

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Brassington, 2018 SCC 37, [2018] 2 S.C.R. 617 | **Appeal Heard:** March 14, 2018  **Judgment Rendered:** July 20, 2018  **Docket:** 37476 |

Between:

Her Majesty The Queen

Appellant

and

Derek Brassington, David Attew, Paul Johnston and Danny Michaud

Respondents

**And Between:**

Person A

Appellant

and

Derek Brassington, David Attew, Paul Johnston and Danny Michaud

Respondents

**And Between:**

Superintendent Gary Shinkaruk

Appellant

and

Derek Brassington, David Attew, Paul Johnston and Danny Michaud

Respondents

**And Between:**

Attorney General of Canada

Appellant

and

Derek Brassington, David Attew, Paul Johnston and Danny Michaud

Respondents

And Between:

Her Majesty The Queen

Appellant

and

Derek Brassington, David Attew, Paul Johnston and Danny Michaud

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**And Between:**

Person A

Appellant

and

Derek Brassington, David Attew, Paul Johnston and Danny Michaud

Respondents

- and -

Attorney General of Ontario, Criminal Lawyers’ Association, Federation of Law Societies of Canada and Independent Criminal Defence Advocacy Society

Interveners

**Coram:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

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| **Reasons for Judgment:**  (paras. 1 to 53) | Abella J. (Wagner C.J. and Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ. concurring) |

R. *v.* Brassington, 2018 SCC 37, [2018] 2 S.C.R. 617

Her Majesty The Queen Appellant

v.

Derek Brassington,

David Attew,

Paul Johnston and

Danny Michaud Respondents

‑ and ‑

Person A Appellant

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**Indexed as:** R. ***v.*** Brassington

2018 SCC 37

File No.: 37476.

2018: March 14; 2018: July 20.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

on appeal from the court of appeal for british columbia

*Criminal law — Defence — Disclosure — Informer privilege — Solicitor‑client communication — Police officers charged with crimes relating to alleged misconduct during police investigation — Officers seeking permission to disclose to their defence lawyers information obtained during investigation that might reveal identity of confidential informers — Whether officers entitled to disclose information — Whether limitations placed on information that officers can disclose to their lawyers interfere with solicitor‑client relationship.*

*Criminal law — Informer‑privileged information — Objection to disclosure —Police officers charged with crimes relating to their conduct during police investigation — Case management judge declaring that officers can discuss information obtained during that investigation with their defence counsel that might reveal identity of confidential informers — Crown objection to disclosure of information dismissed — Whether declaratory order criminal or civil in nature — Whether order authorized form of disclosure to which Crown was entitled to object on public interest grounds under Canada Evidence Act — Whether appeal from dismissal of objection available — Canada Evidence Act, R.S.C. 1985, c. C‑5, ss. 37, 37.1.*

Four police officers were charged with crimes relating to alleged misconduct during a police investigation. Prior to their trial, they applied for a declaration that they could discuss information they learned during the investigation with their defence counsel that might reveal the identity of confidential informers. The assigned case management judge granted the application, declaring that the officers could discuss any information in their possession with counsel. The Crown and the RCMP then brought proceedings to determine whether the communications authorized under the declaratory order constituted “disclosures” within the meaning of s. 37 of the *Canada Evidence Act*. Pursuant to s. 37(1) of the Act, the Crown may object to disclosures on public interest grounds. Section 37.1 of the Act provides a special right of appeal from a determination of an objection. Sections 37 and 37.1 apply to criminal proceedings and other matters over which Parliament has jurisdiction. The case management judge found that she had jurisdiction to hear the Crown’s objection but dismissed it. The Court of Appeal dismissed an appeal from the rejection of the s. 37 objection. It characterized the order allowing disclosure as civil rather than criminal in nature, held that an appeal under s. 37.1 was unavailable and held that the Crown could not object to the declaratory order under s. 37. The case management judge’s declaratory order and the Court of Appeal’s decision were appealed to the Court.

*Held*: The appeals should be allowed. The declaratory order should be set aside. An order should be granted pursuant to s. 37(6) of the *Canada Evidence Act* prohibiting the officers from disclosing informer‑privileged information to their counsel, subject to a successful innocence at stake application.

The case management judge had jurisdiction to hear the Crown’s objection to the declaratory order under s. 37 of the *Canada Evidence Act* and an appeal to the Court of Appeal under s. 37.1 was therefore proper. The declaratory order was criminal in nature and therefore within Parliament’s constitutional authority. In determining whether an order is civil or criminal in nature, what is relevant is not the formal title or styling of the order, but its substance and purpose. Here, the order related to the accused’s claim that declaratory relief was necessary to help them make full answer and defence in ongoing criminal proceedings, and it was issued by a criminal case management judge in connection with the rights of the parties in a pending criminal proceeding, regarding what might be done by the accused in conducting their defence. The fact that it was declaratory does not change its essential character.

Furthermore, s. 37 was the proper route for challenging the order, as it authorized a form of disclosure to which the Crown was entitled to object on public interest grounds. The interconnected purposes of ss. 37 and 37.1 are to give the Crown the ability to object to disclosures on public interest grounds, and to grant an interlocutory right of appeal where it is unsuccessful. They provide a valuable tool for the Crown to protect against disclosure of confidential and privileged information, and reflect the fact that the Crown’s ability to object to disclosures on public interest grounds was not meant to be restricted to those circumstances where the disclosure is compulsory and will occur in open court. Disclosures may be equally harmful to the public interest whether they are made in or outside of court, and whether they are made under compulsion or voluntarily.

The officers are not entitled to disclose the informer‑privileged information to their lawyers. Jurisprudence prevents piercing informer privilege unless the accused can show that his or her innocence is at stake. There is no basis for departing from that rule when the accused is a police officer. Informer privilege arises in circumstances where police receive information under a promise of confidentiality. Informers are entitled to rely on that promise. The informer privilege rule is a common law rule of long standing and it is fundamentally important to the criminal justice system. Subject to the innocence at stake exception, the privilege acts as a complete bar on the disclosure of the informer’s identity, and the police, the Crown and the courts are bound to uphold it. The standard for piercing informer privilege — the innocence at stake test — is, accordingly, onerous. The privilege should be infringed only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction. The officers in this case did not argue that any privileged information in their possession meets the innocence at stake test. Nor did they suggest any information relating to confidential informers was genuinely relevant to their defence.

Furthermore, as previously confirmed by the Court, defence counsel are outside the circle of informer privilege, that is, the group of people who are entitled to access information covered by informer privilege. In all cases where informer privilege applies, disclosure outside the circle requires a showing of innocence at stake. Limitations placed on what the police officers can say to their lawyers do not create conflicting legal and professional duties; rather, they align with the officers’ professional duties and allow their lawyers to proceed without fear of inadvertently revealing the privileged information their clients possess. The law may require officers to exercise some degree of caution with respect to what they disclose, but that expectation does not meaningfully interfere with their relationship with counsel. The primary purpose of the right to free solicitor‑client communication in a criminal proceeding is to permit the accused and counsel to discuss issues that go to full answer and defence — “solicitor‑client communication” does not have some independent, intrinsic value over and above its relationship to full answer and defence. Like any other criminal defendant, if it becomes clear that the police officers are at genuine risk of conviction, and that this information needs to be disclosed, they can bring a *McClure* application.

Police officers are, when accused of crimes, entitled to expect that they will be treated no less fairly than others who are accused and given the full protection of the law. What they are not entitled to expect is that they will be treated better. There is no reason to advantage police officers who, by virtue of their positions of trust, have information that has been confided to them for safekeeping. It is not their information to exploit for personal juridical gain.

**Cases Cited**

**Considered:** *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Canadian Broadcasting Corp. v. Ontario*, 2011 ONCA 624, 107 O.R. (3d) 161; *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389; **referred to:** *R. v. Cheung*, 2000 ABQB 905, 150 C.C.C. (3d) 192; *R. v. Trang*, 2001 ABQB 437, 201 D.L.R. (4th) 160; *R. v. Sandham* (2008), 248 C.C.C. (3d) 543; *R. v. Stobbe*, 2011 MBQB 293, 284 C.C.C. (3d) 123; *Canadian Broadcasting Corp. v. Millard*, 2015 ONSC 6583, 338 C.C.C. (3d) 227; *R. v. Stanley*, 2018 SKQB 27; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *R. v. Named Person B*, 2013 SCC 9, [2013] 1 S.C.R. 405; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253; *R. v. Durham Regional Crime Stoppers Inc.*, 2017 SCC 45, [2017] 2 S.C.R. 157; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185; *R. v. Leipert*, [1997] 1 S.C.R. 281; *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32.

**Statutes and Regulations Cited**

*Canada Evidence Act*, R.S.C. 1985, c. C‑5, ss. 2, 37, 37.1.

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 648(1).

**Authors Cited**

Hubbard, Robert W., Peter M. Brauti and Scott K. Fenton. *Wiretapping and Other Electronic Surveillance: Law and Procedure*, Aurora, Ont.: Canada Law Book, 2000 (loose‑leaf updated March 2018, release 56).

Hubbard, Robert W., Susan Magotiaux and Suzanne M. Duncan. *The Law of Privilege in Canada*, Aurora, Ont.: Canada Law Book, 2006 (loose‑leaf updated March 2018, release 44).

APPEALS from a judgment of the British Columbia Court of Appeal (Newbury, Frankel and Savage JJ.A.), 2017 BCCA 84, varying an order of Wedge J., 2016 BCSC 163. Appeals allowed.

APPEALS from a judgment of the British Columbia Supreme Court (Wedge J.), 2015 BCSC 2001, granting a declaration that the respondents are permitted to provide information about confidential informers to their legal counsel. Appeals allowed.

Christopher M. Considine, Q.C., and Christopher A. Massey, for the appellant Her Majesty The Queen.

Patrick McGowan, for the appellant Person A.

François Lacasse and Ginette Gobeil, for the appellants Superintendent Gary Shinkaruk and the Attorney General of Canada.

Ian Donaldson, Q.C., *Michael Sobkin* and Miriam Isman, for the respondent Derek Brassington.

Michael Klein, Q.C., for the respondent David Attew.

Michael Bolton, Q.C., for the respondent Paul Johnston.

Greg DelBigio, Q.C., and Alison Latimer, for the respondent Danny Michaud.

Robert W. Hubbard and *Rebecca Schwartz*, for the intervener the Attorney General of Ontario.

Scott Hutchison and Lisa Jørgensen, for the intervener the Criminal Lawyers’ Association.

Breese Davies and Owen Goddard, for the intervener the Federation of Law Societies of Canada.

Written submissions only by Brock Martland, for the intervener the Independent Criminal Defence Advocacy Society.

The judgment of the Court was delivered by

1. Abella J. — These appeals involve primarily one substantive question: when police officers are charged with crimes relating to their conduct during an investigation, can they, at their own discretion, disclose to their defence lawyers information they learned during that investigation that might reveal the identity of a confidential informer?
2. Our jurisprudence prevents piercing informer privilege unless the accused can show that his or her innocence is at stake. I see no basis for departing from that rule when the accused is a police officer. No evidence of “innocence at stake” was presented. The police officers are therefore not entitled to disclose the information to their lawyers.

Background

1. These proceedings arose from the “Surrey Six” investigation, a complex RCMP investigation into a gang-related homicide. According to the Crown, about 80 confidential informers were involved in the investigation.
2. The four accused — Derek Brassington, David Attew, Paul Johnston and Danny Michaud — are former police officers who were involved in that investigation. They have been charged with breach of trust, fraud, and obstruction of justice in connection with their conduct with a witness who, while not a confidential informer, was under their protection in connection with the investigation. The allegations — the details of which are not relevant to the disposition of these appeals — have not yet been proven.[[1]](#footnote-1)
3. When the officers were charged, the RCMP and the Crown told them that they were prohibited from discussing “the circumstances of their investigations in a manner that might reveal the identity of confidential informers to anyone, including their legal counsel”.
4. The officers brought a pre-trial application before Wedge J., the assigned case management judge, for a declaration that they could discuss information with their defence counsel that might reveal the identity of confidential informers. The Crown resisted the application, arguing that such discussions would breach informer privilege and that the officers could only do so if they met the “innocence at stake” test. Although the officers stopped short of arguing that they could, at that stage, satisfy the “innocence at stake” test, they deposed that they wished to discuss the information in their possession because they believed it “may be relevant to their defence” and in order to determine “whether there is evidentiary value in the privileged information”. One deposed that he believed “he could not fully and properly instruct counsel [and receive advice] without directly or indirectly disclosing the identity of one or more confidential informers”.
5. The Crown pointed out that there was no evidence that any confidential informers were even involved in any of the transactions that formed part of the Crown’s case against the police officers. Their evidence, therefore, had no apparent relevance.
6. “Person A”, a confidential informer, was granted standing to make submissions as to why the disclosure should be prohibited. The Federal Crown and RCMP Superintendent Gary Shinkaruk were also parties.
7. Wedge J. granted the officers’ application and declared that they could discuss any information in their possession with counsel. She acknowledged the “near-absolute” nature of informer privilege, but also considered the importance of “unfettered communication” between the accused and counsel in a solicitor-client relationship. She concluded that the requirement of proving “innocence at stake” did not apply because, in her view, that narrow exception fit poorly in circumstances where the accused *already knows* the privileged information and merely seeks to discuss it with counsel. She found that both informer privilege and solicitor-client communication could harmoniously co-exist:

Whatever the client tells his or her lawyer is cloaked with privilege. If the client speaks to his or her lawyer about matters that may tend to identify an informer, the information is privileged . . . . [T]he lawyer stands in the shoes of the client. The lawyer will be duty-bound by both solicitor-client privilege and informer privilege . . . . [The information] will remain imbued with that privilege unless and until [the officers] receive advice from their counsel that seeking disclosure of information pertaining to informers is necessary to raise a reasonable doubt as to their guilt and a *McClure* application is made at trial.

(2015 BCSC 2001, reproduced in A.R., vol. I, at pp. 16-55, at para. 134.)

1. The Crown and the RCMP then brought proceedings before Wedge J. under s. 37 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, to determine whether the communications authorized under the initial declaratory order constituted “disclosures” within the meaning of s. 37 such that the Crown could object to them under that section. If they were, the Crown would have an immediate right of appeal to the Court of Appeal against Wedge J.’s denial of its objection, pursuant to s. 37.1 of the *Canada Evidence Act*.[[2]](#footnote-2)
2. Section 37(1) states, in part:

. . . a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

1. Wedge J. found that she had jurisdiction to hear the s. 37 objection because her declaration authorized a form of “disclosure” to which the Crown objected on public interest grounds, thereby triggering s. 37. But she dismissed the objection based on the reasoning in her initial ruling on the officers’ application.
2. The Crown, the RCMP and Person A then appealed the rejection of the s. 37 objection, and the police officers sought to set aside Wedge J.’s finding that she had jurisdiction to hear the objection. At the Court of Appeal, Frankel J.A. characterized the order being appealed as “civil” rather than “criminal” in nature, since a declaration is a civil remedy. As a result, he concluded that an appeal to the Court of Appeal under s. 37.1 was unavailable and the provincial civil appeal rules applied. He also held that the Crown could not object to the declaratory order under s. 37 because it was not a “disclosure” within the meaning of that section, since it did not “require” anyone to disclose anything.
3. The Crown, the RCMP and Person A obtained leave to appeal the initial declaratory order as well as the Court of Appeal’s decision.

Analysis

1. It may be helpful to begin by observing that this case comes before the Court via an unusual procedural route. Ordinarily, informer privilege litigation centres on one or both of two issues: scope and piercing. Disputes about the scope of privilege are relatively common, arising, for example, where the Crown seeks to redact portions of documents that are otherwise producible under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, but contain informer-privileged information, such as an Information to Obtain a Search Warrant. In pre-trial proceedings, a judge may vet the redactions to determine whether the redacted information is properly covered by informer privilege. At this stage, if the information is covered by the privilege, the accused cannot get access to it. Where an accused seeks to pierce privileged information, on the other hand, he or she brings an application, typically at the end of the Crown’s case at trial, pursuant to this Court’s decision in *R. v. McClure*, [2001] 1 S.C.R. 445. Access to the information will be given only where an accused demonstrates “innocence at stake”, as explained later in these reasons.
2. The application in this case was not brought under the ordinary *McClure* process, nor was it adjudicated under *McClure* principles. Instead, the accused sought a pre-trial remedy of declaratory relief, relating not to the *scope* of privilege, but rather to who is entitled to *access* information that everyone agrees is within the scope. These anomalies, in turn, led the Crown to bring proceedings under s. 37 of the *Canada Evidence Act* to object to the declaratory order after it had been made. This gave rise to the jurisdictional dispute litigated up to the Court of Appeal.
3. Although I do not see any determinative procedural or jurisdictional defect in the Crown’s approach to litigating this case, and although I acknowledge how unusual the facts in this case are, neither would I endorse what happened in this case as a procedural template for informer privilege litigation.
4. The root of the jurisdictional issue before us is whether Wedge J.’s order was “civil” or “criminal” in nature. The *Canada Evidence Act* is federal legislation, and Part I of that statute applies only to criminal proceedings or to other matters over which Parliament has jurisdiction (s. 2). For this reason, the characterization of Wedge J.’s declaratory order determines whether s. 37 of the *Canada Evidence Act* has any application in the circumstances of this case.
5. In *Dagenais v. Canadian Broadcasting Corp.*,[1994] 3 S.C.R. 835, at p. 879, Lamer C.J. held that in determining whether an order is civil or criminal in nature, what is relevant is not the formal title or styling of the order, but its substance and purpose. The accused in *Dagenais* brought proceedings seeking an “injunction” against the broadcast of a television program they claimed would prejudice their right to a fair trial. Lamer C.J. held that despite the fact that an injunction is traditionally a civil remedy, the order sought related to the accused’s fair trial rights in the context of an ongoing criminal proceeding. It could not, therefore, be characterized as “civil”.
6. In *Canadian Broadcasting Corp. v. Ontario*, 107 O.R. (3d) 161, Doherty J.A. built on *Dagenais*’ foundation to explain how to apply the distinction between “civil” and “criminal” orders:

Usually, it will not be difficult to distinguish a criminal proceeding from a civil proceeding. An application for an order made in the course of a criminal proceeding, an application for an order directly impacting on an ongoing or pending criminal proceeding, or an application for an order rescinding or varying an order made in a criminal proceeding will all be criminal proceedings . . . . [para. 17]

1. In that case, the Canadian Broadcasting Corporation sought access to a video in the custody of the Ontario Court of Justice that had been an exhibit at a concluded bail hearing. Doherty J.A. held that the order was not criminal in nature because, unlike the publication ban/injunction at issue in *Dagenais*, the request

was not made in the course of a criminal proceeding and has no effect on any ongoing criminal proceeding. Indeed, there is no ongoing criminal proceeding. Nor does the order obtained by the CBC rescind or vary any order made in a criminal proceeding. [para. 18]

1. In this case, the order sought related to the accused’s claim that declaratory relief was necessary to help them make full answer and defence in ongoing criminal proceedings. It was issued by a criminal case management judge, in connection with the rights of the parties in a pending criminal proceeding, regarding what might be done by the accused in conducting their defence. The fact that the order was declaratory does not change its essential character as “criminal”, not “civil”.
2. Having concluded that what we are dealing with is an order that is “criminal” in nature and therefore within Parliament’s constitutional authority, the next issue is whether s. 37 of the *Canada Evidence Act* was the proper route for challenging the order.
3. Section 37(1) gives the Crown the right to object to certain types of disclosures of information on public interest grounds. As previously noted, it states, in part:

. . . a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed *on the grounds of a specified public interest*.

1. A court to which such an objection is made assesses the public interest claim and, in light of that assessment, can order disclosure (s. 37(4.1)), order disclosure subject to conditions and editing (s. 37(5)), or prohibit disclosure (s. 37(6)).
2. Section 37.1 sets out a special interlocutory right of appeal to the provincial or federal courts of appeal, as the case may be, for determinations made under s. 37.
3. Wedge J. concluded that s. 37 was properly invoked to object to her declaration, but rejected the objection on the basis that the declaration did no harm to informer privilege, and, therefore, to the public interest. The Court of Appeal, on the other hand, concluded that s. 37 did not apply at all.
4. This Court confirmed in *R. v. Basi*, [2009] 3 S.C.R. 389, that the Crown is entitled to commence an “incidental” proceeding under s. 37 because maintaining informer privilege is the sort of “specified public interest” contemplated by s. 37 as a valid basis for the Crown to resist disclosure. In *Basi*, the accused applied for disclosure of documents over which the Crown claimed informer privilege and the Crown sought an *ex parte* hearing to establish its privilege claim. Counsel for the accused sought access to the hearing subject to an undertaking that they would not disclose any of the privileged information to the accused. The trial judge granted access on those terms, and the Crown then commenced proceedings under s. 37, objecting to the ruling granting access to the hearing. Fish J., for this Court, held that s. 37 was properly invoked by the Crown to object in such circumstances, as the ruling constituted a form of disclosure of information.
5. The Court of Appeal, however, sought to distinguish this case because *Basi* involved a *compulsory* disclosure order. The Court of Appeal reasoned that where, as here, the order merely declares that a party is *permitted* to disclose, rather than *required* to disclose, there is no “disclosure” order to which an objection can be made, and s. 37 is therefore unavailable. The Court of Appeal also sought to distinguish this case because *Basi* involved a disclosure that was to be made in court. Section 37, Frankel J.A. held, “was not intended to prevent a person who possesses information from voluntarily disclosing that information outside of [court] proceedings”.
6. The police officers said in their affidavits that they sought the declaration because they wanted to disclose informer-privileged information to their lawyers. If left undisturbed, the declaratory order would have led inexorably to disclosure. To argue, then, that there was no “disclosure” order because the order did not strictly require the officers to do what they said they intended to do, or because the disclosure would occur outside court, replaces a plain meaning interpretation with a purely technical one, leaving the purpose of the provision as a casualty in its wake.
7. The purposes animating ss. 37 and 37.1 fully support their availability in the circumstances of this case. The interconnected purposes of ss. 37 and 37.1 are to give the Crown the ability to object to disclosures on public interest grounds, and to grant an interlocutory right of appeal where it is unsuccessful. They provide a “valuable tool in the Crown’s arsenal for protection against disclosure of confidential and privileged information” (Robert W. Hubbard, Peter M. Brauti and Scott K. Fenton, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (loose-leaf), at p. 9-27).Their purposes reflect the fact that the Crown’s ability to object to disclosures on public interest grounds was not meant to be restricted to those circumstances where the disclosure is compulsory and will occur in open court. Disclosures may be equally harmful to the public interest whether they are made in or outside of court, and whether they are made under compulsion or voluntarily. Disclosure of sensitive information, and especially informer-privileged information, can have very serious and immediate consequences for third parties and the administration of justice. That is why Parliament carved out a special process for challenging those disclosures. That process also includes an exception to the ordinary rule against interlocutory appeals in criminal matters, one of the “prime advantages” of invoking s. 37 as a “fail-safe mechanism” (Robert W. Hubbard, Susan Magotiaux and Suzanne M. Duncan, *The Law of Privilege in Canada* (loose-leaf), at pp. 3-44.4 and 3-45).
8. Because, in my respectful view, Wedge J.’s declaratory order was criminal in nature and authorized a form of disclosure to which the Crown was entitled to object on public interest grounds under s. 37 of the *Canada Evidence Act*, an appeal to the Court of Appeal under s. 37.1 was therefore proper.
9. This brings us to the substantive issue raised by the appeal of Wedge J.’s order, namely, whether the officers were entitled to disclose informer-privileged information to their lawyers in the absence of a judicial determination that “innocence at stake” had been established.
10. Informer privilege arises in circumstances where police receive information under a promise of confidentiality. Such a promise can be explicit, or can arise implicitly from police conduct that would “have led a person in the shoes of the potential informer to believe, on reasonable grounds, that his or her identity would be protected” (*R. v. Named Person B*, [2013] 1 S.C.R. 405, at para. 18). Informers are entitled to rely on the promises that police officers make to them because they are otherwise at serious risk of potential personal danger if their cooperation becomes known (*Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, at para. 16). And “[w]hen it is known in the community that an individual’s identity is privileged if he or she provides confidential information to the police, others may come forward” (Hubbard, Magotiaux and Duncan, at p. 2-2).
11. This Court recently summarized the rule in *R. v. Durham Regional Crime Stoppers Inc.*, [2017] 2 S.C.R. 157, where Moldaver J. said:

The informer privilege rule is a common law rule of long standing — and it is fundamentally important to the criminal justice system. Informers play a critical role in law enforcement by providing police with information that is otherwise difficult or impossible to obtain. By protecting the identity of individuals who supply information to the police — and encouraging others to do the same — informer privilege greatly assists the police in the investigation of crime and the protection of the public. Subject to the innocence at stake exception, the privilege acts as a complete bar on the disclosure of the informer’s identity, and the police, the Crown and the courts are bound to uphold it. [para. 1]

1. The standard for piercing informer privilege — the “innocence at stake” test — is, accordingly, onerous. The test was set out by this Court in *McClure*. The “privilege should be infringed only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction” (*McClure*, at para. 47). The *McClure* application is typically made at the close of the Crown’s case so courts only consider piercing informer privilege when strictly necessary (*R. v. Brown*, [2002] 2 S.C.R. 185, at para. 52). There are no other exceptions to informer privilege (*Vancouver Sun*, at para. 28; *R. v. Leipert*, [1997] 1 S.C.R. 281). It is “not something that allows for weighing on a case-by-case basis the maintenance or scope of the privilege depending on what risks the informer might face” (*Vancouver Sun*, at paras. 19 and 22).
2. On a *McClure* application, the accused seeks to gain access to informer-privileged information through, ordinarily, a two-stage process. The first stage typically takes place in open court, with the accused and all counsel present. At this stage, as a threshold matter, the accused must establish that the privileged information is not available from any other source and that, in light of the Crown’s case, there is no other way for him or her to raise a reasonable doubt. At this stage he or she must also establish an “evidentiary basis to conclude that a communication exists that could raise a reasonable doubt as to his guilt” (*Brown*, at para. 4).
3. If such a basis exists, the second stage of the process occurs. At this stage, the trial judge should proceed to “examine the communication to determine whether, in fact, it is likely to raise a reasonable doubt” (*Brown*, at para. 4). Depending on the circumstances of the case, the trial judge may review the information alone, or with the assistance of Crown counsel, or with the assistance of *amicus* where necessary, *in camera* (see, generally, *Brown*; *Vancouver Sun*, at paras. 45-49).
4. At no time have the police officers in this case argued that any privileged information in their possession meets the “innocence at stake” test. Nor have they argued that any of the information relating to confidential informers in the “Surrey Six” investigation is *genuinely* relevant to their defence. They say only that they believe information they possess “may” be relevant, and therefore that they wish to explore its relevance. The female witness at the centre of the police officers’ alleged criminal conduct was not a confidential informer, and the Crown states that to its knowledge no confidential informers were involved in the events that led to these charges.
5. What they argue instead is that this is not a case where “innocence at stake” applies. In their view, the Crown’s position would impose restrictions on the right to “unfettered communication” between the accused and their lawyers, lawyers, moreover, who are bound by both solicitor-client privilege *and* informer privilege.
6. Resolving this issue therefore requires consideration of who falls within the “circle” of informer privilege — the group of people who are entitled to access information covered by informer privilege and who are bound by it. Traditionally, this circle is tightly defined and has only included the confidential informer himself or herself, the police, the Crown and the court (*R. v. Barros*, [2011] 3 S.C.R. 368, at para. 37). If defence counsel can be brought into the circle, then the “innocence at stake” paradigm does not apply. If they cannot, it does.
7. I agree with the Crown that the “innocence at stake” paradigm applies because defence counsel are outside the “circle of privilege”. In *Basi*,Fish J., for the Court, confirmed that defence counsel are not bound by informer privilege and are “outside the circle”. He held that permitting defence counsel to have access to informer- privileged information subject to an undertaking that they would not disclose the information to their clients would be improper, since “[n]o one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies” (para. 44). He went on to observe the problems inherent in bringing defence counsel into the “circle”:

To hold otherwise is to place defence counsel in an awkward and professionally undesirable position. The concern is not that defence counsel would intentionally violate their undertakings or the court order; rather, it is that respecting the undertakings and court order would, at best, strain the necessary relationship between defence counsel and their accused clients.

Defence counsel would have to remain constantly on guard never to say or do anything, even inadvertently, that might tend to reveal the informant’s identity. This exceedingly onerous constraint would by its very nature “preven[t] frankness and fette[r] the free flow of information between lawyer and client”, and otherwise impair the solicitor-client relationship . . . . In certain cases, defence counsel might feel bound to withdraw their representation, caught in a conflict between their duty to represent the best interests of their client and their duty to the court not to disclose or to act on the information heard *in camera* . . . . [Emphasis deleted; paras. 45-46.]

1. The police officers attempted to distinguish *Basi* on the basis that, in this case, disclosure would not place a strain on the solicitor-client relationship, because the accused already have this information. In fact, they submit, the strain is created by *non-*disclosure, because the accused possess the information while counsel do not.
2. In my view, this attempt to distinguish *Basi* is unpersuasive. If the officers discuss this informer-privileged information with their lawyers, and their lawyers cannot use it until they bring a successful “innocence at stake” application at the close of the Crown’s case, the lawyers will be caught in a conflict of duties similar to, if not more serious than, the “awkward and professionally undesirable position” described in *Basi*. On the one hand, their duty to the client will tell them to use the information. On the other, informer privilege will instruct them to remain silent. The rationale in *Basi* therefore applies. I do not accept the police officers’ argument that limitations placed on what *they* can say to their lawyers creates the type of “strain” contemplated in *Basi*. Those limitations, unlike the limitations placed on the lawyer in *Basi*, do not create conflicting legal and professional duties: they align with the officers’ professional duties and allow their lawyers to proceed without fear of inadvertently revealing the privileged information their clients possess. They may require officers to exercise some degree of caution with respect to what they disclose, but that expectation does not meaningfully interfere with their relationship with counsel.
3. More recently, in *Barros*, the Court again considered and rejected the argument that the defence — and in particular its agent, the investigator — was bound by informer privilege:

The duty to protect and enforce informer privilege rests on the police, the Crown, and the courts, but we have been referred to no prior case where the duty has been extended to the accused and his or her representative . . . apart from the exceptional case of inadvertent disclosure to defence counsel . . . . [para. 37]

1. Since defence counsel are outside the circle of privilege, it is no answer for the police officers to say that the risk to the informer posed by disclosure to defence counsel is low. That may well be, as the legal system rightly places great trust in defence counsel. But it represents precisely the sort of “case-by-case” balancing of risks and benefits this Court said was impermissible in *Vancouver Sun*. In all cases where informer privilege applies, disclosure outside the circle requires a showing of “innocence at stake”.
2. There is no reason that this conclusion should yield to the argument of the police officers that applying the “innocence at stake” paradigm would interfere with what they characterize as their right to “unfettered” communication with counsel. Here, the officers are barred from discussing issues that have not yet been judged to meet the “innocence at stake” standard, the standard that the Court has consistently concluded is the one that strikes an appropriate balance between the right to make full answer and defence and the need to protect confidential informers (*Vancouver Sun*, at para. 28; *Leipert*, at para. 28). In my view, adding to the analysis a consideration of the burden on what the accused can say to his or her lawyer does not change the balance in a meaningful way. The primary purpose of the right to free solicitor-client communication in a criminal proceeding is to permit the accused and counsel to discuss issues that *go to* full answer and defence. In these circumstances, “solicitor-client communication” does not have some independent, intrinsic value over and above its relationship to full answer and defence. Like any other criminal defendant, if it becomes clear that the police officers are at genuine risk of conviction, and that this information needs to be disclosed, they can bring a *McClure* application.
3. In effect, the police officers are inviting this Court to establish a new exception to informer privilege sourced in the right to solicitor-client privilege. I would, with respect, reject that invitation, not only because this Court has made clear that it will not create new *ad hoc* exceptions to informer privilege, but also because the police officers’ argument is predicated on a misconception of the right to solicitor-client privilege, and of how it interacts with other legal obligations (in this case, informer privilege). Solicitor-client privilege protects from disclosure and compulsion the accused’s communications with counsel, subject to very narrow, limited exceptions (*Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] 1 S.C.R. 401; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860). It does not, however, provide a licence to the client to communicate information that is otherwise protected from disclosure if it tends to identify a confidential informer. In other words, although solicitor-client privilege provides a near-impenetrable shield for communications with counsel, it is not a sword that can be wielded to pierce informer privilege.
4. The officers submit that they need to be able to discuss the information in their possession with their lawyers in order to determine whether they should bring a *McClure* application in the first place. But this Court has refused to permit disclosure of privileged information solely for exploratory purposes, absent a showing that disclosure is “absolutely necessary” (see, for example, *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, at para. 21). The law does not permit the piercing of informer privilege solely based on the speculative possibility that relevant exculpatory information might be revealed. Nor does it permit disclosure simply because disclosure *might* be helpful to the defence. The standard remains “innocence at stake”.
5. Nor am I persuaded that it would be necessary for the officers to disclose privileged information in order to have the discussions necessary to determine whether to bring a *McClure* application. If an accused officer believes that evidence pertaining to a confidential informer would prove that officer’s innocence, he or she could simply advise counsel of this without disclosing any details tending to identify the informer. Then, at the end of the Crown’s case, a *McClure* application could proceed, with the trial judge determining the particulars of how each step of that application should unfold.
6. Requiring the police officers to exercise caution with respect to what information they disclose to their lawyers does not amount to a *per se* interference with their constitutional rights. Police officers bear particular responsibilities by virtue of the positions of power and trust they occupy, including obligations to keep informer-privileged information in the strictest confidence. Neither the right to solicitor-client privilege nor the right to make full answer and defence relieves police officers of those obligations. And, conversely, holding police officers to those obligations does not, in these circumstances, meaningfully interfere with either right. Police officers are expected to know what their obligations and responsibilities are and to act in accordance with them. The law may require them to exercise caution with respect to what information they disclose to their defence lawyers, but it is not an onerous burden on police officers to prohibit them from committing an illegal breach of their obligations to maintain privilege. And it is not, as discussed earlier in these reasons, an impediment to discussing anything genuinely necessary to making full answer and defence.
7. Moreover, where the officers’ obligations bar them from discussing matters with counsel, it is only because they possess information that any other accused person could only obtain after establishing “innocence at stake”. Police officers are, when accused of crimes, entitled to expect that they will be treated no less fairly than others who are accused and given the full protection of the law. What they are not entitled to expect is that they will be treated better. There is no reason to advantage police officers who, by virtue of their positions of trust, have information that has been confided to them for safekeeping. They hold that information strictly for law enforcement purposes, and may use it only in furtherance of those purposes. It is not their information to exploit for personal juridical gain.
8. I would therefore allow the appeals and set aside Wedge J.’s declaratory order permitting disclosure of informer-privileged information. The Crown’s request for an order pursuant to s. 37(6) of the *Canada Evidence Act* prohibiting the police officers from disclosing informer-privileged information to their counsel, subject to a successful “innocence at stake” application, is granted.

*Appeals allowed.*

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1. On the consent of counsel, the courts below have treated this proceeding as subject to the publication ban set out in s. 648(1) of the *Criminal Code*. The application of s. 648(1) to pre-trial proceedings such as these, where no jury has yet been struck, is the subject of conflicting decisions in trial courts (see, for example, *R. v. Cheung* (2000), 150 C.C.C. (3d) 192 (Alta. Q.B.); *R. v. Trang* (2001), 201 D.L.R. (4th) 160 (Alta. Q.B.); *R. v. Sandham* (2008), 248 C.C.C. (3d) 543 (Ont. S.C.J.); *R. v. Stobbe* (2011), 284 C.C.C. (3d) 123 (Man. Q.B.); *Canadian Broadcasting Corp. v. Millard* (2015),338 C.C.C. (3d) 227 (Ont. S.C.J.); *R. v. Stanley*, 2018 SKQB 27). Without purporting to resolve the issue , I am satisfied that the reasons as written can be published and disseminated in accordance with the Court’s usual practice. [↑](#footnote-ref-1)
2. **37.1 (1)** An appeal lies from a determination under any of subsections 37(4.1) to (6)

   **(a)** to the Federal Court of Appeal from a determination of the Federal Court; or

   **(b)** to the court of appeal of a province from a determination of a trial division or trial court of a superior court of the province. [↑](#footnote-ref-2)