IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. AAA*, 2015 NSPC 98

Date: January 27, 2015
Docket.

BETWEEN:

HER MAJESTY THE QUEEN

v.

AAA

BEFORE THE HONOURABLE JUDGE ANNE S. DERRICK

HEARD: January 23 and 26, 2015

DECISION: January 27, 2015

CHARGES: *Criminal Code*

COUNSEL: Peter Craig and Kim McOnie, for the Crown

Joel Pink, Q.C., for the Claimant

REDACTED TO PROTECT INFORMER PRIVILEGE

By the Court:

Introduction

[1] This decision concerns a claim for informer privilege. I have addressed the procedural aspects in accordance with the Supreme Court of Canada decisions in *R. v. Leipert*, [1997] S.C.J. No. 14; *Named Person v. Vancouver Sun*, [2007] S.C.J. No. 43; and *R. v. Basi*, [2009] S.C.J. No. 52. I have conducted two *in camera, ex parte* proceedings – a pre-trial and a "first stage" hearing. The "first stage" hearing, at which evidence was called, dealt with the merits of the privilege claim. These are my reasons on the "first stage" issue of whether a claim of privilege has been made out.

[2] I will note that the "second stage" in a privilege claim occurs if, once it has been determined that the claimant is entitled to the protection of the privilege, the issue of "innocence at stake" arises. These reasons do not address innocence at stake.

Informer Privilege

[3] The rule of informer privilege has deep roots. It is a class privilege.[1] As the Supreme Court of Canada stated in *Leipert*:

> 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...[2]

[4] In *R. v. Barros*, Binnie, J. observed that "Police rely heavily on informers" and described how the informer privilege rule works: "Because of its almost absolute nature, the privilege encourages other potential informers to come forward with some assurance of protection against reprisal. A more flexible rule that would leave disclosure up to the discretion of the individual trial judge would rob

informers of that assurance and sap their willingness to cooperate."[3] He encapsulated the close to absolute nature of the privilege:

> The jurisprudence establishes that the identity of police informers is protected by a near-absolute privilege that overrides the Crown's general duty of disclosure to the defence. This privilege is subject neither to judicial discretion nor any balancing of competing interests (although qualified by an "innocence at stake" exception)...[4]

[5] I will discuss the law governing the rule of informer privilege later in these reasons.

The Law Governing the "First Stage" Privilege Hearing

[6] In *Vancouver Sun*, the Supreme Court of Canada established that a privilege claim is to be heard *in camera* with only the claimant and the Crown present. Under no circumstances are third parties to be permitted to attend the proceeding and "even the claim of informer privilege must not be disclosed."[5] The Supreme Court held that as the privilege hearing involves the "simple matter" of determining whether the claimant is entitled to the protection of the privilege, no one else will have anything of value to contribute to that determination, and furthermore, permitting third parties (e.g., the media) to have standing at the privilege hearing "would needlessly increase the risk of disclosure of the identity of the confidential informer."[6]

[7] Defence counsel are not permitted to attend the "first stage" privilege hearing. An accused and his or her counsel do not come within the "circle of privilege"[7] and are not to be made privy to "what informer privilege is meant to deny them."[8] This is notwithstanding the fact that the accused faces the jeopardy of a criminal conviction and its consequences, enjoys the right to full answer and defence, is otherwise entitled to be present at his/her trial (by virtue of section 650 of the *Criminal Code*), and has a constitutionally-protected right to disclosure.[9]

[8] It is an error of law to permit defence counsel to attend the "first stage" privilege hearing and hear evidence that would tend to reveal the identity of the claimant.[10]

[9] When the "first stage" is unfolding, Defence counsel will be limited to providing the trial judge with submissions on the law and proposing questions to be put to the claimant (or other witnesses). However, in some circumstances, Defence may receive a redacted transcript of the "first stage" hearing and will not have been given the opportunity to contribute submissions and/or questions. Subject to the particular facts of the case, this will not be an improper procedure.[11]

[10] The case law makes it clear that the contributions of Defence counsel, where they are made, are for the purpose only of assisting the court in properly assessing the claim of privilege.[12] The judge retains a "broad discretion…to craft procedures when faced with an assertion of informer privilege…" Her obligation is to adopt "adequate measures to safeguard the interests of the [accused] in connection with the determination of the question of confidential informer privilege."[13]

Getting the Claim of Privilege into Orbit

[11] The claim of privilege came to the attention of the Crown through the police. The Crown were advised that someone the police had spoken to was making a privilege claim in relation to a statement that had been taken. The Crown advised me by way of a letter that it would be necessary to hold a hearing to deal with the privilege claim. The matter has had to proceed with some urgency.

[12] Unilateral communications with a judge hearing a matter are prohibited under the ethical codes that govern the conduct of lawyers. However in this case, a fundamental preliminary issue that had to be determined was whether even notice to Defence counsel about the claim could tend to identify the privilege claimant. As stated in *Leipert*,

> …it is often difficult to predict with certainty what information might allow the accused to identify the informer. A detail as innocuous as the time of the telephone call may be sufficient to permit identification. In such circumstances, courts must exercise great care not to unwittingly deprive informers of the privilege which the law accords them.[14]

[13] The duty to protect informer privilege applies to the police, the Crown, other counsel, and judges. The privilege extends to any information "which might tend

to identify an informer..." and is not limited only to the informer's name.[15] As I said at the pre-trial:

> ...I'm satisfied that it has been necessary this morning to conduct this pre-trial, not only *ex parte* and *in camera* but also without notice to the defence as I have no way of knowing at this point whether notice could tend to identify the claimant of privilege and it's my obligation in law to scrupulously protect the privilege and to presume that privilege operates.

[14] In *Vancouver Sun*, the Supreme Court of Canada held that "...[w]hile the judge is determining whether the privilege applies, all caution must be taken on the assumption that it does apply."[16] Referencing this edict, the Court in its *Basi* decision went on to say: "No one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies."[17]

[15] The pre-trial was conducted in my chambers on the record using a stand-alone recording system. The Crown attended with a lawyer for the Attorney-General of Nova Scotia. That lawyer's attendance was required to address an issue identified by the Crown – securing representation for the claimant.

[16] The pre-trial dealt only with organizational issues: notice to the Defence provided that this would not tend to identify the claimant of the privilege; what the Attorney-General would be doing to find a lawyer to represent the claimant; and when to have the hearing – the "first stage" hearing - on the merits. The Crown was very circumspect and provided no information about the evidence that would be called at the "first stage" hearing.

[17] A transcript was prepared of this pre-trial by my judicial assistant and provided to the Crown. Communications between Crown and the court were undertaken through hard-copy letters that were sealed and hand-delivered.

[18] Prior to the hearing on the merits I raised with the Crown the issue of staff attendance, that being the court clerk (my judicial assistant) and a deputy sheriff. I was advised that neither the Crown nor counsel for the claimant had any problem with these trusted members of courtroom staff being present.

Notice to Defence Counsel

[19] Once the Crown was able to confirm through the police that notice would not tend to identify the claimant, Defence counsel was given notice. This occurred after the *in camera*, *ex parte* pre-trial and before the *in camera*, *ex parte* "*first stage*" hearing. The notice issue that had to be addressed in this case does not usually arise because in most privilege-claim cases, the Defence already know from the disclosure that the police have used source information in their investigation, raising the possibility of an informer privilege issue. In *Basi* the issue of notice to defence counsel about a claim of informer privilege did not come up because the source's identity and all information they provided to police had already been fully disclosed to the accused in the normal course of Crown disclosure.

[20] Notice in this case, provided by the Crown to Defence counsel, consisted of a letter, copied to me, which indicated the following: there is "a potential witness" who is making an informer privilege claim; there was a pre-trial (referred to as a meeting) the day before on an *in camera, ex parte* basis; a hearing to be conducted *in camera* and *ex parte* to adjudicate the privilege claim has been scheduled; and the court is offering the Defence the opportunity to make submissions on the law relating to informer privilege and the procedure(s) for adjudicating the claim and any questions "you would wish Her Honour to pose to the potential witness/privilege claimant". The Crown also included with the notice cases that had been provided to me, cases I had referred to at the *in camera, ex parte* pre-trial, and three articles on informer privilege from the 2014 National Criminal Law Programme.

[21] The Crown also advised Defence counsel that they anticipated forwarding a redacted version of the *in camera, ex parte* pre-trial transcript, "if this can be disclosed following our review."

Defence Input

[22] Prior to the privilege hearing, Defence counsel sent a submission to me in the form of a letter making the following points: that making a meaningful submission was very difficult as Defence was "operating in a complete vacuum"

because they had been provided with "no information at all, even in the broadest strokes, pertaining to the nature of the witness or the information the witness claims to know"; that as a result, the Defence was relying on the Court "to apply the law and determine, for the most part, appropriate questions to pose." The Defence referenced the Supreme Court of Canada's decision in *Basi* where having a redacted or summarized version of the information provided by the claimant enables the defence to recommend specific questions for use at the privilege hearing and permits defence to decide whether it would be useful to recommend the appointment of an *amicus curiae* to assist the court in making the privilege determination.

[23] Defence counsel went on to make submissions that drew their substance from the governing jurisprudence. The Defence noted that the threshold issue is whether the claimant qualifies as an informer and framed a series of questions intended to explore the nature of the claimant's relationship with police. The Defence pointed out that only a confidential informer can claim the privilege; an agent, acting at the direction of the police, cannot. The Defence wanted the following issue to be explored: Did the claimant provide information to the police on the explicit or clearly understood condition that their name along with any identifying information would not be provided, an understanding that in the Defence submission, "must be commonly held by the police officer and the claimant."

[24] The Defence concluded its submission with the following:

> ...Presumably the procedure at the hearing will be such that the court will be aware generally of the type of information the claimant alleges to have but not the specifics. The knowledge obtained by the court may lead to the conclusion that a summary of some sort should be provided to defense either before this issue is adjudicated so further submissions may be made or in the event the claimant is found to be an informer. It could also be the case that the Court finds the appointment of an *amicus curiae* appropriate. It is impossible to make

> meaningful submissions on either of those options provided for in *Basi* with no information at all about this application.

[25] I responded to Defence counsel in a letter I copied to the Crown. In responding to the paragraph above from the Defence submission I said, referring to *Basi*:

> ...I note the Supreme Court of Canada said the following: "in order to protect these interests of the accused [as discussed in preceding paragraphs], trial judges should adopt all reasonable measures to permit defense counsel to make meaningful submissions regarding what occurs in their absence. Trial judges have broad discretion to craft appropriate procedures in this regard."[18]

[26] I advised defence counsel that I had made note of their submissions and would "be mindful of them as this matter proceeds." I also indicated: "... I have been provided no information concerning any of the particulars of the claimant's application and therefore have nothing to assist me at this point in crafting appropriate procedures for meaningful submissions from the Defence..." I expressed appreciation for what defence counsel had been able to prepare, at short notice, for my consideration.

The Privilege Hearing – the "First Stage" Hearing

[27] The privilege hearing was conducted *in camera* and *ex parte* in compliance with the Supreme Court of Canada's decision in *Basi*. It was recorded on a stand-alone recording system.

[28] The Crown advised at the start of the "first stage" hearing that, as it had indicated in the pre-trial, the claim of privilege was being contested: the police and the Crown disputed the claim and the Crown would be opposing it. However in its final submission the Crown indicated it was taking no position on the privilege claim in light of the evidence of one of the police witnesses, evidence that I will be reviewing shortly.

[29] The evidence on the merits of the privilege claim came from the claimant. The Crown called three police officers who had contact with the claimant at the relevant time.

[30] It was agreed by the Crown and the claimant's lawyer that the claimant bore the onus of proving the existence of the privilege on a balance of probabilities. The law was not in dispute.

The Claimant's Evidence

[31] At the relevant time,

[32] The claimant was known to police. unclear to me whether this was a choice or whether the opportunity was never provided: the claimant testified that In the final analysis, nothing turns on this.

[33] The claimant does not recall any of the arresting officers talking to about anything other than the

[34] The claimant recalls testified that there was a Justice of the Peace remand hearing that led to being held in custody over the weekend until appearance in court on Monday. cannot have been correct about this as

[35] While in the holding cells late in the afternoon on the claimant recalls Cst. Greg Stevens coming to see knew Cst. Stevens from a prior arrest. The claimant testified that Cst. Stevens wanted to know if had any information about two separate, specific crimes and the The claimant testified told Cst. Stevens that yes, "...knew information about it". According to the claimant, Cst. Stevens said someone would be by to see in the morning about these matters, that is, the morning of

The claimant testified Cst. Stevens told that what told police would be kept confidential and would not have to testify in court.

[36] The claimant recalls that between 8 a.m. and 9 a.m. on Cst. Stevens came by again to see testified that he wanted to know if was willing to talk to a police officer. testified said yes, but "I didn't know if it would go further than that."

[37] During time in police cells, the claimant was not doing well. It was the claimant's evidence that when

[38] On cross-examination, the claimant indicated that was assessed at the police station by EHS and taken to the hospital. Once back at the police station, was given

[39] At first the claimant testified that the exchange with Cst. Stevens was the last time the claimant saw him. Another police officer, Cst. McNeil, arrived to take upstairs. However, later in direct examination, the claimant said that Cst. Stevens escorted to the interview room. was asked if recalled Cst. McNeil and Cst. Pam Winterss escorting to which answered: "No, but I was so it's possible."

[40] The claimant testified that both Cst. Stevens and Cst. McNeil told that identity would be protected if talked to police. said that this "affected decision to talk to the police] one hundred percent. I was willing to speak with them as long as my safety was the first concern and that any information that I had given to them was not going to be released or used in any other way except in just their investigation."

[41] It was the claimant's evidence that Cst. McNeil assured in the interview room that identity as a source of information to the police would not be disclosed to anyone. The claimant recalls this occurring in the interview room just

before he started the interview. Cst. McNeil had been out of the room briefly and returned at which time, according to the claimant, he apologized for keeping waiting, told their conversation would be video and audio-recorded, and then said that "my statement wouldn't be used in a court of law." Asked how sure is that Cst. McNeil said that to the claimant responded: "Almost positive."

[42] When the claimant gave statement to Cst. McNeil says was thinking that just wanted "these guys" to leave alone just wanted to give them the information had. described motivation for talking: "Obviously the person who had hurt a few people - I wanted to help anyway I could..." but didn't think it would come to being sought after as a potential witness. testified that was felt nervous while giving statement. said felt "sure" had difficulty understanding Cst. McNeil during the interview and that had difficulty staying awake.

[43] The claimant testified that believed identity would be protected and not divulged to anyone. understood was providing information solely to assist the police in their investigation. testified that both Cst. Stevens and Cst. McNeil gave these assurances.

[44] Although the claimant said on direct examination had no conversation with Cst. McNeil as they went upstairs, later testified he assured at various junctures that identity would be protected: on the stairs when he was escorting to the interview room and in the interview room itself. The claimant says understood would not have to go to court in relation to the statement that Cst. McNeil was about to take from .

[45] The claimant was asked on cross-examination by the Crown if Cst. Stevens ever used words such as "informer" or "informant" or "source" and said no, he had not. testified that he told anything they talked about would be confidential. was asked if Cst. Stevens had told anything said to other police officers would be confidential and said, no, he had not said that.

[46] It was the claimant's evidence that had been assured by both Cst. Stevens and Cst. McNeil that would not have to testify about anything told

them. [redacted] ended [redacted] evidence by saying: "...if anybody finds out I gave this statement I'm as good as dead."

Cst. Greg Stevens

[47] Cst. Greg Stevens knew the claimant before [redacted] He had first met [redacted] On a subsequent occasion while working a night shift, he had pulled over to speak to [redacted]

[48] It was Cst. Stevens' evidence that he had no dealings with the claimant on [redacted] He further testified that he has never discussed with [redacted] the crimes [redacted] says he asked about.

[49] Cst. Stevens was at the police station on [redacted] He was working a 4 p.m. to 2 a.m. shift. At about 11:40 p.m. he took an arrestee to the police station but he did not see the claimant while he was there. He did not know that [redacted] was even in custody at that time. He testified there was no way [redacted] could have seen him from the cell block where [redacted] was being held.

[50] Cst. Stevens testified that he has never extended the protection of confidentiality to the claimant in relation to the matters [redacted] spoke to Cst. McNeil about nor did he ever tell [redacted] that [redacted] would not have to testify if [redacted] gave a statement about them. However as I will describe, Cst. Stevens did have a more general discussion with the claimant about providing confidential information to the police.

[51] Cst. Stevens' first contact with the claimant was when he arrested [redacted] in [redacted] He did not require [redacted] to be a witness and never took a statement from [redacted] On cross-examination he testified that he had a conversation with [redacted] about becoming an informer; he extended [redacted] the benefit of informer privilege he said, "in general" and not with respect to any particular investigation. At that time he says he told the claimant that if [redacted] provided him with any information it would be treated confidentially and [redacted] identity would not be revealed. It was Cst. Stevens' evidence that he wasn't looking for any specific information at that time; his overture to [redacted] "could be for future reference if [redacted] wanted to speak to a police officer." He described it as "kind of rapport-building" that the police do in case the

individual wants to speak to a police officer in the future about something they know.

[52] On a subsequent occasion Cst. Stevens, working a shift with a partner, saw the claimant outside a building by [redacted] and pulled over to ask if [redacted] was alright. It was an abbreviated conversation because Cst. Stevens [redacted] Cst. Stevens [redacted] Cst. Stevens gave the claimant his card and told [redacted] to call him. He had in mind that the claimant might contact him with useful information about something. He testified that he would have given [redacted] informer privilege if [redacted] had come forward with any information. He said he probably mentioned to [redacted] on this occasion that any information [redacted] provided would be kept in confidence.

[53] Cst. Stevens confirmed on cross-examination that his overture to the claimant was an offer of the opportunity to be a confidential police informant whose identity and information would not be disclosed. There were no specifics discussed.

Cst. Jason McNeil

[54] Cst. McNeil's only contact with the claimant was on [redacted] He testified to going to the cells with Cst. Pam Winterss and escorting the claimant to the interview room. He then conducted a video audio-recorded interview with [redacted]

[55] Cst. McNeil was the lead investigator in relation to [redacted] with an [redacted] Prior to [redacted] he had been trying to locate the claimant after receiving information that the claimant knew something about the [redacted] His efforts to track the claimant down had included calling [redacted] On [redacted] called Cst. McNeil to advise that the claimant was in booking at the police station. Cst. McNeil confirmed [redacted] would be held overnight and made a plan to interview [redacted] the next day. He had no contact with the claimant on [redacted] and had not met [redacted] before.

[56] The next morning, [redacted] Cst. McNeil enlisted the assistance of Cst. Pam Winterss. They went to see the claimant in police cells and although Cst. McNeil cannot recall the precise words he used, he says he would have told the

claimant he wanted to talk to [redacted] about an ongoing investigation. He testified he would not have said anything to the claimant about what investigation given the potential that other detainees in cells might overhear. The conversation was very brief. Cst. McNeil made no notes of it.

[57] Cst. Winterss was not involved in Cst. McNeil's investigation. [redacted] role was to accompany Cst. McNeil and the claimant to the interview room and monitor the statement-taking.

[58] Cst. McNeil does not recall the claimant being reluctant about speaking to him. He had no difficulty getting [redacted] to agree to go with him to an interview room. He testified that he is "certain" he did not extend any assurance of confidentiality or say [redacted] would not have to testify. He did not know what [redacted] might tell him. In Cst. McNeil's words, "It would be difficult for me to extend confidentiality when I didn't know what [redacted] was going to tell me."

[59] It was Cst. McNeil's evidence that he has never made a promise of informer privilege to anyone housed in cells.

[60] The walk to the interview room was short – in Cst. McNeil's estimation, less than 30 seconds. Cst. McNeil had said nothing to this point about what he wanted to talk about with the claimant. He does not recall any conversation during the escort. He does not recall Cst. Winterss saying anything to the claimant. Cst. McNeil does not recall saying anything to the claimant when they reached the top of the stairs and entered the interview room.

[61] Cst. McNeil described arriving at the interview room and placing the claimant inside. He locked the door and left the claimant alone while he went next door to make sure the video-audio recording system was working. Cst. Winterss was there to monitor the interview. Cst. McNeil then returned to the interview room and started the interview "right away." He testified that he had no discussion with the claimant prior to the start of the interview other than what is shown on the recording.

[62] The video/audio recording of Cst. McNeil's interview of the claimant (Exhibit 1) shows Cst. McNeil coming into the interview room and telling [redacted] that he is sorry for keeping [redacted] waiting. He tells [redacted] that "everything" is being audio

and video recorded. He assures [redacted] that [redacted] is not in any trouble and will not be charged with any "additional offences or anything like that." He goes on to say: "But I do want to talk to you about some things I've heard that I just want to find out if they're accurate or not."

[63] At no point during his interview with the claimant, not at the beginning or at any subsequent point, does Cst. McNeil say anything to [redacted] about the use to be made of the interview or that the claimant's identity will not be disclosed or that [redacted] will not be called to court to testify.

[64] Cst. McNeil wanted to speak to the claimant while he had the chance. The recording of the interview shows that, as Cst. McNeil recalls, he had no difficulty communicating with the claimant who had no problem understanding or communicating with him. Although he did not know the claimant [redacted] Cst. McNeil agreed on cross-examination that [redacted] How the claimant appears in the video of the interview is consistent with her testimony that [redacted] was experiencing [redacted] is also quite obviously very tired and yawns frequently.

Cst. Pam Winterss

[65] Cst. Winterss testified that she monitored Cst. McNeil's interview with the claimant on [redacted] She has no recollection of what she did prior to monitoring the interview; no recall of going with Cst. McNeil to see the claimant in the holding cells and no recall of accompanying them from the cells, upstairs to the interview room.

An Agreed Fact

[66] An additional fact was admitted by consent of the Crown and the claimant's counsel. Halifax Regional Police officers visited the claimant in jail in [redacted] At that time [redacted] either denied or could not remember giving a statement to Cst. McNeil the month before. However, [redacted] told the officers if [redacted] had spoken to police (as they were claiming [redacted] did, and as we know [redacted] did), it was [redacted] expectation that the conversation would remain confidential.

The Law that Governs Informer Privilege

[67] As I noted earlier, informer privilege is "extremely broad and powerful."[19] It operates to protect the informer from retribution and to encourage, with the assurance of confidentiality, others to come forward to assist the police, without fearing that their identities will be revealed.

[68] Once a trial judge finds that the privilege exists,

> ...a complete and total bar on any disclosure of the informer's identity applies. Outside the innocence at stake exception, the rule's protection is absolute. No case-by-case weighing of the justification for the privilege is permitted. All information which might tend to identify the informer is protected by the privilege, and neither the Crown nor the court has any discretion to disclose this information in any proceeding, at any time.[20]

[69] In a decision of the British Columbia Supreme Court, *R. v. X and Y*[21], applying the principles laid out in *Basi*, the judge found the police were wrong to have determined that the source could not be a confidential informant because they were a material witness. The Court held that at all material times the source was a confidential informant and accordingly, not a compellable witness: (1), unless she or he waived the privilege, or (2) it was established that the evidence fell within the innocence at stake exception.[22]

[70] Informers typically waive privilege when they agree to testify but there is nothing that prevents them "from keeping their privilege until there is a firm decision to testify by both the informer and the prosecution."[23]

[71] Informer privilege can be conferred either explicitly or implicitly.[24] It is not automatic as not everyone who provides information to the police acquires the status of confidential informant. The Supreme Court of Canada has answered the question of how the issue is to be determined:

> ...The legal question is whether, objectively, an implicit promise of confidentiality can be inferred from the

> circumstances. In other words, would the police conduct have led a person in the shoes of the potential informer to believe, on reasonable grounds, that his or her identity would be protected? Related to this, is there evidence from which it can be reasonably inferred that the potential informer believed that informer status was being or had been bestowed on him or her? An implicit promise of informer privilege may arise even if the police did not intend to confer that status or consider the person an informer, so long as the police conduct in all the circumstances would have created reasonable expectations of confidentiality.[25]

[72] Even where a claimant is found not to be credible about receiving explicit promises of confidentiality, the possibility of an implicit promise must be considered.[26] The pivotal question is whether the claimant has reasonable grounds to believe that his or her information-sharing with the police will be shielded by confidentiality and his or her identity protected from disclosure.

Analysis

[73] My analysis of the evidence will disclose that I have found some of the claimant's evidence to be reliable and some of it not to be. I am satisfied that, notwithstanding the claimant's testimony, did not see or speak to Cst. Stevens on I am also satisfied that Cst. McNeil did not either explicitly or by implication extend any promise to the claimant of confidentiality during the time he had contact with on In short, I reject the claimant's evidence about what happened when was in police custody on is plainly mistaken in what now recalls. I will add that I am not making a finding that the claimant was trying to mislead: I have determined that recollection of the events is unreliable.

[74] It is not surprising that the claimant's recollection of would be compromised given the fact that was experiencing for at least a couple of days.

[75] I accept the evidence of Csts. Stevens and McNeil about [redacted] I am satisfied that Cst. Stevens had no contact with the claimant on [redacted] and, when he went to the police station with his 11:40 p.m. arrestee, did not know that [redacted] was even in custody there. I accept that at no time did Cst. McNeil make an explicit or implied offer of confidentiality to the claimant. I find he collected [redacted] from cells with Cst. Winterss, took [redacted] upstairs, a very short distance, and placed [redacted] in an interview room. He left, checked to ensure the video/audio recording system was working, and then re-entered the interview room while the recording was on. I am satisfied that Cst. McNeil's entire interaction with the claimant in the interview room was video and audio recorded. I accept Cst. McNeil's evidence that what he said his interaction with the claimant involved is what occurred, and nothing more.

[76] In sum, I find that the only reliable evidence about the claimant's involvement with the police on [redacted] establishes that [redacted] received no assurances of confidentiality/protection of [redacted] identity on those dates in relation to the statement [redacted] gave to Cst. McNeil.

[77] This, however, does not resolve this application. What resolves the application in favour of a determination that the claimant is entitled to informer privilege is the evidence of Cst. Stevens' interactions with the claimant in [redacted] As I indicated in my review of his evidence, Cst. Stevens testified that on that occasion he extended [redacted] the benefit of informer privilege, "in general" and not with respect to any particular investigation. He says he told the claimant that if [redacted] provided him with any information it would be treated confidentially and [redacted] identity would not be revealed.

[78] I find it is immaterial that Cst. Stevens was not looking for any case-specific information when he spoke to the claimant in [redacted] What is material is my finding that the claimant reasonably believed [redacted] could come forward to the police on a subsequent occasion or occasions with information, and [redacted] identity and what [redacted] shared with police would be protected. I find that [redacted] was willing to talk to Cst. McNeil because [redacted] wanted to help police investigate a [redacted] [redacted] In the course of giving [redacted] statement [redacted] offered information on another [redacted] I accept the claimant's evidence that when

was interviewed by Cst. McNeil believed the police would not disclose identity or the information was providing. I find this to have been a reasonable belief based on what Cst. Stevens had said to previously. I believe recollection of *when* was given the assurance of confidentiality is wrong but I find that evidence *that* was given the assurance is true.

[79] The claimant spoke to Cst. McNeil under very adverse conditions. was is readily apparent in the interview. also expressed how miserable saying to Cst. McNeil: "Right now, I am really was also plainly very tired and stressed.

[80] The evidence establishes that the claimant was I infer that was living a which I presume is one of the reasons Cst. Stevens thought might be of value to the police as a confidential source. was willing to talk to Cst. McNeil but the DVD of interview shows that ability to cope was stretched to its limits. When Cst. McNeil tries to give a preamble to his reasons for wanting to interview about the the claimant tells him: "Let's just cut to the chase…You want to know who did it."

[81] I am satisfied that the claimant had no ability or reason to get into a discussion with Cst. McNeil about the issue of informer privilege. He did not say or imply anything to the claimant that would have caused to think that did not have the protection of confidentiality. I find that to override what Cst. Stevens said to the claimant, Cst. McNeil would have had to very explicitly tell that what told him was not being received in confidence and could or would be disclosed. I find it was reasonable for the claimant to have conducted on the basis of what Cst. Stevens had said to previously: if wanted to talk to police about crimes, they were interested and willing to listen and wouldn't have to worry that identity or the content of what told them would ever come to light. I find, as said in evidence before me, that the claimant believed the police would just use what told Cst. McNeil on in their investigation. I find was doing what Cst. Stevens hoped would do, giving the police information to assist them doing their police work. I find the claimant

reasonably believed that whenever [redacted] talked to the police about specific crimes they were interested in, [redacted] would be doing so as a confidential source.

[82] The evidence also satisfies me that the claimant understood the risk [redacted] was taking by talking to Cst. McNeil. [redacted] told him [redacted]

[redacted] told Cst. McNeil: [redacted] And, as I noted earlier in these reasons, in [redacted] evidence before me, the claimant said: "…if anybody finds out I gave this statement I'm as good as dead."

[83] Cst. Stevens saw in the claimant a potential confidential informer. He hoped [redacted] would come forward with information. He approached [redacted] with the proposal that [redacted] supply information and made it feasible for [redacted] to do so with an assurance of confidentiality. When he didn't hear from [redacted] he spoke to [redacted] again and gave [redacted] his card. The police rely heavily on confidential informers and informer privilege "plays a vital role in law enforcement."[27] Informer privilege exists to protect people like the claimant who are essential to police investigations. The statement the claimant gave to Cst. McNeil, indeed the very fact of [redacted] talking to him at all, came about because Cst. Stevens had previously told [redacted] that if [redacted] talked to the police, [redacted] would be protected. This is not a case of an unsolicited email with no conduct on the part of the police, express or implied, that could have led to the reasonable belief protection would be provided.[28] This is a case where the protection of informer privilege was explicitly extended and acted upon by the claimant. I am satisfied that someone in the claimant's position could reasonably believe that [redacted] was protected by the assurances given to [redacted] by Cst. Stevens.

[84] I therefore find that the claimant's identity and the content of [redacted] information to the police cannot be disclosed to anyone outside the "circle of privilege", subject only to the innocence at stake exception being established.

A Final Comment – The Decision Not to Solicit Any Further Contribution from Defence Counsel

[85] Before I conclude, I want to address my decision not to explore how Defence counsel could have contributed, after the "first stage" evidence was heard,

to the assessment of whether informer privilege applies in this case. As I noted earlier in these reasons, at the "first stage", the contributions of Defence counsel are limited to assisting the court in properly assessing the privilege claim.[29] In inviting such assistance, the court must scrupulously protect the privilege being claimed. The Supreme Court of Canada in *Basi* described what "appropriate procedures" for involving Defence counsel may include:

> Measures that a trial judge may wish to adopt in assessing a claim of informer privilege include inviting submissions on the scope of the privilege – including argument as to who constitutes a confidential informant entitled to the privilege – and its application in the circumstances of the case. Defence counsel may be invited as well to suggest questions to be put by the trial judge to any witness that will be called at the *ex parte* proceeding.[30]

[86] I knew nothing about the facts in this application until I heard the evidence at the *in camera, ex parte* "first stage" hearing. I was not in a position to provide any information to Defence counsel so that they could prepare questions for the "first stage" witnesses. I made sure to ask questions of the witnesses so that I thoroughly understood their evidence. In order to elicit a more meaningful contribution from Defence counsel following the "first stage" hearing, I would have had to delay my decision so that Defence counsel could be provided with details of the evidence. Those details would have had to be limited to information that did not tend to identify the claimant. The purpose would have been to permit Defence counsel to make submissions on how the law of privilege applies to the information that could be provided. In my view, Cst. Stevens' evidence was unambiguous as was the role his assurances played in the claimant's decision to speak to Cst. McNeil. I determined that Defence counsel would not be able to offer anything useful that would assist in my assessment of whether, on a balance of probabilities, the claimant was entitled to the protection of privilege. Similarly I concluded it would be unnecessary and inappropriate in this case to appoint an *amicus curiae*. My task has been the "simple matter"[31] of applying the undisputed law to the facts I have found.

[87] I remain mindful of the admonition of the Supreme Court of Canada in *Basi*, that in making the determination of whether the claim of privilege has been established, trial judges should "...make every effort to avoid unnecessary complexity or delay, without compromising the ability of the accused to make full answer and defence."[42] My approach to this claim of privilege has endeavoured to satisfy these principles.

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[1] *Named Person v. Vancouver Sun*, paragraph 22

[2] *Leipert*, paragraph 9

[3] *R. v. Barros*, [2011] S.C.J. No. 31, paragraph 20

[4] *R. v. Barros*, paragraph 1

[5] *Named Person v. Vancouver Sun*, paragraph 47

[6] *Named Person v. Vancouver Sun*, paragraph 49

[7] *R. v. Basi*, paragraph 20

[8] *R. v. Basi*, paragraph 4

[9] *R. v. Basi*, paragraphs 42, 32 - 38

[10] *R. v. Basi*, paragraph 44

[11] *R. v. Lucas*, [2014] O.J. No. 2471, paragraphs 67 - 69 (C.A.), leave to appeal denied [2014] S.C.C.A. 400

[12] *R. v. Lucas*, paragraph 67

[13] *R. v. Lucas*, paragraph 69

[14] *R. v. Leipert*, paragraph 13

[15] *Named Person v. Vancouver Sun*, paragraph 26

[16] *Named Person v. Vancouver Sun*, paragraph 47

[17] *Named Person v. Vancouver Sun*, paragraph 43

[18] *R. v. Basi*, paragraph 35

[19] *Named Person v. Vancouver Sun*, paragraph 58

[20] *Named Person v. Vancouver Sun*, paragraph 20

R v. X and Y [2013] B.C.J. No. 441

R v. X and Y, paragraphs 143, 146, and 148

R. v. Samuel Parsons B., [2012] S.C.J. No. 8, paragraph 42

R. v. Barrett, paragraphs 11 and 12

R. v. Samuel Parsons B, [2012] S.C.J. No. 8, paragraph 48

R. v. Samuel Parsons B, paragraph 51

R. v. Legere, paragraph 9

R. v. Cook, [2014] O.J. No. 983, paragraph 18 (C.A.)

R. v. Lucas, paragraph 67

R. v. Baid, paragraph 56

Samuel Parsons v. Commerce Bee, paragraph 49

R. v. Baid, paragraph 53