INFORMER PRIVILEGE

"To him that you tell your secret you resign your liberty."

-Anonymous, *Proverb*

Introduction

This section of the Guide Book describes the rule and exceptions to the rule protecting the identity of police informers in prosecutions. The privilege is based on an important principle of public policy in the field of law enforcement. The Guide Book also sets out the Attorney General's policy on protecting the identity of such informers.

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]
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> In summary, informer privilege is of such importance that it cannot be balanced against other interests. Once established, neither the police nor the court possesses discretion to abridge it.[4]

Statement of Policy

Crown Attorneys have 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 Attorneys must object to disclosure of information tending to reveal an informer's identity or status as an informer.

Crown Attorneys 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 Attorneys have 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 Attorneys 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. terminate the proceedings where necessary.[10]

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[11]. Even if Crown Attorneys do not assert the rule, the court must apply it of its own motion.

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[12]. 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[13].

Situations Where the Privilege Might Not Apply

In *R.* v. *Leipert*[14], the Court confirmed that the only exception to the privilege occurs where the accused's innocence is at stake. In *R.* v. *Scott*[15], the Supreme Court of Canada identified three situations[16] 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[17];

b. where the informer has acted as an *agent provocateur*; that is, he or she played an instrumental role in the offence[18]. 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*[19].

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”[20].

Distinguishing Agents from Informers

One of the most difficult problems in this area 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*[21], 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 affects the exchange between the informer and the accused, will not make the informer a state agent for the purposes of the exchange in question. Only if the relationship between the informer and the state is such that the exchange between the informer and the accused is 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.

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

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

[2] (1997), 112 C.C.C. (3d) 385 (SCC).

[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.).

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

[9] Counsel considering this option should consult with the Senior Crown Attorney, who may wish to consult with the DPP.

[10] Crown Attorneys should have regard to **Directive #4**; "Termination of Proceedings", in the section of this Guide Book on the "Conduct of Criminal Litigation".

[11] *R.* v. *Leipert*, at pp. 392-393.

[12] *R.* v. *Leipert*, at pp 393-394.

[13] *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*."

[14] *R.* v. *Leipert*, at 394-395.

[15] See note 8.

[16] 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.

[17] *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.

[18] See *R.* v. *Scott*, note 8, and *R.* v. *Davies*, note 17. 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.

[19] 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.

[20] *R.* v. *Leipert*, at 398.

[21] (1991), 68 C.C.C. (3d) 308 at 318-319 (SCC).