejudicing the efficacy of future operations. This information would also provide suspects with the means of rendering techniques ineffective and could hinder or frustrate investigations by acknowledging the resources available and the degree of expertise possessed by investigators. Needless to say, once a suspect is aware of clandestine methods, not only are investigations jeopardized, the safety of those involved in any undercover capacity, whether an informant or police officer, may be compromised.

In *R. v. Meuckon*, the court discussed privilege in relation to police methods and safety of officers involved in the investigation. The court said:

> If privilege is claimed in a criminal trial the trial judge must first decide whether the information might possibly affect the outcome of the trial. If the information could not affect the outcome of the trial then privilege claim should generally be upheld. If however, the decision to uphold the claim of privilege might affect the outcome of the trial then the trial judge must consider whether upholding the claim of privilege would have the effect of preventing the accused from making full answer and defence... In

[13] A good illustration of this is *R. v. Richards* (1997), 115 C.C.C. (3d) 377 (Ont. C.A.) where the Court refused to order disclosure of a police technique. Another important issue is surveillance using the assistance of civilians, the Courts have been prepared to treat disclosure of such a location as falling within the informant privilege and therefore allowing disclosure only where the accused can establish his innocence is at stake – see: *R. v. Thomas* (1998), 124 C.C.C. (3d) 178 (Ont. Ct. (Gen. Div.))

effect, the trial judge must consider whether the public interest in allowing the accused to make full answer and defence can be overridden by the interest asserted by the Crown.[14]

### Information from other Police or Security Forces

All police agencies in Canada rely upon other police or intelligence forces in national and international jurisdictions to disclose information and intelligence related to criminal activity with local or national implications. This is particularly the case with investigations involving organized crime that easily transcend borders. Accordingly, the assistance and cooperation of police and security forces abroad by way of exchanges of criminal intelligence and, in some cases, resources, is essential to effective investigations. It is understood, and vital to the continuance of relationships between the local police service and the other police or security force, that information provided not be disclosed without the originating agency's permission. To maintain a fluid and consistent flow of information, relationships cannot be compromised. By being forced to step away from professional commitments through disclosure, the foreseeable consequence will lead to the dwindling of useful information being exchanged and will certainly provide a benefit to those in society most reviled.

Generally speaking, when a motion is made by defence counsel to obtain information falling into one of the above categories, the Crown is under an obligation to discuss the request with the police. If it is determined that some of the information is not clearly irrelevant to the proceeding,[15] relevancy being determined by the Crown, then the information must either be turned over to defence counsel or an objection made under the *Canada Evidence Act* with the option of filing a Certificate outlining the privileges claimed with the court. There may be circumstances where the Crown is not prepared, for whatever reason, to get involved in a public interest privilege motion, leaving it to police counsel to make the objection and present the facts.

There has been a suggestion from the defence bar that police, without concurrence from Crown, do not have standing to maintain a *Canada Evidence Act* objection. This argument is based upon Section 37(1) which identifies "the Crown in the right of Canada or other person interested" as being the only entities who have standing to make an objection under the *Canada Evidence Act*. This interpretation however, is too restrictive and contrary to the clear wording of the statute – "other person interested."

There have been instances in Canada where police forces have made application to the Court invoking Section 37 of the *Canada Evidence Act*. Recently, in *R. v. Pangman et al.* (Man. Q.B., 1999) the Winnipeg Police Service, relying on the "other person interested" provision of Section 37, were granted standing by Madam Justice Krindle to challenge disclosure of confidential intelligence files of the Winnipeg Police relating to a street-gang known as the Manitoba Warriors. In *Pangman*, Justice Krindle reasoned that if the Crown refuses to object to disclosure when the police claim a public interest privilege, then it must be left to police to make their argument independent of the Crown. To do otherwise would be unfair to police and those whose information they seek to protect. *Pangman* is a unique case in the sense that the Crown was

---

[14] *R. v. Meuckon* (1990), 57 C.C.C. (3d) 193 (B.C.C.A.)
[15] *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.)

not prepared to make a public interest privilege objection because defence counsel had made a general allegation against the Crown of professional misconduct, as such; the issue was left for the police to pursue.

There have been many occasions where the Crown, on behalf of the police, has made a Section 37 objection and the determination of disclosure has been made by the court after examining the documents. It is not a requirement, however, that the information sought to be protected has to be examined by the court. In *Mickle*, the R.C.M.P. objected to the disclosure of information under the *Canada Evidence Act*. In doing so they asserted a public interest privilege. The R.C.M.P. alleged that disclosure of their files would reveal important and confidential police procedures and information systems which would damage future investigations, reveal *modus operandi* of police agents and agencies, and reveal names of persons currently under investigation. Without examining the documents, the court indicated that the rights of the accused were not outweighed by the privilege claimed by the R.C.M.P. The documents were not released.[16]
This position was also supported in *Bailey v. Royal Canadian Mounted Police*, when the court reasoned that in making a determination under Section 37 of the *Canada Evidence Act* it must first be determined if an apparent case has been made for disclosure. If the apparent case is not met, the court does not have to proceed to the second stage of examining the documents of which privilege is claimed.[17]

In making a determination a Court may examine the documents in question to assist in the balancing test – S. 37(2) of the *Canada Evidence Act*.

**Disclosure**

One of the most important aspects of public interest privilege is its interrelationship with the Crown's general obligation to disclose all relevant information to an accused to allow them to make full answer and defence. The Supreme Court of Canada in the leading decision of *R. v. Stinchcombe* held that as a matter of constitutional law the Crown is under an obligation to disclose all information within its control unless it is clearly irrelevant or privileged.[18]

Until recently, there was some debate as to whether or not this general rule of disclosure might provide another exception to informant privilege.[19]

---

[16] *Mickle v. R* (1987) 19 B.C.L.R. (2d) 266 (S.C.)
[17] *Bailey v. Royal Canadian Mounted Police*, [1990] F.C.J. No. 1139 (QL)
[18] *supra* at note 15. An excellent example is the case of *R. v. Greganti* (Ont. S.C. 2000). In that case debriefing notes of a police agent were not disclosed by the R.C.M.P. to the Crown until the eve of the trial. These internal R.C.M.P. documents were not typically released. Justice Stayshyn was critical of this lack of disclosure which would be important to testing the credibility of the police agent, in addition to staying the charges the Court ordered costs against the Crown in the amount of over $116,000.00.
[19] See D.M. Tanovich, when Does Stinchcombe Demand that the Crown Reveal the Identity of a Police Informer? (1995), 38 C.R. (4th) 202. In the decision of *R. v. 4-12 Electronics* (1996), 108 Man. R. (2d) 32 (Q.B.) this issue was fully litigated. In a decision, which foreshadowed in many aspects the *Leipert* decision, Mr. Justice Hanssen concluded that *Stinchcombe* did not alter any of the rules relating to informant privilege as enunciated in *Scott*. See also - *R.C.M.P. v. Saskatchewan (Commission of Inquiry into the death of Leo Lachance)* (1992), 75 C.C.C. (3d) 419 (Sask. C.A.) at p. 425.

The Supreme Court of Canada had an opportunity to deal with the issue of disclosure and police informant privilege in the decision of *R. v. Leipert*. This was a case where police attended to an accused's residence because of a Crime Stopper's tip. While standing on the street, the investigating officer could smell the aroma of marihuana coming from the accused house and could see that several windows to the house were blacked out or barred. Upon execution of the search warrant, the police discovered a marihuana grow operation. At trial, defence counsel argued that they were entitled to production of the Crime Stopper's document recording the initial tip in order to challenge the search warrant. The Crown refused to disclose the information on the basis of police informant privilege.

The Supreme Court held that the accused's right to disclosure does not supersede or trump the police informant privilege as enunciated in *Scott*. Unless an accused falls within the innocence at stake exception discussed earlier, he will not gain access to informant information based on general principles of disclosure.

## Editing

Once an objection under the *Canada Evidence Act* has been put to the court, it will be for the judge to decide, after hearing representations, the process to determine whether the information sought should be disclosed. A judge may decide to release all of the information, none of the information or some of the information. In the last case, an editing process may occur similar to that utilized when opening a packet relative to wiretaps or sealed search warrant. The Crown will have the opportunity to initially edit the information. Edited material will then be released to counsel and arguments as to the acceptability of the editing will be heard and ultimately a version of the editing will receive judicial approval. The procedures that have been used as a template for the editing process have been discussed by the Supreme Court of Canada in the decisions of *R. v. Garofoli*,[20] *R. v. Durette*,[21] and *Leipert*. This process was followed specific to informant and intelligence information in *Pangman*.

Investigators should understand that the Supreme Court takes the position that the starting point is that an accused is entitled to disclosure of all materials not clearly irrelevant.[22] The police informant privilege is of course grounds to not disclose information, subject to the exceptions discussed earlier in *Scott*. An order under Section 37 of the *Canada Evidence Act* would be another legal reason to not require disclosure. When editing documents, the Supreme Court has made it clear that editing is to be kept to the absolute minimum.[23]

When there are questions of privilege, the editing procedure consists of essentially three (3) stages:

1. The information or content of the information is provided to the Crown for editing purposes.

---

[20] *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 (S.C.C.)
[21] *R. v. Durette* (1994), 88 C.C.C. (3d) 1
[22] *supra* at note 15.
[23] *supra at note 2*, p. 315

At this stage, Crown counsel will meet with police and ask them to see what if any information can be released. It is important to remember that information covered by informant privilege may only be released if the Crown and informant agree. If appropriate in the circumstances, Crown counsel may ask police to speak to the informant, if known to them, to get permission for the release of information.

The factors the Crown must consider in the editing process include those privileges discussed earlier (informant confidentiality, protect police operations and techniques, compromise police investigation). In addition, the court in *R. v. Paramar*,[24] identified the prejudice that may occur to the interests of innocent persons, as being a fourth criteria. This point was supported in *Garofoli*.

In the case of information from an anonymous informant, editing will be almost impossible as the police will have no idea what information will identify the informant, and what will not. *Leipert*, was a case of a search warrant based partly on an anonymous informant. The Supreme Court said in such cases no editing should occur and no disclosure should occur unless the accused can fall within the innocence at stake exception.[25]

2. The edited documents are provided to defence counsel if the accused cannot appreciate the nature of the editing, judicial summaries of the information edited should be provided.

Once the Crown has edited the information, a copy of the edited version is disclosed to counsel. Defence counsel at this point may accept the editing or may challenge the editing that has taken place. If the trial judge believes a judicial summary is necessary to understand the editing, he should provide a judicial summary of the information.

3. If the accused challenges the editing, a procedure occurs whereby the trial judge reviews the Crown's editing. The trial judge is to try to keep editing to the bare minimum necessary to protect the informant. This procedure is done in open court and on the record.[26] Crown counsel and the trial judge will have the unedited materials; defence counsel will have the edited materials and the judicial summaries, if provided, to assist them with the edited information. At this stage the trial judge will rule as to whether or not the edited material should be disclosed; if the material is ordered not disclosed the court should ensure that the editing done is the minimum necessary in the circumstances to protect the informant or information.

Ultimately, the Crown retains the power to stay proceedings before any order of disclosure takes place. This is a crucial safeguard to protect confidentiality of informants or information relative to the other heads of specified public interest.

---

[24] (1987), 34 C.C.C. (3d) 260 (Ont. H.C.)

[25] *supra at note 3*, pp. 397-398

[26] Historically some of this process occurred outside the presence of the accused in chambers. However the Ontario Court of Appeal in *R. v. Rowbotham* (1988), 63 C.R. (3d) 113 and cases since then have made it clear that the "editing review" procedures should be done on the record in open court and in the presence of the accused. Exceptional care must be taken by the trial judge and Crown counsel not to make any inadvertent disclosure of informant information during this procedure.

## Conclusion

As indicated at the outset, privilege is an invaluable tool for law enforcement. Without it, a tremendous source of information for investigators would likely evaporate, as confidentiality could not be preserved when matters proceeded through the court process. Care must be shown by both the police and Crown to guard informant privilege and other public interest privileges because of their importance to the effective functioning of law enforcement. Care must also be shown to ensure that informants do not lose their confidentiality by their actions or directions from the police. The rules in *Scott* are not complicated, but if an informant falls within the exception either his or her identity will be ordered disclosed or the Crown may terminate the case by staying the charge. This area of law is challenging not only for investigators but for lawyers as well. Consultation with the Crown, particularly in the investigative stage, can prevent difficulties at a later date.

---

*The National Executive Institute Associates Leadership Bulletin editor is Edward J. Tully. He served with the FBI as a Special Agent from 1962 to 1993. He is presently the Executive Director of the National Executive Institute Associates and the Major City Chiefs. You can reach him via e-mail at* **tullye@aol.com** *or by writing to 308 Altoona Drive, Fredericksburg, Virginia 22401.*