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October 23, 2017

The Confidential Informant as a Creation of Law

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Case Commented On: *Her Majesty The Queen v Named Person A*, 2017 ABQB 552 (CanLII)

We are all conversant with a creation story, be it biblical or cultural. We are less apt, however, to recite a purely legal creation story, where the law is not in itself created but creates. In the decision of *Her Majesty The Queen v Named Person A*, Madam Justice Antonio applies the law and in doing so creates a legally constructed status, as confidential informant, for Named Person A (NPA). The effect of the law or the privilege that arises, requires that NPA's identity be strictly protected and non-disclosable, subject to the "innocence at stake" exception. This is a status which NPA neither wanted nor asked for. Once NPA became this pronounced creation of law, NPA became nameless. The discussion we will undertake will provide us with the ultimate creation story of how certain encounters can transform a person into a creation of law. With that transformation, comes the full force of the law as legal principles must be and are rigidly applied. The preliminary issue of whether NPA was, in law, a confidential informant is incredibly important. If NPA is not such an informant then the issues flowing from this status are moot. If, however, NPA is a confidential informant, then the court must decide how the Crown can fulfill its *Stinchcombe* obligations requiring full disclosure of NPA's criminal file to NPA's counsel without violating the sacrosanct confidential informant privilege. To disclose or even to edit the disclosure would reveal NPA's identity. To not disclose would run afoul of NPA's right to full answer and defence. Alternatively, if NPA's defence counsel is within NPA's confidential "circle of privilege", then disclosure may be made within the safety of that legal privilege. This post considers the initial decision by Justice Antonio to find that, in law, NPA is a confidential informant. It is this finding which engages the law and which matters most to NPA.

First, we will start with a narrative, which is not particularly exceptional. NPA was arrested on various criminal charges. Subsequently, NPA was approached by police officers from the "human sources" unit, who handle police informants, also known as "handlers". These handlers had been following NPA's investigation and believed NPA could provide them with useful information to assist the police in other investigations. To induce NPA to be an informant, the handlers offered NPA the usual terms: the handlers "promised" to keep NPA's status confidential; NPA, as a "volunteer", could stop providing information at any time; and NPA was "prohibited" from disclosing the status. On this basis, according to one of the handlers, NPA agreed to be a confidential informant. Notably, there were no promises relating to his outstanding charges (paras 16 to 19).

NPA saw the "relationship" differently. NPA "never wanted" to become a confidential informant, although NPA did give the handlers information (para 27). In other words, NPA agreed to the "informant" part but not the "confidential" moniker. Consistent with this perception, NPA immediately breached the "terms of the contract" by "self-outing" as an

informant (para 25). NPA told people of his encounter with the handlers, NPA told the police officers investigating his criminal charges and NPA told his defence lawyer. Justice Antonio does not speculate on why NPA did this, other than to confirm that NPA did not reveal the status as a ploy to force the hand of the Crown in staying the charges (para 79). We, however, can speculate that NPA might have revealed the status thinking there would be some sort of benefit from co-operating with the authorities – for instance, an agreement to plead to reduced charges for a reduced sentence. As insightfully suggested by Justice Antonio, "the police must take [NPA] as they found [NPA], existing charges and all" (para 79).

As a result of the disclosure by NPA, NPA was promptly "terminated" (para 21) as a confidential informant. This "termination" did not affect NPA's legal status as a confidential informant. Borrowing from the lyrics to Hotel California, NPA could check out any time, but could never leave. Whether this sentiment was made clear to NPA is questionable (para 26). Despite this lack of clarity, Justice Antonio found NPA to be a confidential informant with all the "associated privileges and obligations" (para 25). I would add that those "privileges and obligations" flowed from a legal construction or legally imposed view of NPA's brief interaction with the handlers. Moreover, once that legal principle was engaged, it was required to be applied in a "nearly absolute" manner (para 37). A few minutes in an interview room, gave NPA status close to an "officer of the court" (para 41). It is doubtful whether NPA viewed the conferred status as anything but an albatross around the proverbial neck. It was something imposed as opposed to something welcomed. As succinctly stated by Justice Antonio, "the role of a confidential informant is a creation of law enforcement, and the privilege that attaches to it is a creation of the common law" (para 41). In this creation story, NPA has a minor role indeed.

Notably, NPA's counsel did not provide much argument or authority for the position that NPA was not a confidential informant (para 23). In concluding that NPA was indeed a confidential informant in fact and in law, Justice Antonio applied the "test" from *R v Basi*, 2009 SCC 52 (CanLII). The issue in *Basi* differed from NPA's situation. In *Basi*, the Court was struggling with how a confidential informant could have counsel on a hearing to determine informant privilege when such representation would include disclosing the confidential informant status contrary to that limited and rigidly enforced "circle of privilege" that necessarily includes the handlers and the prosecutor but no one else. Justice Fish explained that the status as confidential informant arises when "a police officer, in the course of an investigation, guarantees protection and confidentiality to a prospective informer in exchange for useful information that would otherwise be difficult or impossible to obtain" (*Basi* at para 36). The question of whether the person is a confidential informant is a legal one and the judge must be satisfied of that status on a balance of probabilities (*Basi* at para 39).

Another decision Justice Antonio referenced to assist in the "status" hearing was *R v Barros*, 2011 SCC 51 (CanLII). In *Barros*, the issue centered on the scope of the confidential informant privilege and was not focussed on the initial finding of that privilege. As a prelude to that main finding, Justice Binnie, on behalf of the majority, reviewed the purpose of the privilege itself. It is important to keep in mind Justice Binnie's sentiment that "of course, not everybody who provides information to the police thereby becomes a confidential informant. In a clear case, confidentiality is explicitly sought by the informer and agreed to by the police" (para 31). Justice Binnie then quotes the previously referred to "test" from *Basi*.

Although both Justice Binnie (para 32) and Justice Antonio (para 25) refer to the "contract-type elements of offer and acceptance" as evidence of the status, Justice Binnie notes that confidential informant privilege, as a creature of the law, "was created and is enforced as a matter of public interest rather than contract." The public interest as outlined by Justice Binnie (at para 30) involves the incentives for those in the know to provide information to those who are not to assist in the goals of public safety and law enforcement (See also *Bisaillon v Keable*, [1983] 2 SCR 60, 1983 CanLII 26 (SCC), Beetz J at 93). Providing a safe "place" where these vital conversations can be had in the context of an atmosphere of protection is the underlying purpose for rigidly enforcing the privilege once it attaches. This public interest aspect assumes two premises: that the informant wants the protection and that the public has no interest in the impact such a status would have on the informant. The *Basi* "test" does not allow for a reluctant informant nor does it concern itself with the implications of the confidential informant status on an individual. The incentive is to promote law enforcement, which is a valid and convincing objective we all applaud. However, the "test" as fashioned does not encourage the police to fully inform the potential confidential informant of the true implications of the privileged status which will, not might, flow from the agreement. As noted by Justice Antonio, when the handlers "ended Named Person A's tenure as an informant, Officers X and Y used final-sounding language that might easily have led him to believe that every aspect of his short-lived role was over and he would never hear about this again." But not so, Justice Antonio continues, "for obvious reasons, confidential informant privilege persists after the informant's active role has ended" (para 26). Sadly, the forever status is known to the legal segment of society but not so obvious to people like NPA. These realities reveal a weakness in the *Basi* test as it fails to see beyond the protective veil which flows from the confirmation of the status as confidential informant. Rather, such status is derived from a moment in time when NPA spoke without appreciation of the repercussions which would come in the name of the public interest.

To be fair, Justice Antonio is also concerned with NPA's protection. Although NPA "never wanted to be a confidential informer", NPA is "fearful of one person finding out", namely the person he informed on (para 27). But this discussion in the decision comes after the confidential informant status is confirmed and forms part of the alternate issue on whether NPA waived his status. Waiver presupposes status as a confidential informant.

Returning to the *Basi* test, it should be noted that the full test as articulated by Justice Fish requires that the "useful information" to be given "would otherwise be difficult or impossible to obtain" (para 36). There is no discussion of this part of the test in Justice Antonio's findings. Was this information "useful"? Was it "otherwise difficult or impossible to obtain"? The record is silent. Without inquiring into this aspect of the *Basi* test, confidential informant status can be conferred broadly by a handler who is "fishing" for information or testing out an informant's reliability. It could be argued that without this requirement, status could be irrevocably conferred in a "offhanded way" (para 25). Leaving this phrase empty fails to serve the purpose of the informant privilege, which strives to not only encourage people to share information but also to encourage effective and efficient investigatory practices. Additionally, a more restrictive reading of the *Basi* test would encourage potential informants to give useful information in exchange for status. These informants, I would suggest, would be more prudent in entering into such an "agreement" and subsequently not so flippant or forthcoming with their confidential identity. It

would also assist handlers in pre-screening potential informants, who may, as the Crown feared in the case at bar, “self-out” themselves purely for the purpose of forcing the Crown to withdraw any future criminal charges they may face (paras 73 to 81).

Confidential informant status has advantages and disadvantages as starkly seen in *Her Majesty The Queen v Named Person A*. The key to a robust and successful justice system is to provide protections and incentives for all those who play a role in it. The law of privilege once engaged is a hard-hearted companion as NPA ultimately came to appreciate. But we, as purveyors of the law and as readers of this creation story should consider the effect of the law and how, within the confines of the Rule of Law, we can be part of that changing narrative. In this way, NPA’s personal story can inform further discussion on the future of the law of privilege in this area and whether, as with other traditional rules of evidence, it is time to re-consider the underlying logic of the rule in favour of a different, more responsive, approach. This creation story may indeed create another story about the law.

This post may be cited as: Lisa A. Silver “The Confidential Informant as a Creation of Law” (23 October, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/10/Blog_LAS_Confidential_Informant.pdf

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