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.

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[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

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[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.

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[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

For the innocence at stake exception to apply, the accused must prove on the balance of probabilities that he can establish at least one of the three grounds. A mere possibility or speculation is not sufficient. The Court will not condone fishing expeditions in this area. Justice McLachlin commented in the *Leipert* decision as follows:

> If speculation sufficed to remove the privilege, little if anything would be left of the protection which the privilege purports to accord.[9]

Specified Public Interest & the *Canada Evidence Act*

Section 37 of the *Canada Evidence Act*, has codified the common law position with respect to the limited public interest immunity available to police in preventing the disclosure of intelligence information. It has been established that a balance need occur between the need to protect the interests of the accused and the ability of police agencies to investigate matters without concern that its methods of obtaining information, its contacts and the targets of investigations will be exposed.

The *Canada Evidence Act*, Section 37(1) states:

> A minister of the Crown in the 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.

In discussing Section 37 in *Re Attorney-General of Canada et al. and Sander*, the B.C. Court of Appeal indicated that:

> An order for disclosure in a criminal trial invokes the common law and concentrates on the requirement that there be a fair trial. The right to make full answer and defence is at the heart of the inquiry.
>
> An application under S. 37 concerns two questions. First, it involves a consideration of the public interest in the proper functioning of government. Secondly, it involves a consideration of the public interest in disclosure, and whether it outweighs a specific interest bearing upon the proper functioning of government.[10]

There is no exhaustive definition of Public Interest Privilege, in *Sander* the concept was discussed:

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[9] *supra* note *3*, at p. 395

[10] *Re Attorney-General of Canada et al. and Sander* (1994), 114 D.L.R. (4th) 455 (B.C.C.A.)

> 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

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[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

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[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]

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[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.

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[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.

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[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.*