

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Named Person B, 2013 SCC 9, [2013] 1 S.C.R. 405 | **Date:** 20130222**Docket:** 34053 |

**Between:**

**Named Person B**

Appellant

and

**Her Majesty The Queen**

Respondent

- and -

**Jacqueline Benoît, Raymond Bouchard, Denis Corriveau, Marcel Demers,**

**Raymond Desfossés, Gilles Dubois, Frédéric Faucher, Jean-Claude Gagné,**

**Denis Gaudreault and Gérard Hubert**

Others

and

**Director of Public Prosecutions, Attorney General of Ontario and**

**Criminal Lawyers’ Association (Ontario)**

Interveners

**Notice:**

On January 24 and December 20, 2011, the Court issued orders sealing the record in the matter of *Named Person B v. Her Majesty the Queen* (34053) and banning the publication of any information within the sealed record.

The reasons for judgment are not subject to these orders.

**Coram:** McLachlin C.J. and LeBel, Deschamps,[[1]](#footnote-1)\* Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**(paras. 1 to 49)**Dissenting Reasons:**(paras. 50 to 153) | Abella J. (McLachlin C.J. and LeBel, Fish, Moldaver and Karakatsanis JJ. concurring)Cromwell J. (Rothstein J. concurring) |

R. *v.* Named Person B, 2013 SCC 9, [2013] 1 S.C.R. 405

Named Person B *Appellant*

v.

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**Indexed as: R. *v.* Named Person B**

2013 SCC 9

File No.:  34053.

2012:  April 11; 2013:  February 22.

Present: McLachlin C.J. and LeBel, Deschamps,[[2]](#footnote-2)\* Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the superior court of québec

 *Criminal law — Evidence — Informer privilege — Individual with informer privilege with one police force providing information relating to himself and others to second police force — Whether individual has status of police informer with second police force — Whether implicit promise of confidentiality by second police force exists as result of nexus between two police forces.*

 B approached a first police force to give information about violent crimes and was promised confidentiality by that police force. Two days later, the first police force transferred B and the information he had provided to the Sûreté du Québec (“SQ”). Over the next five years, B continued to cooperate with the SQ and to give information about serious crimes. At the end of that period, the Crown ordered the SQ to redact B’s name and any information that could identify him from all documents and to put those documents under seal. It also brought an application to determine if B benefitted from police informer privilege with the SQ. The application judge found that B did not have informer status.

 *Held* (Rothstein and Cromwell JJ. dissenting): The appeal is allowed and the matter remitted for reconsideration.

 *Per* McLachlin C.J. and LeBel, Fish, Abella, Moldaver and Karakatsanis JJ.: While the application judge recognized that a promise of confidentiality could be either explicit or implicit, he undertook no analysis into whether an implicit promise could have been inferred. In particular, the application judge failed to make any findings about whether B’s transfer from the first police force to the SQ, the relationship between the two police forces, and the similarities in B’s relationships with both, could have led someone in B’s position to believe, on reasonable grounds, that the status he had with the first police force would continue with the second.

 The possibility of an implied promise of confidentiality emerges from this record based on the nexus between the first police force and the SQ and the SQ’s failure to clarify to B what his status was. B’s interactions with the SQ originated in his relationship as a confidential informant with the first police force and the two police forces cooperated in handling B over the following years. In addition, the evidence is undisputed that no one ever told B that he ceased to be a confidential informant when he was transferred to the SQ, even though it is also undisputed that he repeatedly asked the SQ to clarify his status.

 B approached the first police force to provide information about violent crimes. He was promised informer privilege with respect to the information that he provided to that force. In its investigations, the SQ used confidential information B had given to the first police force prior to the SQ’s involvement.

 Based on B’s information, the two police forces worked together and dealt with B interchangeably. An SQ officer acknowledged that the first police force and the SQ were effectively operating together in respect of an investigation that developed around B’s information. This interconnection is also reflected in a letter sent by an officer of the first police force, which acknowledges B’s confidentiality with the first force and implies that that force believed that B had a similar status with the SQ.

 In addition to the temporal and operational nexus between the two forces, B insistently asked what his status was and never received a clear answer. This may well have led someone in B’s position to reasonably believe that his identity would be protected. While the SQ officerswere adamant that they did not think of B as an informer, they do not appear to have shared this view with B. B was promised confidentiality by the first police force because his cooperation put his life at risk. The risk did not change when he was transferred to the SQ two days later and there is no doubt that the SQ knew of B’s protected status with the first police force. At the very least, the SQ sent mixed signals to B concerning the confidentiality of his statements. The net effect of these mixed signals from the SQ on B’s reasonable expectation of confidentiality must be decided at a new hearing.

 The fact that one police force has granted informer status to an individual is not, on its own, a sufficient basis for a claim of informer privilege with another police force. However, given the nexus between the forces in handling B, and given the essential continuity of B’s relationship with both, B may well have had reasonable grounds to believe that the protection promised by the first police force would continue with the ongoing flow of information that he was providing to the SQ.

 *Per* Rothstein and Cromwell JJ. (dissenting): To decide this case, the concrete realities of it and the limits of appellate review must first be assessed. The realities are that the application judge expressly rejected B’s evidence that his status as a confidential police informer was ever promised or even discussed. He further found that the police had done nothing that would permit B to understand that he was to become a confidential police informer. While it may in some rare cases be theoretically possible for a person to be both a Crown witness and a confidential police informer, it was not possible in B’s situation. The application judge recognized this as does B’s own counsel before this Court. The fact that the police have an obligation to protect a person has nothing to do with whether that person is a confidential police informer. Thus, there is nothing inconsistent with the police position that, on the one hand, they felt obliged to protect B and on the other, that B was not a confidential police informer.

 Any implication that B inquired about his status as a police informer and was not given a straight answer is not supported by either the application judge’s findings or by this record. In fact, the officers who testified on this issue repeatedly asserted that a conversation about B’s status as a source or confidential informer simply never occurred. Indeed, none of the officers involved failed to give B a straight answer about whether he was a confidential source because there were no such discussions.

 It is not open to an appellate court to reweigh the evidence in the record or to draw inferences from the evidence, which the application judge refused to draw, absent some clear and determinative error on the part of the judge. Thus, it is not open to this Court on appeal to draw any inference from this record that B inquired whether or not he was a source and did not receive a straight answer. Such an inference is not only contrary to the evidence that the application judge accepted but it is also contrary to the judge’s express finding of fact that the SQ did nothing that could have led B to believe that he would become a confidential police source.

 On the issue of alleged police promises of confidentiality, the application judge was alive to and expressly noted that there was inconsistency in the evidence. A review of the record shows that there was indeed inconsistency or confusion in the evidence about what was or was not confidential. Sorting this out is the job of the application judge, not of an appellate court. The judge did so and there is no basis to interfere with his findings.

 The application judge did not fail to consider whether a promise of confidential informer status could be implicit in this case. Rather, the judge’s factual findings and the record amply support the conclusion that he was careful to consider whether any promise was made implicitly as well as explicitly, even though B’s evidence was solely to the effect that the SQ had made repeated explicit promises. This was the only basis for his professed belief that he had informer status.

 The judge was alive to B’s dealings with other police agencies. Having heard that evidence, however, he found as a fact that the evidence in the case required that B’s dealings with the SQ be considered differently. The judge referred to several differences in support of this conclusion, which is amply supported by the evidence.

 In light of the application judge’s extensive findings, there is no evidence to support the view that there may have been some implicit promise in this case. In fact, this possibility is inconsistent with B’s own clear and unequivocal evidence that the claim of informer privilege arose solely from alleged express promises, which the application judge concluded had never been made. Moreover, the judge accepted police evidence that there was never even any thought of making B a confidential informer and that they did nothing that could let B understand that he had that status. The judge also found that it was some years after B’s initial dealings with the SQ that B started to claim the status of a confidential police informer. These findings leave no room for the imputed or implied promise theory.

 Finally, the judge’s conclusions that B actually knew that he did not have informer privilege and that B’s claim of that status was an after-the-fact exercise of opportunism make irrelevant any possibility that some hypothetical person in B’s circumstances might have thought that the promise was implicit. B knew he had no such promise and provided the information anyway. B was a disappointed suitor for a potentially lucrative co-operating witness contract and an opportunist, not a police informer.

 In light of the record, there is no reason to interfere with the application judge’s findings of fact. Nothing in this case, however, should be taken as undermining the importance of the police being clear with potential sources about their status; quite the contrary. Given the important role that informer status plays in the detection and prosecution of crime, courts must not undermine its effectiveness by condoning police actions that leave potential informers uncertain or confused as to their status. The application judge in this case was clearly alive to these concerns, as he ought to have been, and reached the conclusions he did after a careful and thorough review of all of the evidence. His decision should not be disturbed.

**Cases Cited**

By Abella J.

 **Referred to:** *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *R. v. Leipert*, [1997] 1 S.C.R. 281; *Attorney‑General v. Briant* (1846), 15 M. & W. 169, 153 E.R. 808.

By Cromwell J. (dissenting)

 *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *R. v. Leipert*, [1997] 1 S.C.R. 281; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253; *R. v. Babes* (2000), 146 C.C.C. (3d) 465; *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368; *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389.

 APPEAL from a decision of the Quebec Superior Court (Gagnon J.), No. 200‑01‑134678‑097, rendered on September 17, 2010. Appeal allowed, Rothstein and Cromwell JJ. dissenting.

 *Guy Bertrand*, for the appellant.

 *Jacques Casgrain* and *Maxime Laganière*, for the respondent.

 *Louis Belleau*, for the Others.

 *François Lacasse* and *Nancy L. Irving*, for the intervener the Director of Public Prosecutions.

 *Susan Magotiaux*, for the intervener the Attorney General of Ontario.

 *Anil K. Kapoor* and *Lindsay L. Daviau*, for the intervener the Criminal Lawyers’ Association (Ontario).

 The judgment of McLachlin C.J. and LeBel, Fish, Abella, Moldaver and Karakatsanis JJ. was delivered by

1. Abella J. — This appeal involves an individual, “B”,[[3]](#footnote-3) who was guaranteed confidentiality by one police force and then transferred to another. The second police force failed to answer B’s repeated questions about his status, nor did it at any time clarify what that status was. The disposition of this case rests on the consequences of the information vacuum created by the second police force and, in particular, on whether an inference could reasonably have been drawn that an implicit promise of confidentiality was made based on the nexus between the two police forces.
2. The application judge held that B’s status as a confidential informant with one police force did not automatically make him a confidential informant for the other. The application judge also found that B lied about being expressly promised confidential informer status by the second police force. But the inquiry should not have ended there. What remained unanswered was whether, due to the interaction between the police forces and other police conduct, there was a nexus between the two police forces and, if so, whether B was implicitly promised that the confidentiality he enjoyed with one police force would continue to the other. The application judge accepted the testimony of officers in the second police force concerning their interactions with B. Significantly, that testimony included acknowledgments that B repeatedly asked what his status was, and was never clearly told that he was *not* a police informer.
3. The application judge concluded that B’s status with each police force was to be treated differently. He never explained why. B placed himself at risk by providing the Sûreté du Québec (“SQ”) with information leading to the investigation and prosecution of violent crime. I see an error in the application judge’s failure to make *any* findings about whether the transfer, the relationship between the two police forces, and the similarities in B’s relationships with both, could have led someone in B’s position to believe, on reasonable grounds, that the status he had with the first police force would continue with the police force to which he was transferred.
4. The record reveals that these are live issues. None of the application judge’s findings address them, even accepting all of the findings delineated by Justice Cromwell. This, with respect, leaves a key question unanswered, namely, whether an implicit promise of confidentiality was made in these circumstances.

Background

1. Motivated by fear for his safety and a desire for vengeance, B met with two officers of the first police force in order to give them information. B’s information implicated a number of people who were involved in violent criminal activity and in which he admitted to having been involved as well. B was promised confidentiality and given an informant code in that police force’s system. The police force then released B, but because the criminal activity was outside its authority, the force transmitted the information it got from B to the SQ.
2. Two days later, B was transferred to the SQ and two SQ officers arrested him for his crimes. B continued to want to cooperate and to give information both about his crimes and his prior criminal activities. In the next several days, B made a number of statements to the SQ relating to them.
3. B was given an informant code in the SQ’s system and, for five years, continued to cooperate with the SQ. Mostof B’s declarations to the SQ were preceded by a statement promising him that the information he provided would not be used against him in a proceeding, except for perjury, but that charges could be brought against him if they were supported by independent evidence.
4. During the course of those five years, B pleaded guilty to one of his violent crimes and was sentenced for it.
5. At the end of the five years, the Crown ordered the SQ to redact B’s name and any information that could identify him from all documents and to put those documents under seal. A few months later, two SQ officers went to the penitentiary to have B sign a document entitled [translation] “Waiver of Informer Privilege” — a waiver of his right to invoke police informer privilege. He did not sign. Thereafter, B’s name does not appear in any new documents, and was replaced with the word “source”.
6. The Crown brought an application to clarify B’s status and determine if he benefitted from a police informer privilege that assured the confidentiality of his identity. The hearing took place in closed session, with documents under seal.
7. At the hearing, B testified that he was told by the SQ on several occasions that he was an informer. He relied on the fact that he was attributed an informant code by the SQ, that he was asked to sign a “Waiver of Informer Privilege”, and that he was identified as a “source” in any documents created after the Crown requested the general redaction. For its part, the Crown argued that the SQ expected B to become a cooperating witness; that B was told on many occasions that his statements could be used against him; that B’s identity was not concealed by the SQ in documents and statements prior to the sealing of the documents; and that the police had made limited disclosure of one of B’s statements on one occasion. The Crown suggested that this was inconsistent with B’s testimonythat he had been promised that his identity would remain protected.
8. The application judge found that the first police force’s officers had promised to keep B’s identity confidential in exchange for the information he provided. All of B’s statements to that police force, therefore, were protected by informer privilege. This is not contested by any of the parties.
9. The application judge concluded, however, that [translation] “[t]he evidence requires that [B’s] situation be viewed differently depending on whether information was being disclosed to the [first police force] or to investigators from the Sûreté du Québec”. As to B’s status with the SQ, the application judge saw the evidence as presenting “two diametrically opposed versions” of events. The application judge rejected B’s evidence that the SQ had expressly told him that he was a confidential informer, and accepted the SQ’s denial that any such promise was made.
10. While he noted that it was [translation] “odd” that the police would ask a person to renounce his right to invoke police informer privilege if it had never been offered in the first place, the application judge nonetheless ultimately accepted the testimony of the Crown’s witnesses and found that B’s testimony was not credible. He therefore concluded that B had never been promised police informer status by the SQ in exchange for his statements.
11. But the application judge undertook no analysis into whether the promise was implicit in the circumstances because of the nexus between the first police force, who had expressly granted B informer status, and the SQ, to whom the first force immediately transferred B because they lacked jurisdiction over the crimes he was describing. That oversight was based on the application judge’s conclusion that B’s relationships with the first police force and the SQ had to be treated differently. The application judge therefore ignored B’s relationship with the first force entirely when assessing his status *vis-à-vis* the SQ.
12. The application judge never explained why the two forces had to be treated differently, nor did he make any findings related to the issue. Instead, his analysis unfolded based on this unexplored assumption. Yet B only became involved with the SQ due to his collaboration with the first police force as a confidential informer. The failure to consider this nexus, in my respectful view, meant that the application judge did not consider whether the police conduct gave rise to an implicit promise of protected status. In other words, would the police conduct have led someone in B’s position to believe, on reasonable grounds, that his protected status would continue when he and his information were transferred to the SQ?
13. I would set aside the application judge’s order and direct that a new hearing take place to determine B’s status in light of the nexus between the police forces.

Analysis

1. In *R. v. Barros*, [2011] 3 S.C.R. 368, this Court held that “not everybody who provides information to the police thereby becomes a confidential informant” (para. 31). The Court was clear, however, that “the promise [of protection and confidentiality] need not be express [and] may be implicit in the circumstances” (para. 31, citing *Bisaillon v. Keable*, [1983] 2 S.C.R. 60). 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 reasonably be 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 could have created reasonable expectations of confidentiality.
2. The application judge recognized that the promise of confidentiality could be either explicit or implicit, but he undertook no analysis into whether an implicit promise could have been inferred from the circumstances of the relationship between the two police forces. In fairness, a theory based on an implicit promise of confidentiality was not specifically argued before the application judge. The arguments before him centred on B’s claims that SQ officers had *expressly* and repeatedly told him that his identity would remain confidential, which the officers denied. Once the application judge found against B on that point, he effectively overlooked the possibility that the police conduct, even in the absence of any express statements, could have amounted to an implicit promise of confidentiality.
3. Justice Cromwell states that there is no live issue as to whether B received an *implicit* promise of confidentiality**,** because the application judge effectively found that B *knew* that he did not have informant status with the SQ. With respect, those were not the application judge’s findings. I agree that if there had been a finding that B actually knew that he did not have informant status, the inquiry would end there. But there was no such finding. What the application judge did was to reject B’s claims that the SQ *expressly promised him* confidential informer status. He invoked B’s [translation] “doubtful credibility . . . and . . . obvious opportunism”. In other words, the application judge found that B lied in saying that the SQ officers expressly promised him confidentiality in order to bolster his claim. That does not, however, amount to a finding that B knew all along that he did not benefit from confidentiality with the SQ.
4. Similarly, B’s failure to testify about an implicit promise does not necessarily mean that no such promise was made or that he knew that informer status had been withheld. While B may have been found not to be credible about receiving *explicit* promises of confidentiality, the evidence in the record of a nexus between the police forces leaves open the possibility of an implicit promise. B’s “obvious opportunism” and lack of credibility do not, in the circumstances of this case, close the door to finding an *implicit* promise of confidentiality, nor do they dispense with the need for the application judge to examine the nexus between the investigations and determine whether it gave rise to such a promise. It is hard to speculate what the application judge’s findings *might have been* had he specifically turned his mind to the issue.
5. For me, the possibility of an implied promise of confidentiality emerges from this record based on the nexus between the first police force and the SQ, and the SQ’s failure to clarify to B what his status was. First, B’s interactions with the SQ originated in his relationship as a confidential informant with the first police force and the two police forces cooperated in handling B over the following years. In addition, the evidence is undisputed that no one ever told B that he *ceased* to be a confidential informant when he was transferred to the SQ, even though it is also undisputed that he repeatedly asked the SQ to clarify his status.
6. The key issue is the nexus between the police forces. B advanced the argument that all police forces are “indivisible” with respect to police informer privilege such that, where one police force extends a promise of confidentiality to an informer, that status will continue to attach to the person when he or she is transferred to another force. I see no need for such a blunt “indivisibility” rule. The fact that one police force has granted informer status to an individual is not, on its own, a sufficient basis for a claim of informer privilege with another police force.
7. This is not to say that B’s transfer from one police force to another is irrelevant to whether B had reason to believe that he had been given informer privilege by the SQ. Given the interactions between the two police forces in handling B, and given the essential continuity of B’s relationship with both forces, in my view B may have had reasonable grounds to believe that the protection promised by the first police force would continue with the ongoing flow of information that he was providing to the SQ.
8. B approached the first police force in order to provide information about violent crimes. He was promised informer privilege with respect to the information that he provided to that force from their initial meeting onwards. One of the two officers who had been at that meeting explained that he perceived a strong need for confidentiality as of that first meeting, given the risk to B’s safety and the sensitive information he was providing concerning serious criminal activity:

[translation] We can’t afford to put [his] safety at risk. One thing that’s absolutely certain is that we wouldn’t have time to, as we say, . . . “code” [him] at that time; there’s a coding procedure and all that. But in our minds, everything Named Person B told us . . . went into a classified file to protect [his] . . . shall we say, secrets.

. . .

. . . everything that was said . . . [h]ad to remain highly confidential, and there was evidence there that related to past investigations, [violent crimes]. We couldn’t afford to . . . we couldn’t give it a low classification. It had to be given a high classification . . . .

1. In its investigations, the SQ used confidential information B had given to the first police force during their initial meetings, prior to the SQ’s involvement. Significantly, that informationwas *unrelated* to the charges against B, and includeda list of individuals involved in violent criminal activity. In other words, while it is true that the SQ arrested B for a violent crime that he committed, the SQ treated B as much more than merely a suspect in a serious crime. B was expected, and in fact continued to provide the SQ with information about violent criminal activity, just as he had done with the first police force.
2. There is no doubt that the SQ knew of B’s protected status with the first police force. One of the SQ officers who arrested B acknowledged that when the SQ picked B up, they knew that B had provided [translation] “a lot of information” to the first police force, that B wanted to cooperate by providing information, that he was “protected” by that other force, and that the SQ would have to continue to protect him:

[translation] Well, we knew from the beginning that Named Person B wanted to give information, there was no secret about it, and when we took charge of Named Person B, it was because the [first police force] told us [he] was implicated in [violent criminal activity, for which] the Sûreté du Québec [was] responsible. . . . So we met [him] as a [violent crime] suspect, but *we knew that this person . . . wanted to co-operate with the Sûreté. We knew that [he]’d given information to the [first police force]. We knew that this was a person who was protected by the [first police force]. We knew that we were the ones who would continue to protect [him]. So, we were in a sense [his] controllers*. [Emphasis added.]

1. Another SQ officer who had dealt with B from the beginning acknowledged that he knew that B was coded as a “source” by the other police force when he first talked to him upon his transfer from that force. The exchange at the hearing was as follows:

[translation]

Q Was [he] already classified as a “source” by the Quebec police?

. . .

A I would say, to the best of my knowledge, I would say no.

. . .

Q Did you know that [he] had been one for the [first police force] or that [he] still was one for the [first police force]?

A *A “source” for the [first police force]?*

Q Yeah.

A *It’d been coded that way . . .* . [Emphasis added.]

1. Notes taken two years after B’s arrest by an officer of the first police force following a conversation with an SQ officer (introduced as fresh evidence), confirm that the first police force put the SQ on notice that B benefitted from confidentiality:

[translation]

[The SQ officer and I] discussed [B] and the information that source had given [the two officers of the first police force who first met with B].

Informer privilege was discussed. On this subject, I said that [B] had the privilege because [he] had given the information as a source and [he] had an expectation of confidentiality.

I told [the SQ officer] that in my opinion, though I’m not a lawyer, if the information is confidential and if it is included in [any document], it should be redacted. To be confirmed with a lawyer.

1. For five years, B continued to provide the SQ with wide-ranging information dealing with violent crimes. SQ officers kept going back to him as a source, and his information led to the investigation and prosecution of many other crimes.
2. During the years when he was being questioned, B knew that he was being dealt with interchangeably by both police forces. At various points, he stayed under the first police force’s guard or at that force’s premises and was picked up there by SQ officers. On at least three occasions, an officer of the first force met with B along with SQ officers.
3. At the hearing, an SQ officer acknowledged that the first police force and the SQ were effectively operating together in respect of an investigation that developed around B’s information. In order to show his good faith, B had surrendered various items to the SQ, including thousands of dollars. The SQ turned the money over to the first police force. When asked why the SQ turned the money over to that force, the SQ officer noted that [translation] “[the first force] was on the case, was . . . participating in the case”. He referred to the joint handling of B as “a sort of interorganizational project”.
4. This interconnection is also reflected in a letter sent by an officer of the first police force to the SQ with respect to the money, which acknowledges B’s confidentiality with the first force and implies that that force believed that B had a similar status with the SQ. The officer asked the SQ to return the money to B because the only evidence that the money was the proceeds of crime was given by B to the SQ under a promise that it would not be used against him. He indicated that

[translation] given the status of [B] with the Sûreté du Québec and the [first police force], and given *our obligation to keep this status confidential*, we have been unable to gather any other evidence that could be used. [Emphasis added.]

1. In other words, the relationship between B and the SQ was not only connected to the first police force in an ongoing way, it was not significantly different from that between B and the first force. Both police forces warned him that he would receive no immunity in respect of his own criminal acts, and both forces expected him to become a cooperating witness in other cases. Based on B’s information, the two police forces worked together and dealt with B interchangeably.
2. This evidence of a close connection between the first police force and the SQestablishes a foundation upon which someone in B’s position may reasonably have seen himself as being part of a joint, ongoing operation between the two police forces: the first force had given him an express promise of informer privilege, and the SQ, to whom he was transferred consensually for jurisdictional reasons, took advantage of the relationship and information that flowed from this protection.
3. In addition to the temporal and operational nexus between the two forces, the evidence is undisputed that B insistently asked what his status was and never received a clear answer. An SQ officer who had dealt with B since his arrest testified that around the time of his transfer to the SQ, B [translation] “was worried about what was going to happen to [him]”, and that he was “deeply concerned” about this. It was a source of stress for B, who was “extremely afraid” that he would be killed. Another SQ officer testified that B was asking about his status two years after his transfer. The application judge found that B was still asking about his status two years after that.
4. The SQ’s conduct in failing to clarify B’s status to him despite being repeatedly asked to do so, may well have led someone in B’s position to reasonably believe that his identity would be protected. It bears emphasizing that no one ever told B that he was *not* a confidential informant with the SQ. One of the SQ officers who arrested B, for instance, testified that he did not discuss B’s status with him when he first took B into SQ custody, because B had already “started the process” with the first police force:

[translation]

Q Was [his] testimony as a cooperating witness, [his] status discussed . . . .

A It was not discussed.

Q . . . at that time?

A No, because [he]’d already started with the [first police force]. Named Person B, *[he] was in a process with [that force], we knew that [he]’d given a lot of information to the [first force]*. We knew that because we’d met the guys from that force. So I don’t know what Named Person B might’ve been thinking at that time. *[He] . . . was in a process in [his] mind, that’s for sure, for sure . . . because . . . [he] was cooperating with [the first force]*. [Emphasis added.]

Although this officer was referring to the process of becoming a cooperating witness, the “process” B had started with the first police force included a promise of confidentiality made only two days earlier.

1. While the SQ officerswere adamant that they did not think of B as an informer, they do not appear to have shared this view with B. B was promised confidentiality by the first police force because his cooperation put his life at risk. The risk did not change when he was transferred to the SQ two days later. From that point onward, B repeatedly voiced concerns about his confidentiality, his safety, and the uncertainty and confusion he felt while waiting for the possibility of a cooperating witness contract to materialize.
2. There is no doubt that much of the focus of B’s questions related to whether the cooperating witness contract was forthcoming and to the type of protection that he would be given under it. But there is also no doubt that he voiced inquiries that raised confidentiality concerns. Where B’s status was in flux and unclear as a result of his transfer from one police force to another, the SQ’s failure to clarify his status may have given rise to a reasonable belief in informer status, whether or not he actually asked a specific question like, “Will I be treated as a police informer in the event of failure to conclude a cooperating witness contract?”
3. In these circumstances, the fact that nobody clarified for him whether the confidentiality promised by the first police force continued to apply to his dealings with the SQ could well have led him to believe that the protection he had with the first force continued pending the cooperating witness contract.
4. The fresh evidence also illustrates the ambiguity generated by the SQ’s approach to B’s status.Two documents introduced as fresh evidence were written by one of the SQ officers who had been involved with B since his transfer. These documents followed a discussion the SQ officer had two years after B’s arrest with an officer of the first police force about B’s status. In these documents, B was referred to as a “source”, as was the practice with informers, rather than by name. Many other documents prepared by SQ officers refer to B by his name. In other words, SQ officers inconsistently referred to B, sometimes designating him by his real name, and sometimes calling him an informer. Their confusion may well have led B to reasonably assume that his confidential status remained unchanged upon his transfer from the first police force to the SQ.
5. Justice Cromwell concludes that B could not reasonably have believed that the SQ considered him an informer, given the expectation that he would become a cooperating witness. But informer privilege is not necessarily inconsistent with being a cooperating witness. B’s position at the hearing was that he believed he would remain a police informer until he secured a cooperating witness contract with the Crown. In other words, his identity would remain confidential until the Crown *confirmed* that it intended to call him as a witness and provide certain advantages in exchange for his testimony.
6. As this Court recognized in *Barros*, the same person can be an informer entitled to privilege in one matter, and a witness whose identity is disclosable in another:

Once a police informer goes into the “field” and acts as a police agent, the informer privilege is no longer applicable to prevent disclosure of his or her identity in respect of the events in which he or she acted as an agent. . . . *This does not mean, of course, that the informer loses protection in other cases where he or she has not stepped out of the protected role.* [Emphasis added; para. 33.]

Witnesses can even testify without having to disclose that they supplied confidential information to the police in that same matter, as this Court noted in *R. v.* *Leipert*, [1997] 1 S.C.R. 281, at para. 17: “[Informer privilege] applies to a witness on the stand. Such a person cannot be compelled to state whether he or she is a police informer . . .”. This possibility has been recognized since *Attorney-General v. Briant* (1846), 15 M. & W. 169, 153 E.R. 808, in which Pollock C.B. held that a Crown witness could not be asked, “Did you give the information?” that led to the institution of penal proceedings. Finally, while informers typically waive privilege when they agree to testify, nothing prevents them from keeping their privilege until there is a firm decision to testify by both the informer and the prosecution.

1. SQ officers gave B several reassurances that may have reinforced his view that he *was* an informer until he became a cooperating witness. One of the two SQ officers who arrested B explained to him that he would never have to testify in relation to any of the information he provided unless a cooperating witness contract was signed:

[translation]

A . . . And I also explained to [him] that if [he] didn’t sign a contract, [he] would never have to testify about any of the things [he]’d given us under a promise. . . .

Q Under a promise of . . . that it couldn’t be used against [him]?

A That’s it. . . . [He] wouldn’t have to testify, because the contract is so that the person will testify . . . and that’s the point of the contract . . . .

Q If there was no contract, well, [he] wouldn’t have to testify. . . .

A That’s it.

1. Moreover, another SQ officer testified that he always made it clear to B that his statements were confidential:

[translation]

Q But Named Person B asked you several times: “*Hey*, my statements, what’re you doing with them? Will they stay confidential? Don’t show that to anyone.”

A They were always confidential.

Q They were always confidential?

A Yes.

Q But you were always clear with Named Person B that they were confidential?

A They were always confidential. The only thing . . . When I say confidential, it’s that those statements weren’t shown to other accused, or potential accused, or even “accusables” . . . . [Emphasis in original.]

He also said that he repeatedly reassured B that none of his statements had ever been disclosed:

[TRANSLATION]

Q But [he] was told they were confidential?

A As far as I know, [his] statements were never disclosed in any case. Except for [one time] . . . we didn’t disclose any statements. In fact, it bothered me at times, and I would tell [him]: “Look, don’t worry, nothing in the file, nothing’s been disclosed”.

1. This officer said that there was only one exception to the confidentiality which generally applied to B’s statements: on one occasion, a statement was disclosed in another investigation. The SQ did so without B’s knowledge or consent. The exceptional use of B’s statements a few years after the start of his relationship with the SQ is hardly revelatory of whether B could reasonably have believed that his identity was being protected throughout that time.
2. It is true that B gave statements to the SQ after being cautioned that they could be used as evidence in court against third parties. But these cautions must be juxtaposed against the repeated reassurances from SQ officers that B’s statements would remain confidential, and that B would never have to testify on those subjects *unless and until* he became a cooperating witness. At the very least, the SQ sent mixed signals to B concerning the confidentiality of his statements, and never clearly denied that he benefitted from confidentiality. In my view, the net effect of these mixed signals from the SQ on B’s reasonable expectation of confidentiality must be decided at a new hearing.
3. Significantly too, five years after B’s transfer to the SQ, the Crown ordered the SQ to redact all documents that could identify B, and asked that a signed waiver of privilege be obtained from B. SQ officers repeatedly visited B for that purpose. Had there been certainty that B’s status was *not* protected, these steps would not have been necessary. The application judge acknowledged that the Crown’s request for a waiver of privilege was [translation] “contradictory” and “odd” given the SQ officers’ position that they had never promised B confidentiality, concluding: “Had the intention been to confuse, it could not have been done better.”
4. All of this, including the uncontradicted evidence that B was not told by the SQ what his status was, makes it possible that someone in B’s circumstances could reasonably believe that the confidentiality he was promised by the first police force continued when they transferred him to the SQ. I would therefore allow the appeal and remit the matter for reconsideration in light of these reasons.

 The reasons of Rothstein and Cromwell JJ. were delivered by

 Cromwell J. (dissenting) —

I. Overview

1. The appellant, B, provided information about criminal activity ― his own and that of others ― to the Sûreté du Québec (“SQ”).[[4]](#footnote-4) The issue here is whether B had confidential informer status with respect to the information. The application judge, after a hearing at which B and a number of police officers testified, decided that B did not have that status. This appeal challenges that conclusion.
2. My colleague Abella J. would hold that the application judge’s ruling must be set aside and the matter reheard, essentially for two reasons. First, the application judge “undertook no analysis” into whether the promise of confidential informer status was implicit in the circumstances (paras. 15 and 19). Second, this issue which the application judge failed to consider is a live issue on this record because there is evidence, including new evidence, to support the conclusion that “the police conduct [would] have led someone in B’s position to believe, on reasonable grounds, that [his status was] protected” (para. 16). The failure to consider this live issue therefore requires a new hearing. I cannot subscribe to my colleague’s conclusion or the reasons for it. My disagreement is based on the following interrelated points.
3. First, the analysis of the appeal in my view must take place in the context of the concrete realities of this case and within the proper limits of appellate review. Respectfully, my colleague’s analysis is directed towards hypothetical possibilities that are either contrary to clear findings by the application judge or have no air of reality on the record before the Court.
4. Second, the application judge, as I see it, did not fail to consider whether a promise of confidential informer status could be implicit in this case. In my view, the judge’s factual findings and the record amply support the conclusion that he considered that possibility.
5. Third, as I read the record in light of the application judge’s extensive findings, there is no evidence to support the view that there may have been some implicit promise in this case. In fact, this possibility is inconsistent with B’s own evidence and with the circumstances under which B was treated by the SQ. Moreover, the application judge specifically considered whether an implicit promise had been made and made explicit findings of fact that the *SQ never did anything that could allow B to understand that he would become a confidential police informer*. As I see it there is no live issue on this point.
6. Fourth, the application judge found as a fact that B *actually knew* from his first dealings, and during his subsequent dealings, with the SQ that he had no promise that he would be a confidential source for the SQ and that the claim of informer status was an after-the-fact exercise in opportunism on B’s part. This conclusion, amply supported by the record, makes irrelevant what some hypothetical person in B’s position might have thought. B thought no such thing and, knowing he did not have any promise of confidentiality, supplied information to the SQ for a number of years. As the application judge found, B’s assertion of informer privilege came only when the Crown, in the context of discharging disclosure obligations in another prosecution, thought it advisable to have B’s status clarified by a judicial determination. The judge dismissed B’s after-the-fact claims as showing [translation] “obvious opportunism” on his part.
7. I would dismiss the appeal.

II. Issues, Facts and Proceedings

A. *Introduction*

1. The appellant, B, provided information about criminal activity — his own and that of others — over a number of years to the SQ in the hopes of being retained as a [translation] “co-operating witness” and of receiving the type of remuneration and other benefits normally commensurate with this type of co-operation. Ultimately, individuals (some of whom are parties to this appeal and are referred to as the “Other Individuals”) were charged with several violent crimes and it is in the context of their trial that the question of B’s possible status as a confidential police informer arises.
2. If information provided by B met the *Stinchcombe* standard, it would normally have to be disclosed: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. However, B claimed to have confidential police informer status: therefore, B’s identity as the supplier of the information to the SQ was privileged and must not be disclosed. The Crown’s position, however, is that B has no such status.
3. B’s status of course could significantly affect the scope of the Crown’s disclosure obligation to the Other Individuals at their trial. If B is a confidential source with respect to certain information, then B’s identity as the supplier of that information must be kept confidential, along with any other information that could reveal B’s identity as the source in that regard. None of this confidential information could be disclosed, subject only to an accused establishing that it falls within the “innocence at stake” exception or unless both B and the police waive the privilege. Otherwise, the confidentiality is absolute and disclosure cannot be made. The impact on disclosure is thus potentially considerable.
4. The Crown applied to the application judge for a determination of this issue and the application judge held that B was not a confidential informer with respect to information he supplied to the SQ.
5. *Issues*
6. The principal issues, as the appeal has evolved, are these:

What are the concrete realities of this case and the proper limits of appellate review which form the basis for consideration of the appeal? In my view, the judge’s express findings of fact, read in light of the record leave no room for appellate intervention with respect to his conclusion that B was not a confidential source for the SQ.

Did the application judge fail to consider whether a promise of confidential informer status could be implicit in this case? In my view he did not.

Is there a live issue on this record as to whether there may have been an implicit promise of informer privilege by the SQ? In my view there is not.

Is the application judge’s finding of fact that B actually knew that he did not have confidential informer status fatal to B’s claim? In my view it is.

C. *Background Facts*

 (1) The Appellant Seeks Out the Police

1. The appellant, motivated by a desire to avenge himself against others and to make amends for his past criminal activity, contacted the police. He sought to provide information about past crimes and to assist in their prosecution.
2. Soon thereafter, the appellant was put under arrest by the SQ, cautioned and detained for his criminal activity. Of course, that warning would have included advice that anything B said could be used as evidence. During the application hearing, Crown counsel read out the warning given to B by the SQ before taking B’s statements regarding his criminal activity.

[translation]

Q And when [he] told you then: My name is . . . . I’m going to read you a warning. You can sit down. I want to inform you that you’re under arrest. . . .

. . .

Q . . . you have the right to remain silent. We must inform you that we are police officers. You are not required to say anything, and you must understand clearly that if you wish to speak, everything you say will be taken down . . . and can be used as evidence against you. [Emphasis added.]

1. The appellant gave a statement to the SQ regarding his involvement in criminal activity, going so far as to bring SQ officers to the crime scene. B was told by the police at the outset that B would be held to account for his crime. It was therefore clear to B that those matters were not subject to any sort of confidentiality obligation. B’s arrest, detention and cautioning by the SQ are in every respect consistent with that advice.
2. I also underline the application judge’s finding that B stated that from the beginning of his co-operation with the police, B both wanted and expected to testify at future trials. In the circumstances here, as the application judge found, B could not possibly become a Crown witness and a confidential police informer with the SQ.
3. The next day, the appellant was arrested and cautioned for another crime. Again, B freely made a statement discussing several subjects, including the extent of B’s involvement in that crime.
4. I underline the cautions given to B by the SQ to the effect any statements could be used in evidence.
5. The appellant’s co-operation subsequently continued to intensify, as he provided the SQ with further statements implicating other individuals in serious crimes. Several of these statements were made under a promise by the SQ that they would not be used as incriminating evidence *against the appellant*.
6. The SQ officers involved, realizing that the appellant could possibly be of great use to them in solving other cases, started to evaluate whether he could make a suitable co-operating witness.
7. As a result of their frequent meetings, they registered the appellant as an informer in the SQ database, apparently to enable them to incur secret expenses for him. Indeed, though this type of code was normally used to identify confidential informers in its database, the SQ was clear that it had been attributed to the appellant for purely administrative imperatives. As an SQ officer testified, this registration was warranted because secret expenses could only be reimbursed if incurred for the benefit of an individual who had such a code assigned to him in the SQ database.
8. Soon after his first meeting with the SQ, the latter also submitted the appellant to a polygraph test, one of the important preliminary steps to obtaining co-operating witness status.

 (2) The Appellant Shows Signs of Impatience

1. While the administration of the polygraph test could have been interpreted by the appellant as an encouraging sign that a co-operating witness contract was forthcoming, B was not appeased. He soon thereafter became nervous about the Crown’s lateness in formalizing his status as a co-operating witness and voiced this to the SQ. He insisted on being promptly informed of the state of his co-operating witness application and on receiving clarification about his status in the meantime. He threatened, at one point, to starve himself and stop co-operating with the SQ until he was formally recognized as a co-operating witness.
2. The appellant testified that his insistence led the SQ to tell him that he would be considered a confidential police informer until it received instructions as to whether his co-operating witness candidacy was approved. The SQ police officers who testified, on the other hand, denied ever making such a promise. Their view of the situation was that he was in the process of becoming a co-operating witness (and some explicitly told him this) and that the idea of making him a confidential informer had not crossed their mind at that time. The application judge accepted the police evidence and rejected that of B. The appellant continued to cooperate with the SQ for a time after this episode.

 (3) The Appellant Continues Co-operation With the SQ

1. Almost a year after being arrested, the appellant was informed by officers that the Crown had decided against enrolling the appellant as a co-operating witness. The Crown had decided against calling B as a witness in future trials and therefore that status was in the Crown’s view unnecessary.
2. The SQ later informed B that there was a possibility that B would be offered a co-operating witness contract nonetheless. The appellant accepted the police’s offer and a co-operative relationship between the SQ and the appellant was re-established.
3. After B resumed active co-operation with the SQ, he later gave several statements to the SQ. It is worth noting here that though it was made clear to the appellant that these statements could not be used against *him* in a court of law, it was also made clear that they could be used as evidence *in the trials of third parties*. As I shall discuss and the application judge rightly found, in these circumstances, the roles of potential witness and police informer were completely inconsistent, as B would well have understood.
4. Subsequently, the appellant had occasional dealings with the SQ, either in person or by phone, providing additional information. On these occasions, the SQ provided assurances that a co-operating witness contract was probably forthcoming.

 (4) Non-completion of the Co-operating Witness Contract

1. The following year, SQ officers met with the appellant to transmit, on behalf of the Crown, a new offer in a case before the court. The SQ officers also informed him that he would, for the time being, be considered a special witness (a witness who benefits from police protection because of the sensitive nature of the information that he may be called upon to testify on, but who does not obtain the financial advantages normally commensurate with being a co-operating witness). They assured him however that his co-operating witness application was still pending.
2. A few weeks later, the appellant contacted the SQ, seeking assurances about the progress of his co-operating witness application. The appellant testified that he was told by an SQ officer, with another officer present, that his contract was forthcoming and that, in any event, he was considered a confidential police informer in the meantime. Again, this is denied by the SQ. The officer, on the other hand, claims only to have told him that he wanted him to testify in court, and assured him that he was taking care of him and his safety. According to the officer, the option of granting the appellant confidential informer status was never contemplated because he was always sure that the appellant would be given a co-operating witness contract. As noted earlier, the application judge accepted the police evidence.
3. What is uncontested, however, is that the evaluation process was progressing. Officers took the appellant to other SQ-controlled premises later that same year, where he made full disclosure of his criminal past — a prerequisite to the signature of a co-operating witness contract. He also met with Crown prosecutors a few days later.
4. A few months later, the appellant was questioned again with the assurance that his statements would not be used against him in a court of law. He was questioned regarding several inconsistencies between different statements he had made to the police and to Crown prosecutors. It is clear that his credibility was being tested, as is often done when evaluating the suitability of a co-operating witness candidate and his potential for providing convincing testimony in court.
5. However, the Crown ultimately decided against entering into the arrangement because it did not intend to have him testify for the moment. He would therefore not be retained as a co-operating witness.

 (5) The Crown Attempts to Clarify Appellant’s Status

1. The Crown, having decided not to retain the appellant as a co-operating witness, sought to clarify the appellant’s status in order to properly discharge its disclosure obligations. While this was being sorted out, the Crown, as a measure of precaution, ordered that the appellant’s name and any information capable of leading to the discovery of his identity be redacted from various documents.
2. Chief among its concerns was its desire to clarify whether or not the appellant benefited from informer privilege, for if he did, much of his statements even if otherwise subject to disclosure would not be so subject. In an effort to clear up this issue, the Crown sent a police officer to meet with the appellant and ask him whether he would agree to sign a document whereby he would undertake not to seek to invoke informer privilege regarding the information he had provided the SQ. The appellant refused. The Crown therefore brought a motion before the court seeking to determine whether or not the appellant benefited from informer privilege. After witness testimony and argument by counsel, the judge held that B did not benefit from informer privilege in regard to that information.

D. *Judgment Below*

1. After having reviewed this Court’s decisions in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *R. v. Leipert*, [1997] 1 S.C.R. 281; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, and the Ontario Court of Appeal’s decision in *R. v. Babes* (2000), 146 C.C.C. (3d) 465, the application judge held that in order for informer privilege to apply, the police had to explicitly or implicitly promise a claimant that his identity as the provider of information would be kept confidential. He added that the burden rested on the individual claiming informer privilege to demonstrate, on a balance of probabilities, that he was entitled to benefit from it.
2. The appellant testified about this issue during the hearing, admitting that the purpose for initially coming forward to the police was to get revenge. B further testified that he hoped to become a co-operating witness and that B’s statements would not be used against B in a court of law. Nevertheless, the appellant testified that he believed he benefited from informer privilege *because he had been assured of this many times by several SQ officers. According to B, he had been told that he would be considered a confidential informer as long as the hoped-for co-operating witness agreement with the Crown had not been finalized*. *B’s position throughout was that the SQ had made an explicit promise of informer status. B’s position in his evidence was never that he had inferred from police conduct that they were promising B informer status or that anything done by the police force fed any such inference.*
3. The Crown also called several SQ officers to testify in that regard. They all indicated that the appellant had never been considered a confidential informer and had never been told so. In fact, they indicated that they always had in mind that B was in the process of becoming a co-operating witness and would testify in future court proceedings. The prospect of granting B informer privilege had, according to them, simply never been on their radar.
4. After having considered the testimonial and documentary evidence before him, the application judge proceeded to identify the elements which supported the parties’ respective positions.
5. In support of the appellant’s position, the application judge noted the fact that the SQ in some respects treated B as it would a confidential informer and had invited him to sign a document whereby he would undertake not to seek to invoke informer privilege regarding the information he had provided the SQ.
6. In support of the opposite conclusion, the application judge noted, amongst other things, that (1) the appellant wished to become a police agent and expected to have to testify in future trials, (2) B was arrested for violent criminal activity and the information that he gave the SQ in that regard was used against B, (3) B gave a statement soon after his first meeting with the SQ knowing that this could lead to charges of violent criminal activity, (4) the SQ never produced any source reports regarding the information gathered from him, (5) B was offered immunity and an undertaking not to testify in a prosecution, (6) one of the appellant’s statements was disclosed in the course of another investigation (this is incompatible with the confidentiality owed to an individual benefiting from informer privilege), and that (7) the appellant gave several statements in regards of which he was warned they could be used as evidence in the trial of others.
7. Having completed this exercise, the application judge acknowledged that it was certainly surprising to [translation] “ask someone considered to be a possible witness to waive [his] police informer privilege [some] years after having assigned [him] an identifier reserved for sources”. He also found quite strange that the Crown asked the appellant to undertake not to seek to invoke a privilege that only the SQ police officers could have granted and that they maintained never having granted.
8. Nevertheless, the application judge remained of the view that no express or implied understanding existed between the SQ and the appellant that he would be conferred confidential informer status. Contrary to Justice Abella’s suggestion that the key question of whether there was an implicit promise of confidentiality was left unanswered, this question was in fact specifically answered in the negative by the application judge. Recognizing that the evidence was contradictory, he largely rejected the appellant’s testimony as lacking credibility, and instead accepted the evidence of the SQ officers.
9. The application judge further found that the appellant had *always*, since his first meeting with the SQ, understood that he would testify in other trials. B’s insistence on obtaining confidential informer status was sparked, the application judge found, by disappointment with not being signed on as a co-operating witness and the fruitlessness of the negotiations with the witness protection programme. The application judge was of the view that the appellant seized the opportunity of trying to invoke informer privilege when the Crown tried to obtain an undertaking not to seek to invoke informer privilege; on account of this, the appellant’s behaviour, the application judge opined, was that of an obvious opportunist. Considering this express finding that B only sought to assert privilege after the fact, it is my view that we can conclude that, contrary to my colleague’s statement at para. 20, this *does* “amount to a finding that B knew all along that he did not benefit from confidentiality with the SQ”.
10. With all that having been said, the application judge concluded that an analysis of the testimonies and the exhibits leads to the overriding conclusion that the appellant did not benefit from informer privilege in regard to the information provided to the SQ, but was rather a compellable witness in the trial of other individuals. The judge further found that the SQ had never done anything that would allow B to understand that he would become a confidential police informer.

III. Analysis

A. *What Are the Concrete Realities of This Case?*

1. At the outset, I think it is important to note the concrete realities of the case and the limits of appellate review against which the appellant’s submissions must be assessed. As I see it, there are several matters that must be kept in mind.
2. First, the application judge expressly rejected B’s evidence including the evidence that his status as a confidential police informer was ever promised, or even discussed. He further found that the police had done nothing that would permit B to understand that he was to become a confidential police informer. It is worth setting out in full some key parts of the application judge’s findings in this regard:

 [translation] Officers . . . who were in regular contact with [B] from [the time of his first meeting with the SQ], all state that they always dealt with [him] as a witness to crimes and that they at no time suggested to [him] that they would one day consider [him] a police informer should [he] not be granted a co-operating witness contract. [B] states categorically that the opposite is true and that the officers in question formally undertook to do so on several occasions.

. . .

 The Court accordingly accepts the version of the police witnesses, who have always, since [B’s first meeting with the SQ], made it clear that they intended to have [B] testify publicly about [his] disclosures, and who have always told [him] so without ever suggesting to [him] that [he] might become a police informer should there be no contract with the Crown.

. . .

 . . . the Court must on the basis of the evidence as a whole find that there was no agreement, either express or tacit, between [B] and the officers . . . under which [he] had the status of a police informer . . . . [Emphasis added.]

1. Second, while it may in some rare cases be theoretically possible for a person to be both a Crown witness and a confidential police informer, it was not possible in B’s situation. The application judge recognized this as indeed does B’s own counsel before this Court. Moreover, the application judge specifically rejected as a matter of fact B’s evidence that he was promised confidential informer status pending the resolution of the co-operating witness process and accepted the police evidence that they did nothing that could have led B to understand that he had confidential police informer status at any point in their dealings.
2. Third, the fact that the police have an obligation to protect a person has nothing to do with whether that person is a confidential police informer. There is nothing inconsistent with the police position that, on the one hand, they felt obliged to protect B, and on the other that B was not a confidential police informer.
3. Fourth, it is not open to an appellate court to reweigh the evidence in the record or to draw inferences from the evidence which the application judge refused to draw absent some clear and determinative error on the part of the application judge. In my respectful view, my colleague Abella J.’s reasons run afoul of this important principle in more than one respect.
4. Consider, for example, my colleague’s repeated references to B’s inquiries concerning his “status”. In effect, my colleague suggests that B asked repeatedly about whether he was a police informer and was not given a straight answer. Respectfully, that is not an inference that may be fairly drawn from this record or the application judge’s findings of fact.
5. B’s testimony that he was assured that he had the status of a confidential police informer pending the outcome of the co-operating witness contract process was specifically rejected by the application judge. On the contrary, the judge found expressly that the police, since B’s first meeting with the SQ, had *always manifested the intention to call B to testify* publicly about his revelations to them and that *their discussions with him never allowed him to understand that he could become a confidential source*.
6. According to the police witnesses, whose evidence the judge accepted, B’s preoccupation was with getting a co-operating witness contract — a contract that he could reasonably expect would provide financial and other benefits. It was about the progress of the process of being given such a contract, not whether B was a confidential informer, that B repeatedly inquired and in response to which the police advised that the process was ongoing and that the Crown had the final decision. Any implication that B inquired about his status as a police informer and was not given a straight answer is, respectfully, not supported by either the application judge’s findings or by this record. In fact, the officers who testified on this issue repeatedly asserted that a conversation about B’s status as a “source” or “confidential informer” *simply never occurred*. For example, an officer testified in the following manner:

[translation]

Q But when [he] had these questions, do you remember that Named Person B asked you: “Yeah, but then, if [he] doesn’t sign, what will you do with me?

A No.

Q What am I?

A No.

Q . . . What are you doing with the statements?”

A No. We always worked with the idea that [he] would become a co‑operating witness. When I worked with [him], we took down statements, we went looking for evidence. It was clear to us that it was going to be given to Crown prosecutors so that charges would be laid. But I, anyway, it had been explained to [him] how [he] would become a co­‑operating witness, that is, that there were people who would be deciding that. So we always worked with the idea that [he] would become a co‑operating witness.

Another officer’s testimony on this issue is also instructive:

[translation]

Q And Named Person B, when [he] spoke with you, am I right to say that [he] told you a number of times: “I want to be a ‘source’, I don’t want you to give my statements to anyone” . . . .

A No, Named Person B . . . .

Q . . .

A No, Named Person B, [his] statements were targeted, and we used them . . . Named Person B, every time [he] was with us, [he] knew we were using [his] statements.

Yet another officer provides a similar answer to this question:

[translation]

Q Did you . . . at the beginning of your relationship, if I can call it that . . . as controller with Named Person B, discuss possible avenues for Named Person B at the level, to help you out a bit . . . . Did you describe [him], did you say “OK, you’re a ‘source’, special witness or co‑operating witness in any event”?

A Me, I never spoke . . . .  Me, in my work there, the status of Named Person B, [he] was always going to become a co‑operating witness, become a witness in the case. It was always that.

. . .

Q But did you not also answer [him] that, at any rate, in the meantime, you are a “source”?

A No. No. [He] was always regarded as . . . . In my mind, [he] was going to testify. It was a surprise when we learned that [he] would not be testifying. It was a surprise.

In other words, none of the officers involved failed to give B a straight answer about whether he was a confidential source because there were no such discussions and the very idea of B being or becoming a source never even crossed their minds.

1. In my view, it is not open to this Court on appeal to draw any inference from this record that B inquired whether or not he was a “source” and did not receive a straight answer.Such an inference is not only contrary to the evidence which the application judge accepted but it is also contrary to the judge’s express finding of fact that the SQ did nothing that could have led B to believe that he would become a confidential police source.
2. My colleague also, in my respectful view, oversteps the bounds of appellate review with respect to the issue of alleged police promises of confidentiality. On this, the application judge was alive to and expressly noted that there was a lack of clarity and consistency in the evidence. A review of the record shows that there were indeed some inconsistencies in the police evidence on this issue and that the term “confidential” was used in several different senses. The judge even interjected during the testimony of an officer in order to clarify the sense in which the officer was using the term confidential.
3. The apparent confusion about what was or was not confidential is evident in the police testimony. For example, an officer — in the passage cited by my colleague Abella J. at para. 44 — states that if B does not sign a contract, he will not have to testify and his statements will not be used against him, implying a certain level of confidentiality. Later, however, he testified to having on one occasion acted in a way that was inconsistent with B being a confidential source and insisted that B is not a “source” because with a “source” you cannot divulge his identity. Similarly, another officer is inconsistent in his testimony about confidentiality. While in the passage cited by my colleague at para. 45, the officer states that B’s statements were “always confidential”, he also testifies to the fact that B was never a police informer nor a confidential “source”. On the other hand, the evidence of another officer consistently contrasts B’s situation with that of a police informer — whose identity and statements must be kept secret — and states that there was no confidentiality.
4. Sorting this out was the job of the application judge, not of an appellate court. The judge adverted to this issue (among others) and made findings that the evidence showed that B in this case could not be at the same time a police informer and prosecution witness, that the police had consistently manifested the intention to call B as a witness and that the police had never let B understand that he would become a confidential police informer. There is in my view no basis to interfere with these clear findings.
5. With those matters in mind, I turn to the remaining issues.

B. *Did the Application Judge Fail to Consider Whether a Promise of Confidential Informer Status Could Be Implicit in This Case?*

1. My colleague Abella J. finds that the application judge’s ruling ought to be quashed because he did not consider whether a promise of confidential informer status could be implicit. Respectfully, I do not agree that the judge failed to consider the question. Several considerations lead me to this view.
2. The judge was alive to B’s dealings with other police agencies. Having heard that evidence, however, he found as a fact that the evidence in the case required that B’s dealings with the SQ be considered differently. The judge referred to several differences in support of this conclusion, which is amply supported by the evidence.
3. B had contacted the police for the purpose of providing them with information. During the initial encounter with the SQ, B was taken into custody and arrested for his crime. As I have reviewed above, B made a number of statements. While in some cases, B was promised that the statements would not be used as evidence against B, in many cases it was made perfectly clear to B, and B clearly understood, that they could be used as evidence in court *against others*. That use of B’s statements, of course, is completely inconsistent with any notion that B’s identity as the supplier of that information would remain confidential. In short, the dealings with the SQ consisted of plea bargaining and protracted negotiations of a possible co-operating witness contract, which contemplated B testifying for the Crown in public trials.
4. These considerations lead me to the view that the application judge did not fail to consider whether a promise of confidential informer status could be implicit. Rather, the judge was careful to consider whether any promise was made *implicitly* as well as explicitly, even though B’s evidence was solely to the effect that the SQ had made repeated explicit promises. This was the *sole* basis for his professed belief that he had informer status. In any event, as I will discuss in the next section, the existence of a supposed “implicit promise” was never a live issue on this record.

C. *Is There a Live Issue on This Record as to Whether There may Have Been an Implicit Promise of Informer Privilege by the SQ?*

1. I see no basis on this record for thinking that a reasonable person in the position of B would or could reasonably think his identity as the supplier of the information would remain confidential. This point requires considerable reference to the record as well as to the judge’s findings of fact.
2. To begin, it is critical to understand B’s own evidence before the judge. B consistently maintained that he had received numerous, explicit promises from the SQ that he had the status of a confidential informer pending the negotiation of his “co‑operating witness” contract. B’s position in his testimony was never that his perception of the SQ’s actions led him to believe that his identity was protected. According to B’s own testimony, the supposed understanding of the obligation of confidentiality arose solely from express promises to that effect by officers of the SQ.
3. During the application hearing, the appellant was very clear about the basis upon which he claimed informer privilege: The police had *explicitly* promised him informer privilege status. Indeed, at the beginning of his testimony, B indicated asking the SQ what his status would be shortly after the beginning of his co-operation. According to him, this is what happened:

[translation]

[B] Then, after that, I spoke with the police about . . . . “What will my status be? Are you going to sign me to a contract? Are you going to sign me . . . .” “No, before the contract Named Person B, everything you tell me will remain confidential. There are always . . . . There are 3 types of status: a ‘source’, a special witness or you’re a co‑operating witness.” OK. “So now, for now, you’re a ‘source’.” “Oh yeah?” “Yeah, so everything you tell us now, for us it’s . . . you have no charges now, so we take it and that’s all.”

1. He added that for some months after his first contact with the SQ, he was regularly told by SQ officers that they could not tell him whether or not he would be retained as a co-operating witness, but that, in any event, he was a confidential informer in the meantime:

[translation]

[B]  They said: “. . . [W]e can’t say you’re a special witness, we don’t know that Named Person B, you aren’t a co-operating witness, we don’t know that. So you’re a ‘source’”.

1. Later in his testimony, the appellant identified the individuals who allegedly expressly told him that he would be considered a confidential informer until his co-operating witness candidacy was settled.
2. Never in his testimony did the appellant suggest that his understanding of his alleged confidential status had its origins in anything other than repeated express promises by the SQ. B never suggested in evidence that his dealings with the SQ had given the impression that he had that status. All of the SQ officers testified that not only had no such promises ever been made but that the possibility of B becoming a confidential informer had never been discussed with B or considered by them.
3. The application judge made clear findings of fact regarding the probative value that he attached to the appellant’s testimony. He found that it lacked credibility, and that the *appellant himself* had *always*, since his first meeting with the SQ, understood that he would testify in the trial of other individuals (and therefore his identity could necessarily not remain confidential). This is consistent with the numerous cautions given to the appellant in relation to the many statements given to the SQ. The application judge further found that the appellant’s request for informer privilege was essentially a vain attempt by a disgruntled individual to get back at the Crown and the SQ for the unfair treatment he believed he had experienced in relation to his desire to become a co-operating witness. The judge found as a fact that it was only after B was asked to renounce any intention to claim informer privilege that B started to claim the status of confidential informer. Moreover, as noted, the judge also found as a fact that the SQ never did anything that could have allowed B to understand that he was or might be a confidential police informer. In short, the application judge disbelieved the bulk of the appellant’s version of facts, including his allegation that an explicit promise had been made to him. Significantly, the appellant does not contest the application judge’s devastating findings of credibility regarding his testimony.
4. In addition to rejecting the centrepiece of the appellant’s version of facts, the application judge found as a matter of fact that the SQ officers had always had in mind to have the appellant testify and that they had never intended to make him a confidential informer. This corresponds largely to what the SQ officers who testified said and is, in my view, a perfectly defensible finding of fact, on the record before us.
5. To sum up, the appellant’s own testimony was clear and unequivocal that the claim of informer privilege arose solely from alleged express promises — promises which the application judge concluded had never been made. Moreover, the judge accepted police evidence that there was *never even any thought* of making B a confidential informer and that they did nothing that could let B understand that he had that status. The judge also found that it was some years after B’s initial dealings with the SQ that B started to claim the status of a confidential police informer. These findings leave no room for the imputed or implied promise theory.
6. Moreover, as I touched on earlier, we know that SQ officers arrested the appellant for his criminal activity soon after their first meeting. The appellant was cautioned and specifically informed that anything he would say could be used against him in a court of law. We also know that throughout his relationship with the SQ, his statements were generally accompanied by a warning that either the evidence could be used against him, or, at the very least, that it could be used in the trial of others. The record discloses that the appellant understood this.
7. Indeed, when cross-examined by the Crown, the appellant clearly stated that he understood that his first statements to the SQ could be used against him and entered into evidence in a *public* trial:

[translation]

Q So you, when they tell you “it can be used as evidence against you”, what do you understand that to mean?

A Well, it can be used as evidence against me. That’s what I understand; it’s clear.

Q In what context can it be used as evidence against you?

A Well, it can be used as evidence against me. What do you want me to say? . . .

Q During what? During the trial? During a public trial? So it means that that statement will be used if they say. . . .

A Exactly. Yes, Yes.

Q Do you understand that clearly?

A Yes. Yes. [Emphasis added.]

1. And later, again during his testimony on cross-examination, the Crown attorney read to the appellant a portion of the transcript of one of his interviews conducted after his arrest by the SQ. Therein, an SQ officer explained to the appellant that he had a right to counsel and that anything he would say could be used as evidence in an eventual trial. The Crown attorney then asked the appellant if he had properly understood what the SQ had told him:

[translation]

Q You understood clearly what you were told at that time? You knew that it could be used . . . .

A Yes.

Q . . . as evidence in court?

A Yes. Yes.

1. Not only did the appellant understand that the statements he gave the SQ could be used against him, he even stated that he hoped, at first, to get a co-operating witness contract precisely because he hoped they would not be if he acquired that status:

[translation]

Q Did, did you hope to have a co‑operating witness contract?

A At first, I hoped to have one, because I didn’t want my statements to be held against me, since . . . .

. . .

Yes, I hoped to at first. But then, they kept on telling me: “No, Named Person B, we’ll cross that bridge when we get there.” [Emphasis added.]

1. On account of this evidence, it appears to me that the application judge did not err in deciding that the appellant understood that the information he provided the SQ could be used in public trials and that his identity as the purveyor of that information would not remain confidential, and therefore that he did not benefit from informer privilege in regard to that information. The SQ had told him that at the time of their first contact with B and reiterated it when he started making his statements.
2. In any event, even had he had such an expectation, this expectation as well as any belief that the police had acted on it and guaranteed him confidentiality would have been unreasonable. Indeed, the very fact that he was cautioned several times that his statements could at the very least be entered into evidence against others in public trials is fundamentally incompatible with an expectation or belief in a guarantee of confidentiality.
3. My colleague Abella J. mentions several elements which she believes support her position that the appellant could have believed, on reasonable grounds, that he benefited from informer privilege. Respectfully, I find none to be persuasive.
4. When he was formally charged and cautioned, he would have known that everything he said from that point on could be used as evidence in a court of law. Being treated in that fashion by the police is absolutely incompatible with any notion that it would have somehow led someone to believe that his or her identity as the purveyor of statements to them would be kept confidential. B of course would have fully understood this.
5. I have already discussed my colleague’s suggestion that B repeatedly asked the SQ about his status and did not receive a straight answer. Neither the application judge’s conclusions nor the record permit any such inference to be drawn. I have also referred to the police evidence about confidentiality; the application judge considered this evidence and found that the SQ had done nothing that would allow B to infer that he was a confidential police informer. My colleague also places weight on some documents to support the possibility that B thought he had been implicitly promised confidential source status. The reason that this cannot be so, however, is that there is no evidence that B was even aware of them. The documents could therefore not bear on his belief. The police officers who were in a position to provide the appellant with confidential informer status testified that they never had in mind to make the appellant a confidential informer. The only “status” he had with the SQ, in their mind, was that of an individual in the process of becoming a co-operating witness. This testimony was accepted by the application judge.
6. My colleague points to the fact that the appellant was referred to as a source in two documents while having been named in many others. My colleague concludes that this inconsistent treatment of B may have led B to reasonably assume that he had confidential status with the SQ. Respectfully, this is not an inference that is open on this record. B never suggested any such thing during his extensive testimony. Moreover, there is no evidence that this fact was known by the appellant at the relevant time and it therefore cannot have given rise to any implied promise in the appellant’s mind. If this evidence is seen as undermining the SQ’s evidence that it never considered giving B confidential source status, that use is directly contrary to clear findings of fact by the application judge. Finally, the evidence is inconsequential placed in the correct factual context. The appellant is referred to by name in many documents and this is incompatible with the police having an actual desire to keep his identity confidential. The evidence of the documents provides no basis to set aside the application judge’s finding of fact that the SQ did not ever treat B as a confidential source. The fact that B was not aware of any of this at the time of course means that this could not have given rise to any implied promise of confidentiality.
7. Finally, counsel for the appellant made much of the fact that the Crown tried to get the appellant to sign a document whereby he would undertake not to seek to invoke informer privilege regarding the information he had provided the SQ. At the outset, it bears mentioning that the document in question did not assume that the appellant was a confidential informer. Rather, it only asked the appellant to provide assurances that he would not *seek* confidential informer status in the future. In any event, the evidence is clear that this initiative came from the Crown and not the SQ. While the Crown may have had its reasons to seek such assurances, I do not think that this can be used, without supporting evidence, to conclude that the SQ thought the appellant was a confidential informer or that it gave rise to a reasonable belief that an implied promise of confidentiality had been given. This point was fully considered by the application judge and rejected.
8. To conclude, I am of the view that the implicit promise of confidentiality was never a live issue on this record.

D. *Is the Application Judge’s Finding of Fact That B Actually Knew That He Did Not Have Confidential Informer Status Fatal to B’s Claim?*

1. The application judge in effect found that B *actually knew* that his identity was not protected with respect to the information given to the SQ. My colleague maintains that there was no such finding, but I respectfully disagree. This finding, in my view, is supported by the evidence and fatal to the suggestion that there could be some implied understanding to the contrary. To develop this point, I must touch first on some principles of the law about confidential informers and then return to examine the application judge’s findings.
2. The traditional view is that informer privilege has “contract-like” elements of offer and acceptance. The privilege arises where a police officer promises protection and confidentiality to a prospective informer in exchange for information. In a clear case, confidentiality is explicitly sought and agreed to:  *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, at paras. 31-32; *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389, at para. 36. This promise may be express or implied: *Bisaillon*,at p. 105. While the subjective intent of the police may be relevant to assessing the evidence, subjective intent on their part to confer the privilege is not a necessary element of the test for whether the privilege has been conferred. All of the leading cases from this Court put this rule on this “contract-like” basis.
3. I therefore agree with my colleague Abella J. when she says that the test for whether there was an implicit promise of confidentiality in this case is whether the police conduct would have led someone in B’s position to believe, on reasonable grounds, that such a promise had been made in exchange for the information provided. There is thus both a subjective and an objective element: the alleged source must in fact believe that confidentiality was promised in exchange for the information and that belief must be reasonable, judged from the point of view of a reasonable person in the alleged source’s position. If there is such a belief and it is reasonable, an implicit promise has been established.
4. I note that appellant’s counsel in this Court agrees that the alleged source must believe that the protection has been accorded. As appellant’s counsel put it, [translation] “B’s belief and perception as to his status as an informer is of prime importance”.
5. I emphasize this fundamental point because I am respectfully of the view that my colleague has lost sight of it in her analysis. My colleague spends much effort in trying to demonstrate that if B had believed that he had been promised confidentiality, that belief would have been reasonable. I of course do not accept that contention. But be that as it may, the reasonableness of the belief of some hypothetical person in B’s situation is not sufficient to establish the existence of the privilege unless B also established that he actually believed that the implicit promise had been made. There can be no such finding here and that is fatal to B’s claim.
6. I repeat that B’s position in his extensive testimony was never that there was some sort of implicit promise. B’s alleged belief was based solely on alleged express — and repeated — promises of being given confidential informer status. There is no basis in fact to support the conclusion that B in fact believed that he was an informer. Quite the contrary.
7. The judge correctly noted that the evidence showed that in the circumstances of this case, *B could not be at the same time a prosecution witness and a police informer* with respect to the information given to the SQ. The application judge also proceeded on the basis that in the circumstances here, this would have been clear to B. The application judge makes repeated reference to B’s knowledge that he would be a witness and to the cautions which he had heard and signed that made this explicit. This approach cannot be faulted and accords with the evidence.
8. So far as I am aware, there is no hard and fast rule that a confidential informer cannot become a witness to testify regarding the very information he provided to police in confidence. However, as a practical matter, such situations would be extremely rare. It is hard to see how an informer could testify about certain things without making it obvious that he was a source of the police knowledge about those things. In other words, such testimony could only rarely if at all be given without creating a risk that the informer’s identity as the purveyor of the privileged information would be discovered, an outcome, I would emphasize, the Crown is under a legal obligation to do all in its power to avoid. As a practical matter, unless both the Crown *and* the witness agree to renounce it, informer privilege must be seen as barring, for all practical purposes, the Crown from calling an informer to testify at trial about the very information provided to the police in confidence. The two roles are almost invariably incompatible. Of course, a potential witness would fully understand this as it will generally be obvious that the testimony will reveal the source of the information. The application judge, as noted, concluded that this was the situation in this case. It is also important to remember that the application judge specifically rejected B’s evidence that B was expressly promised the status of confidential informer pending the decision about the possible co-operating witness contract.
9. Taking all of the evidence into account, the judge concluded that B knew he was to be a witness in relation to the information that he provided to the SQ and this necessarily required B to know that he was not a confidential informer. Moreover, and perhaps even more significantly, the judge found that it was only some years after B’s first dealings with the SQ and his being told that his evidence would not for the moment be required that B’s behaviour gradually changed. The judge also found that it was only after B was requested to sign the renunciation of any intention to claim informer privilege and the unsuccessful negotiations with the witness protection service that he asserted confidential informer status. In short, the judge concluded that B knew all along that he had no informer protection and that B’s assertion to the contrary was an after-the-fact exercise of obvious opportunism.
10. In my view, these clear and strong findings are supported by a mountain of evidence, not the least of which is that B in his testimony before the judge at no time suggested that his belief that informer protection had been accorded depended on anything other than express promises by members of the SQ to that effect. The judge found, of course, that there were no such express promises and indeed that the SQ officers did nothing that would let B understand that any such promise was being made.
11. The judge’s conclusions that B actually knew that he did not have informer privilege and that B’s claim of that status was an after-the-fact exercise of opportunism make irrelevant any possibility that some hypothetical person in B’s circumstances might have thought that the promise was implicit. B knew he had no such promise and provided the information anyway. B was a disappointed suitor for a potentially lucrative co-operating witness contract and an opportunist, not a police informer.
12. To conclude on this point, B never claimed to have a subjective belief that he had been promised confidentiality in exchange for the information provided to the SQ on any basis other than express promises. In light of the application judge’s findings, there is no evidence to support the view that B in fact had any such subjective belief on any basis. This, to my way of thinking, makes irrelevant what some hypothetical person in B’s position might reasonably have believed.
13. In light of the record and the findings of fact of the application judge in this case, there is, in my view, no reason to interfere with the application ruling. However, I would underline that I share the application judge’s view that the police and the prosecution could have handled this matter in a more satisfactory manner. Nothing that I have said, therefore, should be taken as undermining the importance of the police being clear with potential sources about their status; quite the contrary.
14. Police informer status plays an important role in the investigation and prosecution of crimes. As this Court noted in *Leipert*, at para. 10, “[t]he rule is of fundamental importance to the workings of a criminal justice system”. In order for it to be effective, the protection provided to police informers must be virtually inviolable, subject only to the narrow innocence at stake exception. Indeed this Court has previously described the privilege as “absolute”: *Vancouver Sun*, at para. 4.
15. Both the police and the public at large benefit from the existence of this privilege because it encourages people to come forward to assist in police investigations:

 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 of the identity of those who give information related to criminal matters in confidence. This protection in turn encourages cooperation with the criminal justice system for future potential informers.

(*Vancouver Sun*, at para. 16)

1. Given the important role that informer status plays in the detection and prosecution of crime, courts must not undermine its effectiveness by condoning police actions which leave potential informers uncertain or confused as to their status. Police actions which amount to deliberate attempts to confuse a person about his status, or even inadvertent actions that have the same effect, reduce confidence in the protection provided by informer privilege. That reduced confidence discourages people with information about criminal activity from reporting to the police, which erodes a powerful investigative avenue.
2. The application judge in this case was clearly alive to these concerns, as he ought to have been, and reached the conclusions he did after a careful and thorough review of all of the evidence. His decision should not be disturbed.
3. I must now turn briefly to two further issues.

E. *Should a New Hearing Be Granted on the Basis That the Application Judge Failed to Pay Heed to the Principles Established by Our Court in R. v. Basi*?

1. The Other Individuals submit that the application judge did not follow the principles established in *Basi* and therefore disregarded their rights to full answer and defence. However, as I find that the appellant does not benefit from informer privilege, the Other Individuals would be entitled to whatever relevant discloseable evidence came out of the SQ’s dealings with the appellant. It follows that any procedural failings on the part of the application judge, if there were such, did not in the end prejudice the Other Individuals.

F. *Would Any Privilege Have Been Lost Through Disclosure of B’s Identity?*

1. The Other Individuals submit that even if the privilege arose, it would have been lost through disclosure of B’s identity. As in my view, the privilege did not arise, I do not have to address this issue. I simply note that it seems to me that this issue would have to be decided if one were of the view that the privilege may have indeed arisen.

IV. Disposition

1. I would dismiss the appeal with no order as to costs.

 *Appeal allowed,* Rothstein *and* Cromwell JJ. *dissenting.*

 Solicitors for the appellant:  Guy Bertrand Avocats, Québec.

 Solicitor for the respondent:  Poursuites criminelles et pénales du Québec, Québec.

 Solicitors for the Others:  Shadley Battista, Montréal.

 Solicitor for the intervener the Director of Public Prosecutions:  Public Prosecution Service of Canada, Ottawa.

 Solicitor for the intervener the Attorney General of Ontario:  Attorney General of Ontario, Toronto.

 Solicitors for the intervener the Criminal Lawyers’ Association (Ontario):  Kapoor Barristers, Toronto.

1. \* Deschamps J. took no part in the judgment. [↑](#footnote-ref-1)
2. \* Deschamps J. took no part in the judgment. [↑](#footnote-ref-2)
3. B, whose identity is anonymous, is referred to in the masculine throughout these reasons. To further protect B’s identity, the name of the police force which granted him informer status, the names of the officers who dealt with him, and the dates of relevant meetings and conversations, have not been disclosed in these reasons. [↑](#footnote-ref-3)
4. B and all other individuals are referred to in the masculine throughout these reasons. [↑](#footnote-ref-4)