SCC File No.: 40371

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

BETWEEN

SOCIÉTÉ RADIO-CANADA / CANADIAN BROADCASTING CORPORATION, LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉPENDANTE (CN21), CANADIAN PRESS ENTERPRISES INC., MEDIAQMI INC., and GROUPE TVA INC.

APPELLANTS

and

HIS MAJESTY THE KING and NAMED PERSON

RESPONDENTS

(continued)

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(Pursuant to Rule 44 of the *Rules of the Supreme Court of Canada*)

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APPELLANTS

and

HIS MAJESTY THE KING and NAMED PERSON

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AND BETWEEN

ATTORNEY GENERAL OF QUÉBEC

APPELLANT

and

HIS MAJESTY THE KING and NAMED PERSON

RESPONDENTS

and

SOCIÉTÉ RADIO-CANADA / CANADIAN BROADCASTING CORPORATION, LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉPENDANTE (CN21), CANADIAN PRESS ENTERPRISES INC., LUCIE RONDEAU, IN HER CAPACITY AS CHIEF JUSTICE OF THE COURT OF QUÉBEC, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, CANADIAN MUSLIM LAWYERS ASSOCIATION, ADVOCATES' SOCIETY, BARREAU DU QUÉBEC, ASSOCIATION QUÉBÉCOISE DES AVOCATES ET AVOCATES DE LA DÉFENSE AND ASSOCIATION DES AVOCATS DE LA DÉFENSE DE MONTRÉAL-LAVAL-LONGUEUIL, CENTRE FOR FREE EXPRESSION, CANADIAN CIVIL LIBERTIES ASSOCIATION, AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, POSTMEDIA NETWORK INC., GLOBAL NEWS, A DIVISION OF CORUS TELEVISION LIMITED PARTNERSHIP, TORSTAR CORPORATION, GLACIER MEDIA INC., and CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

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Chapter 15 PUBLIC INTEREST IMMUNITY

§ 15.01 INTRODUCTION

¶15.1

In many lawsuits, both civil and criminal, documents and information in the possession and control of the executive branch of government and various government agencies and employees are relevant to the issues in dispute. Claims for the disclosure of such documents and information can involve a conflict between public interests.[1] The public interest in the administration of justice is promoted through full access of litigants to relevant information. The public also has an interest in protecting the country from the damage to national security and international relations that could be caused by the disclosure of state secrets.[2] Also, damage to the process of government decision-making and functioning may be caused by disclosure of other government documents. In those areas where the public interest favours non-disclosure, the government may assert an immunity from disclosure.

¶*15.2*

This government right, where it can be successfully asserted, is more appropriately labelled an “immunity” rather than a privilege.[3] The assertion of an immunity claim may result in the non-disclosure of reports, memoranda and communications, just as in the case of a traditional privilege. However, unlike the private privileges, such as that relating to communications passing between solicitor and client, this public immunity belongs not to any private party, nor to any witness.[4] It is most often asserted by government, either during the discovery process,[5] where the government is a party to the action, or at trial where the government has been served with a *subpoena duces tecum*.[6] It applies whether or not the government is a party to the litigation.

¶15.3

Even in the absence of the Crown’s objection, the judge should prohibit disclosure if he or she feels that disclosure will be harmful to the state.[7] Moreover, any party or witness may draw the court’s attention to the nature of the evidence with a view to its exclusion,[8] whether or not the Crown has raised an objection.[9] However, the court may not be under a duty to raise the objection if the government is a party and has clearly waived its claim of immunity.[10] Generally, however, this immunity cannot be “waived” by the Crown in the same way as a traditional privilege may be waived. One must distinguish between a right or privilege, on the one hand, and duty on the other. Public interest immunity could not in the ordinary sense be waived because there can be a waiver of rights, but not duties.[11] Furthermore, secondary evidence of a document or communication covered by this immunity is inadmissible.[12]

¶15.4

The trend in the application of this immunity is to treat the government no differently than any other litigant or witness. The immunity should not be invoked unless clearly warranted by the circumstances.[13]

Footnote(s)

1 See, for example, *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24, [2018] F.C.J. No. 57 (F.C.A.). See also *British Columbia (Attorney General) v. Provincial Court Judges' Assn. of British Columbia*, 2020 SCC 20, [2020] S.C.J. No. 20 (S.C.C.) and *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21, [2020] S.C.J. No. 21 (S.C.C.), where the Supreme Court of Canada identified competing constitutional interests of judicial independence and the confidence of Cabinet decision-making. In both cases, the applicant judges sought access to a government document relevant to its decision not to grant salary increases. In the former, disclosure was not ordered whereas partial disclosure was ordered in the latter case. See discussion in this chapter, at § 15.04[3].

2 *Carey v. R.*, [1986] 2 S.C.R. 637, at 639, [1986] S.C.J. No. 74 (S.C.C.).

3 Lord Reid in *Rogers v. Secretary of State for the Home Department*, [1972] 2 All E.R. 1057, at 1060, [1972] 3 W.L.R. 279 (H.L.) took issue with the use of the phrase "Crown privilege" as follows:

> I think that the expression is wrong and may be misleading. There is no question of any privilege in the ordinary sense of the word. The real question is whether the public interest requires that the letter shall not be produced and whether that public interest is so strong as to override the ordinary right and interest of a litigant that he shall be able to lay before a court of justice all relevant evidence.

Lords Pearson, Simon and Salmon, at 1066 and 1070 (All E.R.), were of the same view. Canadian courts, however are still content to use the word "privilege": see *Churchill Falls (Labrador) Corp. v. R.* (1972), 28 D.L.R. (3d) 493, [1972] F.C.J. No. 501 (F.C.T.D.); *Blais v. Andras*, [1972] F.C. 958, [1972] F.C.J. No. 77 (F.C.A.); *Huron Steel Fabricators (London) Ltd. v. M.N.R.*,[1972] F.C. 1007, [1972] F.C.J. No. 81 (F.C.T.D.), affd [1973] F.C. 808, [1973] F.C.J. No. 89 (F.C.A.); *Smerchanski v. Lewis; Smerchanski v. Asta Securities Corp.* (1981), 31 O.R. (2d) 705, at 708, [1981] O.J. No. 2906 (Ont. C.A.); *Manitoba Hydro-Electric Board v. Consumers' Assn. of Canada (Manitoba) Inc.* (2012), 275 Man. R. (2d) 60, [2012] M.J. No. 1, paras. 129-130 (Man. C.A.); and see also *Evans v. Chief Constable of Surrey Constabulary*, [1989] 2 All E.R. 594, [1988] Q.B.D. 588 (H.L.); *Air Canada v. Secretary of State for Trade (No. 2)*, [1983] 2 A.C. 394, at 436, [1983] 1 All E.R. 910, at 917 (H.L.). The issue is also discussed in T.G. Cooper, *Crown Privilege* (Aurora, ON: Canada Law Book, 1990), at 1-5; David Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020), at 371-72.

4 *Carey v. R.*, [1986] 2 S.C.R. 637, at 653, [1986] S.C.J. No. 74 (S.C.C.).

5 *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] S.C.J. No. 46 (S.C.C.); *British Columbia (Attorney General) v. Provincial Court Judges' Assn. of British Columbia*, 2020 SCC 20, [2020] S.C.J. No. 20 (S.C.C.); *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21, [2020] S.C.J. No. 21 (S.C.C.).

6 *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, at 638, [1942] 1 All E.R. 587 (H.L.); *United States v. Reynolds*, 345 U.S. 1 (1953).

7 *Carey v. R.*, [1986] 2 S.C.R. 637, at 653, [1986] S.C.J. No. 74 (S.C.C.); *R. v. Governor of Brixton Prison*, [1991] 1 W.L.R. 281, at 290 (Q.B.D.); Roderick Munday, ed., *Cross and Tapper on Evidence*, 13th ed. (Oxford: Oxford University Press, 2018), at 488; *Conway v. Rimmer*, [1968] A.C. 910, [1968] 1 All E.R. 874, at 887 (H.L.); *Rogers v. Secretary of State for the Home Department*, [1972] 2 All E.R. 1057, at 1060, [1972] 3 W.L.R. 279 (H.L.); *Hennesy v. Wright* (1888), 21 Q.B.D. 509, at 521 (D.C.); *Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2)*,[1972] 2 All E.R. 353, at 380 (C.A.), affd [1973] 2 All E.R. 1169, [1973] 3 W.L.R. 268 (H.L.).

8 *Rogers v. Secretary of State for the Home Department*, [1972] 2 All E.R. 1057, at 1066, [1972] 3 W.L.R. 279 (H.L.); *Smerchanski v. Lewis* (1981), 31 O.R. (2d) 705, at 710, [1981] O.J. No. 2906 (Ont. C.A.); but see *Thornhill v. Dartmouth Broadcasting Ltd.* (1981), 45 N.S.R. (2d) 111, at 130, [1981] N.S.J. No. 367 (S.C.T.D.) and *R. v. Lines* (1986), 27 C.C.C. (3d) 377, [1986] N.W.T.J. No. 2 (N.W.T.C.A.), where an accused argued that the disclosure of certain information would be contrary to the public interest. The Court dismissed the objection to the evidence since the accused was not an interested member of the government within the meaning of s. 36.1 of the *Canada Evidence Act*, R.S.C. 1970, c. E-10 [now R.S.C. 1985, c. C-5, s. 37(1)].

9 *R. v. Snider*, [1954] S.C.R. 479, [1954] S.C.J. No. 32 (S.C.C.).

10 *Leeds v. Alberta (Minister of the Environment)* (1990), 69 D.L.R. (4th) 681, at 695, [1990] A.J. No. 370 (Alta. Q.B.).

11 *Makanjuola v. Commissioner of Police of the Metropolis*, [1992] 3 All E.R. 617, at 623 (C.A.); see also *R. v. Ward* (1993), 96 Cr. App. R. 1, at 26-27 (C.A.); *R. v. Davis* (1993), 97 Cr. App. R. 110 (C.A.); *Rogers v. Secretary of State for the Home Department*, [1972] 2 All E.R. 1057, at 1060, [1972] 3 W.L.R. 279 (H.L.); *Burma Oil Co. v. Bank of England*, [1979] 3 W.L.R. 722 (H.L.); *Air Canada v. Secretary of State for Trade (No. 2)*, [1983] 2 A.C. 394, at 436, [1983] 1 All E.R. 910, at 917 (H.L.); *Science Research Council v. Nassé*; *B.L. Cars Ltd. (formerly Leyland Cars) v. Vyas*, [1979] 3 All E.R. 673, [1979] 3 W.L.R. 762 (H.L.). But see *Leeds v. Alberta (Minister of the Environment)* (1990), 69 D.L.R. (4th) 681, at 695, [1990] A.J. No. 370 (Alta. Q.B.), where Miller A.C.J.Q.B. held that the Crown had waived the immunity by disclosing the documents in a proceeding in which it was a party (at 694 (D.L.R.)). See also *R. v. Meuckon* (1990), 57 C.C.C. (3d) 193, [1990] B.C.J. No. 1552 (B.C.C.A.), where the Court noted that the Crown could withdraw the privilege claim. See T.R.S. Allan, "Public Interest Immunity and Ministers' Responsibilities" (1993) Crim. L. Rev. 660 for a discussion as to how the nature of the claim asserted may affect the character of the Minister's duty.

12 *Cooke v. Maxwell* (1817), 2 Stark 183, at 186 (N.P.); *Air Canada v. Secretary of State for Trade (No. 2)*, [1983] 2 A.C. 394, at 442, [1983] 1 All E.R. 910, at 917 (H.L.).

13 *Carey v. R.*, [1986] 2 S.C.R. 637, [1986] S.C.J. No. 74 (S.C.C.); *Leeds v. Alberta (Minister of the Environment)* (1990), 69 D.L.R. (4th) 681, at 688, [1990] A.J. No. 370 (Alta. Q.B.); *Enbridge Gas New Brunswick Limited Partnership v. New Brunswick* (2016), 447 N.B.R. (2d) 201, [2016] N.B.J. No. 79 (N.B.C.A.), leave to appeal refused [2016] S.C.C.A. No. 234 (S.C.C.); as Angers J. stated in *Dufresne Construction Co. v. R.*, [1935] Ex. C.R. 77, at 88 (Ex. Ct.): "The privilege of exclusion of documents as evidence at the request of the Crown must not be extended beyond the requirements of public safety or convenience." In the United States, the constitutional right of freedom of speech and the right of the people to know what their government is doing moved the Supreme Court of the United States in *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140 (1971), to refuse to prevent the publication in American newspapers of military secrets which were stolen from the Department of Defense in the Pentagon and which related to the Vietnam War.

End of Document

[1] General

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Chapter 15 PUBLIC INTEREST IMMUNITY

§ 15.04 CRITERIA FOR GRANT OF IMMUNITY

[1] General

¶15.51

Whether the balance falls in favour of disclosure or immunity depends on the circumstances of the particular case. The judge must weigh the competing public interests[1] by considering such factors as: (a) the probative value of the evidence in the particular case and how necessary it will be for a proper determination of the issues,[2] (b) the subject matter of the litigation,[3] (c) the effect of non-disclosure on the public perception of the administration of justice, (d) whether the claim or defence involves an allegation of government wrongdoing (in which case the claim for immunity may be motivated by self-interest and not a genuine concern for the secrecy of the information),[4] (e) the length of time that has passed since the communication was made,[5] (f) the level of government from which the communication emanated, and (g) the sensitivity of the contents of the communication (including whether and the extent to which there has been prior publication of the information).[6] In *Enbridge Gas New Brunswick Limited Partnership v. New Brunswick*,[7] the New Brunswick Court of Appeal distilled the jurisprudence and listed the analytic criteria in determining whether public interest immunity applies:

i) The nature of the policy;

ii) The contents of the documents;

iii) The level of the decision-making process and the need to protect the confidences of Cabinet;

iv) The importance of producing the documents to the administration of justice;

v) The time that has elapsed;

vi) Any allegation of improper conduct by the executive branch of government towards a citizen (*Leeds*, at para. 25);

vii) Whether the document relates to policy formation or implementation;

viii) Whether the document affects “present policy”.[8]

¶15.52

The court, therefore, must balance the possible denial of justice that could result from non-disclosure against the injury to the public arising from disclosure of public documents which were never intended to be made public.[9] As to what matters may be covered by s. 37 of the *Canada Evidence Act*, Macfarlane J.A. stated as follows in *Canada (Attorney General) v. Sander*:

[1] General

> Section 37 does not say what particular matters 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-to-case basis. I see no reason why the proper functioning of government may not include a public interest in maintaining the confidentiality of discussions between government lawyers and those government officials they advise.[10]

¶15.53

The Supreme Court of Canada in *R. v. Brassington*[11] affirmed that maintaining informer privilege is the sort of “specified public interest” contemplated by s. 37 as a valid basis for the Crown to resist disclosure. The Court also clarified the broad scope of s. 37 objections, which may apply to documents not disclosed in open court and to non-compulsory disclosure of documents.

¶15.54

In *National Inquiry into Missing and Murdered Indigenous Women and Girls v. Canada (Royal Canadian Mounted Police, Deputy Commissioner)*,[12] the Federal Court upheld an objection by the RCMP under s. 37 to disclosure of information to the National Inquiry into Missing and Murdered Indigenous Women and Girls. The RCMP objected to the disclosure on the basis that the two files sought would endanger ongoing police investigations into the disappearance of one indigenous woman and the murder of another. The Court found that the protection of ongoing police investigations is a legitimate public interest and that the public interest in the National Inquiry’s mandate, while important, did not outweigh the public interest in protecting the investigations. Finally, the Court held that, given the amount of information already before the National Inquiry, the relevance and necessity of the two files to the completion of its mandate was, at best, minimal.

¶15.55

In the criminal context, the accused’s right to a fair hearing and to make full answer and defence can require the disclosure of the information.[13] In *R. v. Stinchcombe*,[14] the Supreme Court of Canada reviewed the policy considerations concerning disclosure in criminal cases and concluded that there was a duty on the Crown to disclose all relevant information to an accused. The Court recognized the “overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence”.[15] This common law right to full disclosure is now guaranteed by s. 7 of the *Charter* as a principle of fundamental justice. A decision by the Crown not to disclose all relevant evidence to an accused is reviewable by the courts and the Crown must bring itself within any recognized exception, such as the identity of an informer.

Footnote(s)

1 For a review of the various factors, see *Leeds v. Alberta (Minister of the Environment)* (1990), 69 D.L.R. (4th) 681, [1990] A.J. No. 370 (Alta. Q.B.). See also *British Columbia Teachers’ Federation v. British Columbia*, 2013 BCSC 1216, [2013] B.C.J. No. 1483 (B.C.S.C.); *Nunavut (Department of Community and Government Services) v. Northern Transportation Co.*, 2011 NUCJ 4, [2011] Nu. J. No. 3 (Nun. C.J.); *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia* (2002), 8 B.C.L.R. (4th) 281, [2002] B.C.J. No. 2464 (B.C.S.C.).

2 *R. v. Meuckon* (1990), 57 C.C.C. (3d) 193, [1990] B.C.J. No. 1552 (B.C.C.A.).

3 *Gold v. Canada*, [1986] 2 F.C. 129 (F.C.A.). For example, in *Mickle v. R.* (1987), 19 B.C.L.R. (2d) 266, [1987] B.C.J. No. 2330 (B.C.S.C.), the Court was clearly influenced by the fact that the party wanting disclosure was applying for a firearms permit and was not the subject of a criminal prosecution. Disclosure will be warranted more often in criminal than in civil cases: see Roderick Munday, ed., *Cross and Tapper on Evidence*, 13th ed. (Oxford: Oxford University Press, 2018), at 490; T.G. Cooper, *Crown Privilege* (Aurora, ON: Canada Law Book, 1990), at 76 ff.

4 *Carey v. R.*, [1986] 2 S.C.R. 637, [1986] S.C.J. No. 74 (S.C.C.).

5 *Carey v. R.*, [1986] 2 S.C.R. 637, [1986] S.C.J. No. 74 (S.C.C.); *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)* (1995), 176 A.R. 66, [1995] A.J. No. 981 (Q.B.).

6 *Carey v. R.*, [1986] 2 S.C.R. 637, at 673-74, [1986] S.C.J. No. 74 (S.C.C.); *R. v. Governor of Brixton Prison*, [1991] 1 W.L.R. 281, at 290-91 (Q.B.).

7 (2016), 447 N.B.R. (2d) 201, [2016] N.B.J. No. 79, at para. 18 (N.B.C.A.), leave to appeal refused [2016] S.C.C.A. No. 234 (S.C.C.).

8 *Enbridge Gas New Brunswick Limited Partnership v. New Brunswick* (2016), 447 N.B.R. (2d) 201, [2016] N.B.J. No. 79, at para. 47 (N.B.C.A.), leave to appeal refused [2016] S.C.C.A. No. 234 (S.C.C.).

9 *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24, [2018] F.C.J. No. 57, at para. 39 (F.C.A.); *Canada (Attorney General) v. Sander* (1994), 114 D.L.R. (4th) 455, [1994] B.C.J. No. 998 (B.C.C.A.); *R. v. Desjardins* (1990), 61 C.C.C. (3d) 376, [1990] N.J. No. 324 (Nfld. T.D.).

10 *Canada (Attorney General) v. Sander* (1994), 114 D.L.R. (4th) 455, at 462, [1994] B.C.J. No. 998 (B.C.C.A.); see also *R. v. Gray* (1993), 79 C.C.C. (3d) 332, [1993] B.C.J. No. 265 (B.C.C.A.), leave to appeal refused [1993] S.C.C.A. No. 53, 83 C.C.C. (3d) vi (S.C.C.).

11 2018 SCC 37, [2018] S.C.J. No. 37, at para. 31 (S.C.C.).

12 2019 FC 741, [2019] F.C.J. No. 729 (F.C.).

13 *R. v. Meuckon* (1990), 57 C.C.C. (3d) 193, [1990] B.C.J. No. 1552 (B.C.C.A.); *Tatham v. Canada (National Parole Board)* (1990), 77 C.R. (3d) 209, [1990] B.C.J. No. 989 (B.C.S.C.); *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83 (S.C.C.); *R. v. Chaplin*, [1995] 1 S.C.R. 727, [1994] S.C.J. No. 89 (S.C.C.).

14 *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83 (S.C.C.).

15 *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83 (S.C.C.).

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[1] The General Rule and Its Scope

Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 6th Ed.

Sidney N. Lederman, Michelle K. Fuerst, Hamish C. Stewart

Chapter 15 PUBLIC INTEREST IMMUNITY

§ 15.05 PROTECTION OF INFORMANT'S IDENTITY[1]

[1] The General Rule and Its Scope

¶15.96

The court cannot compel the disclosure of the identity, or information which might disclose the identity, of persons who have given information to the police acting in the course of their investigative duties.[2] The rule does not protect any other information communicated by the informant (although a more general claim for Crown immunity may apply). In *R. v. Leipert*,[3] the Supreme Court of Canada said that "the rule is of fundamental importance to the workings of a criminal justice system".[4] The importance of the rule with respect to informants in drug trafficking cases was also emphasized by Cory J. in *R. v. Scott*.[5] It is rooted in the necessity of citizen participation 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.[6]

¶15.97

More recently, Bastarache J. explained the rationale behind the rule as follows:

> Police work, and the criminal justice system as a whole, depend to some degree on the work of confidential informers. The law has therefore long recognized that those who choose to act as confidential informers must be protected from the possibility of retribution. The law's protection has been provided in the form of the informer privilege rule, which protects from revelation in public or in court the identity of those who gave information related to criminal matters in confidence. This protection in turn encourages cooperation with the criminal justice system for future potential informers.[7]

¶15.98

This so-called "secrecy rule"[8] or "informer privilege"[9] applies not only where a person with knowledge of the identity is testifying, such as the police officer, but also where the witness himself or herself is the informant.[10] The rule applies in criminal, civil and administrative proceedings.[11] It applies to both documentary evidence and oral testimony. Because of its importance, no judicial balancing exercise takes place where the rule applies: "once established, neither the police nor the court possesses discretion to abridge it."[12] It also applies to police officers who are charged with criminal offences.[13]

¶15.99

Although it is often described as such, this rule of non-disclosure is not an evidentiary privilege. Nor is it a facet of Crown immunity. The privilege belongs to *both* the Crown and the informer and thus the informer alone cannot

"waive" the privilege[14] and neither can a party in a civil proceeding. The Crown, without the informer's consent, cannot expressly or by implication waive it either.[15]

¶15.100

The privilege is not lost by inadvertent disclosure.[16]

¶15.101

As a "rule" of criminal law, the provincial government cannot legislate so as to abrogate the rule in criminal cases.[17] Nor does the court have any discretion to decide on a case-by-case basis whether the public interest favours application of the rule.[18]

¶15.102

Justice Bastarache in *Named Person v. Vancouver Sun* stated that the "informer privilege" 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.[19]

¶15.103

Recognition of an "informer privilege" flies in the face of keeping court proceedings open and public. Justice Bastarache in *Named Person v. Vancouver Sun*[20] articulated this conflict:

> On the one hand is the open court principle, which, as has been repeatedly recognized by this Court, provides that court proceedings should presumptively be a matter of public record. On the other hand lies informer privilege, an age-old privilege according to which the identity of a confidential informer cannot be exposed under any but the narrowest of exceptions.[21]

Footnote(s)

1 See generally, R.W. Hubbard, S. Magotiaux & S.M. Duncan, *The Law of Privilege in Canada* (looseleaf) (Aurora, ON: Canada Law Book, 2006); L.E. Lawler, "***Police Informer Privilege***: A Study for the Law Reform Commission of Canada" (1985-86) 28 Crim. L.Q. 92. See also T.G. Cooper, *Crown Privilege* (Aurora, ON: Canada Law Book, 1990), at 183 ff.; R.D. Manes & M.P. Silver, *The Law of Confidential Communications in Canada* (Toronto: Butterworths, 1996), ch. 16.

2 The genesis of this rule is the decision in *Marks v. Beyfus* (1890), 25 Q.B.D. 494, 17 Cox C.C. 196 (C.A.).

3 *[1997] 1 S.C.R. 281*, *[1997] S.C.J. No. 14* (S.C.C.).

4 *R. v. Leipert*, *[1997] 1 S.C.R. 281*, *[1997] S.C.J. No. 14*, at para. 10 (S.C.C.). This importance is emphasized in *R. v. Y. (X.)* *(2011), 105 O.R. (3d) 433*, *269 C.C.C. (3d) 534*, *[2011] O.J. No. 1479* (Ont. C.A.), where the Court stayed charges against an informant due to abuse of process. The Court found that the actions of the police and the Crown of permitting disclosure of the accused informant's identity amounted to gross negligence and noted (at para. 23) that the impact of these actions "could have a significant impact on future disclosures by current and prospective informers to the detriment of the administration of justice overall".

5 *[1990] 3 S.C.R. 979*, at 994, *[1990] S.C.J. No. 132* (S.C.C.).

6 *R. v. Leipert*, *[1997] 1 S.C.R. 281*, *112 C.C.C. (3d) 385*, at 390, *[1997] S.C.J. No. 14* (S.C.C.), *per* McLachlin J.; to the same effect, see *R. v. Hunter* *(1987), 59 O.R. (2d) 364*, *[1987] O.J. No. 328* (Ont. C.A.); *D. v. National Society for the Prevention of Cruelty to Children*, [1978] A.C. 171, at 218-19, [1977] 1 All E.R. 589 (H.L.); *R. v. Durham Regional Crime Stoppers Inc.*, *2017 SCC 45*, *[2017] S.C.J. No. 45* (S.C.C.); and *R. v. Brassington*, *[2018] 2 S.C.R. 617*, at para. 34, *[2018] S.C.J. No. 37* (S.C.C.). The protection is also extended to those persons who supply police with facilities to observe and gather information, and thus the location of police observation posts cannot be disclosed: *Blake v. D.P.P.*

(1993), 97 Cr. App. R. 169 (Q.B. Div. Ct.); *R. v. Hewitt and Davis* (1992), 95 Cr. App. R. 81 (C.A.); *R. v. Durette*, [1994] 1 S.C.R. 469, [1994] S.C.J. No. 22 (S.C.C.).

7 *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, [2007] S.C.J. No. 43, at para. 16 (S.C.C.). See also *R. v. Basi*, [2009] 3 S.C.R. 389, [2009] S.C.J. No. 52, at paras. 36, 37 (S.C.C.); *R. v. Barros*, [2011] 3 S.C.R. 368,273 C.C.C. (3d) 129, [2011] S.C.J. No. 51, at para. 31 (S.C.C.); *R. v. Durham Regional Crime Stoppers Inc.*, 2017 SCC 45, [2017] S.C.J. No. 45, at paras. 11-15 (S.C.C.).

8 This is how it is described in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at 96-97, [1983] S.C.J. No. 65 (S.C.C.), *per* Beetz J.

9 As so described in *R. v. Leipert*, [1997] 1 S.C.R. 281, [1997] S.C.J. No. 14 (S.C.C.).

10 *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, [1983] S.C.J. No. 65 (S.C.C.); *Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into Confidentiality of Health Records)*, [1981] 2 S.C.R. 494, at 527-30, [1981] S.C.J. No. 95 (S.C.C.), *per* Martland J. (the *Health Records Case*); *Attorney General v. Briant* (1846), 15 L.J. Ex. 265, at 274.

11 *A. v. Drapeau*, [2012] N.B.J. No. 293,393 N.B.R. (2d) 76, at para. 14 (N.B.C.A.); *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, [1983] S.C.J. No. 65 (S.C.C.). *Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into Confidentiality of Health Records)*, [1981] 2 S.C.R. 494, [1981] S.C.J. No. 95 (S.C.C.); *Marks v. Beyfus* (1890), 25 Q.B.D. 494, Cox. C.C. 196 (C.A.); *Humphrey v. Archibald* (1893), 20 O.A.R. 267, [1893] O.J. No. 108 (Ont. C.A.).

12 *R. v. Leipert*, [1997] 1 S.C.R. 281, [1997] S.C.J. No. 14, at para. 14 (S.C.C.); *R. v. Omar* (2007), 84 O.R. (3d) 493, [2007] O.J. No. 541, at para. 38 (Ont. C.A.); *R. v. Y. (X.)* (2011), 105 O.R. (3d) 433, 269 C.C.C. (3d) 534, [2011] O.J. No. 1479 (Ont. C.A.).

13 *R. v. Brassington*, [2018] 2 S.C.R. 617, [2018] S.C.J. No. 37 (S.C.C.).

14 *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, [2007] S.C.J. No. 43, at para. 25 (S.C.C.); *R. v. Schertzer*, [2007] O.J. No. 4995, at paras. 8-18 (Ont. S.C.J.); *R. v. Leipert*, [1997] 1 S.C.R. 281, [1997] S.C.J. No. 14, at para. 14 (S.C.C.); *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, [1983] S.C.J. No. 65 (S.C.C.); *Health Records Case*, [1981] 2 S.C.R. 494, [1981] S.C.J. No. 95 (S.C.C.). See *R. v. W. (D.C.)* (1997), 36 O.R. (3d) 551, [1997] O.J. No. 4831 (Ont. Gen. Div.), where it was held that the accused, by his conduct, in raising the subject of his possible role as an informant, had impliedly waived any ***police informer privilege***. See also *Savage v. Chief Constable of Hampshire,* [1997] 1 W.L.R. 1001 (C.A.), in which it was held that a police informer may waive privilege in order to bring an action to recover moneys allegedly promised to him by the police in exchange for information.

15 *R. v. Leipert*, [1997] 1 S.C.R. 281, [1997] S.C.J. No. 14 (S.C.C.); *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, [1983] S.C.J. No. 65 (S.C.C.); *R. v. Basi*, [2009] 3 S.C.R. 389, [2009] S.C.J. No. 52 (S.C.C.); *Newfoundland (Attorney General) v. Trahey* (1984), 51 Nfld. & P.E.I.R. 203, [1984] N.J. No. 334 (Nfld. S.C.). However, where the Crown and informant both agree the rule will not apply: see *R. v. Hunter* (1987), 59 O.R. (2d) 364, [1987] O.J. No. 328 (Ont. C.A.).

16 See, *e.g.*, *R. v. Poncelet* (2005), 278 Sask. R. 164, [2005] S.C.J. No. 756, at para. 16 (Sask. Q.B.); *R. v. Nicholson*, [2001] B.C.J. No. 2239, at paras. 13-19 (B.C.S.C.); *R. v. Hazelwood*, [2000] O.J. No. 4534, at paras. 89-90 (Ont. S.C.J.).

17 *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, [1983] S.C.J. No. 65 (S.C.C.).

18 *Health Records Case*, [1981] 2 S.C.R. 494, [1981] S.C.J. No. 95 (S.C.C.). See also *New Westminster Police Department (Re)* (2015), 381 B.C.A.C. 110, [2015] B.C.J. No. 2806, at para. 80 (B.C.C.A.), leave to appeal refused [2016] S.C.C.A. No. 75 (S.C.C.); but see *R. v. Mickle* (1987), 19 B.C.L.R. (2d) 266, [1987] B.C.J. No. 2330 (B.C.S.C.), where the Court appears to have taken this approach. Determining whether the exceptions applicable in criminal cases apply is, however, done on a case-by-case basis. See § 15.05[5].

19 [2007] 3 S.C.R. 253, [2007] S.C.J. No. 43, at para. 30 (S.C.C.).

20 *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, [2007] S.C.J. No. 43 (S.C.C.).

21 *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, [2007] S.C.J. No. 43, at para. 2 (S.C.C.).