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Informer Privilege: A Fickle Friend?

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Case Commented On: *R v Named Person X*, 2018 ABQB 827 (CanLII)

In the series "Mission: Impossible" the protagonist Ethan Hunt knows what is at stake. Before every new assignment, a self-destructing tape informs him of his new mission. The message ends with a disclaimer: "as always, should any member of your team be caught or killed, the Secretary will disavow all knowledge of your actions." In serving his state, he knows that the state is a fickle friend: if he is compromised, he cannot expect any assistance. At least Ethan Hunt is fully aware of this before he sets off.

The situation of Named Person X (NPX) in the recent Alberta Court of Queen's Bench decision, *R v Named Person X*, 2018 ABQB 827 (CanLII) is similar to Ethan Hunt's. NPX is allegedly a police informer, and leaked information that resulted in successful arrests of several people. However, there is a twist: NPX was among those arrested. Just like the Secretary in "Mission: Impossible", the Crown would "neither confirm nor deny that any informer privilege exists in relation to the Accused [NPX]" (at para 16). NPX filed an application for an order directing the Crown to disclose source handler notes related to NPX's activity as an informer, and the central issue in *Named Person X* was whether this application should be granted or whether the notes were protected by informer privilege.

The core evidentiary issue arising in cases involving informer privilege is the balance between the public interest and the right of the accused to make full answer and defense. Law enforcement often relies on insider information to prevent crimes and prosecute criminals, and the identity of the informer is guarded zealously. From the public interest perspective, informer privilege has been characterized as "of fundamental importance to the workings of a criminal justice system" (*R v Leipert*, [1997] 1 SCR 281, 1997 CanLII 367 (SCC) at para 10; *Named Person X* at para 8). As noted in *Named Person v Vancouver Sun*, 2007 SCC 43 (CanLII), informer privilege "protects that informer from possible retribution, [and] sends a signal to potential informers that their identity, too, will be protected" (at para 18).

However, there remains a question as to the right of the accused to make full answer and defense. When an informer is arrested, how can he bring his informer status to the attention of the court? To answer this question in *Named Person X*, Justice Steven Mandziuk approached the issue in a methodological way. The first issue to be solved was the participants in the hearing. In *R v Brassington*, 2018 SCC 37 (CanLII), the Supreme Court of Canada ruled that defense counsel is outside the circle of privilege, unless there is a waiver or the innocence at stake exception to the rule of informer privilege applies (at para 42). While the earlier Alberta Court of Queen's Bench case, *Her Majesty The Queen v Named Person A*, 2017 ABQB 552 (CanLII) (at para 6) established a case-by-case basis for defense counsel to be included in the circle of

privilege, the Supreme Court of Canada rejected this approach a year later in *Brassington* and ruled in favor of a strict rule, where the circle of privilege only includes the informer, the police, the Crown, and the court. Justice Mandziuk was obliged to follow the rule in *Brassington* (*Named Person X* at para 27).

Second, Justice Mandziuk considered whether NPX could unilaterally waive informer privilege. Following the case law, he concluded that there is "dual ownership of informer privilege" (at para 31). In his reasoning, once an informer relationship is established, the informer privilege "goes beyond the interests of any single case or individual" (at para 41). Therefore, once NPX entered the informer relationship, the privilege was not his alone to waive. Third, Justice Mandziuk considered whether the source handler notes could be disclosed, and concluded that given the absence of a valid, mutual waiver, the notes were protected by informer privilege.

Finally, Justice Mandziuk considered the innocence at stake exception to informer privilege. If this exception exists, the court may allow defense counsel to be included in the circle of privilege, and the court can compel the Crown to produce the source handler notes. The innocence at stake test is stringent, and it can only be invoked to infringe the privilege if there is a "genuine risk of wrongful conviction" (*R v McClure*, 2001 SCC 14 (CanLII) at para 47; *Brassington* at para 36). In the first step of the test, the accused must establish that there is information that may raise a reasonable doubt as to his guilt, and that this privileged information is not available elsewhere and must be obtained from the Crown (*Named Person X* at para 53; *Brassington* at para 37). Once this is established, in the second step of the test, the court examines the information to see if it likely raises a reasonable doubt (*Named Person X* at para 54; *Brassington* at para 38). However, noting that the court would be in a position to holistically assess all the evidence at trial, Justice Mandziuk declined to rule on the innocence at stake exception at this application stage (*Named Person X* at para 58).

In *Named Person X*, Justice Mandziuk attempted to reconcile the absolute nature of informer privilege with the right of the accused to make full answer and defense. Yet in his ruling, he excluded defense counsel from the *in camera* hearing, despite the wish of NPX to have the assistance of defense counsel (at para 15). Moreover, he also excluded the source handler notes from evidence, since NPX could not unilaterally waive informer privilege and the Crown's consent was required. All of these aspects of the ruling suggest that the balance is tipped in favor of the public interest, not the right of the accused to make full answer and defense.

Named Person X therefore seems to contain many of the challenging issues of previous case law such as *Named Person A*. In that case, the central issue was that Named Person A (NPA) was not aware of the extent and duration of informer privilege when NPA became an informer. In particular, NPA was not aware that informer privilege survives the role of NPA as a "terminated" informer for law enforcement. As Professor Lisa Silver noted in her previous post on this case, "[s]adly, the forever status is known to the legal segment of society but not so obvious to people like NPA." Similarly, in *Named Person X*, it remains unclear whether NPX fully appreciated the ramifications of becoming an informer, especially when NPX was arrested and required to claim informer status. If informer privilege has a lasting effect beyond the "termination" of the informer (as in *Named Person A*) or cannot unilaterally be waived by the informer (as in *Named Person X*), these legal characteristics have a tangible impact on the life of an informer once he makes a decision to become an informer. This is more troubling in the post-*Brassington* world,

where defense counsel is strictly excluded from *in camera* hearings, and there is no longer a case-by-case admittance of defense counsel in the circle of privilege.

Moreover, the exclusion of defense counsel on the grounds of informer privilege as "an ancient and hallowed protection" (*Leipert* at para 9) seems to be at odds with another hallowed relationship in criminal law, namely solicitor-client privilege. Doctrinally, informer privilege belongs both to the Crown and the informer, unlike solicitor-client privilege, which belongs only to the client. Yet removing information about the accused informer from defense counsel seems unlikely to advance the position of the accused.

In *Named Person X*, Justice Mandziuk was bound to follow *Brassington*. He concluded that "the holding of the *in camera* hearing does not dilute the Accused's right to make full answer and defence," since there are "sufficient protections within the circle of privilege [...] to ensure that any rights or concerns or interests of the accused are met" (at para 29). In his reasoning, Justice Mandziuk seemed to follow the concerns of Justice Fish in *R v Basi*, 2009 SCC 52 (CanLII), where he worried that the inclusion of defense counsel in the circle of privilege would place defense counsel in a dilemma between the duty to the client and the duty to the court. Yet perhaps more faith ought to be given to defense lawyers, since, by occupation, defense lawyers are required to skillfully manage their duty to their clients and their duty to the court.

The state in "Mission: Impossible" always gives Ethan Hunt a fair warning that it will be a fickle friend in times of trouble. Law enforcement, when recruiting NPX, may have informed NPX of the potential legal consequences of the informer relationship. Yet once NPX was arrested by law enforcement for the very crime NPX informed on, informer privilege showed itself to be a fickle friend to NPX in the court of law.

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