

CANADA / JUDGMENT

R. v. Podolski

2015 BCCA 513

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 513 R. v. Podolski

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Podolski,

2015 BCCA 513

Date: 20151216

Dockets: CA40515; CA40551; CA40652

Docket: CA40515

Between:

Regina

Respondent

And

Leslie Podolski

Appellant

- and -

Docket: CA40551

Between:

Regina

Respondent

And

Sheldon Richard O'Donnell

Appellant

- and -

Docket: CA40652

Between:

Regina

Respondent

And

Peter Manolakos

Appellant

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Before:

The Honourable Mr. Justice Lowry

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated November 25, 2012 (R. v. Sipes, Kelowna Docket 66431)

Counsel for the Appellant,

Leslie Podolski:

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Counsel for the Appellant,

Sheldon Richard O'Donnell:

C.L. Bauman

Counsel for the Appellant,

Peter Manolakos:

M.A. Nathanson

Counsel for the (Crown) Respondent:

S.J. Brown, D.J. McLaughlin

and M.J. Brundrett

Place and Date of Hearing:

Vancouver, British Columbia

November 20, 2015

Place and Date of Judgment:

Vancouver, British Columbia

December 16, 2015

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Mr. Justice Lowry

The Honourable Madam Justice Fenlon

Summary:

The appellants were charged with offences relating to the killing of three men. Before trial, several off-the-record hearings were held to determine the status of persons alleged to be confidential informants. Defence counsel had a limited opportunity to make submissions at some of these hearings. The presiding judge concluded that all but one person whose status was considered was not protected by informant privilege. The appellants were convicted at trial and sought to appeal, inter alia, the findings of the judge with respect to the persons' status. The Crown applied to strike the grounds of appeal relating to the off-the-record hearings on the basis that the appellants lacked standing to appeal the decisions, and on the basis that the issue was moot. Held: application allowed. In a proceeding to determine confidential informant privilege, only the person claiming the privilege and the Attorney General participate as of right. Allowing defence counsel some limited participation in the hearing does not grant the accused standing. Accused may have standing to challenge the extent of an informant's privilege, but not the existence of the privilege itself. The Crown's mootness argument need not be addressed.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] On November 25, 2012, following an 18-month trial before Mr. Justice Smart and a jury, Leslie Podolski was convicted of first degree murder, Sheldon Richard O'Donnell was convicted of first degree murder and two counts of second degree murder, and Peter Manolakos was convicted of first degree murder and manslaughter. Each of the three accused appeals his convictions.
- [2] Podolski's amended notice of appeal describes, among others, the following grounds of appeal that relate to certain off-the-record ("OTR") proceedings before the commencement of the trial proper:
1. The trial judge erred by receiving submissions and evidence from the crown and/or police in ex parte proceedings where defence counsel and the accused were prohibited from attending with no amicus appointed to represent the interests of the accused.
 2. The trial judge erred by relying on notes made by police officers and other hearsay rather than direct evidence from the informants, and by making findings regarding their informant status based on this incomplete record.
 3. The trial judge applied the wrong legal test in determining whether these individuals were protected by informant privilege.
 4. The trial judge erred in finding that one or more of these individuals had impliedly waived the protection of informant privilege.
- [3] Manolakos's amended notice of appeal identifies the following errors said to relate to the same OTR proceedings:
1. The trial judge erred by receiving submissions and evidence from the crown and/or police in ex parte proceedings where defence counsel and the accused were prohibited from attending with no amicus appointed to represent the interests of the accused.
 2. The trial judge erred by failing to appoint amicus to represent the putative informants in OTR proceedings.
 3. The trial judge erred by relying on hearsay based on police officers["] notes and recollections, in lieu of evidence from the putative informants, to draw inferences and to speculate as to the beliefs of the putative informants, based on the incomplete and fundamentally flawed record.
 4. The trial judge erred in law by applying the wrong legal test to the creation of informer privilege by failing to consider whether the actions of the police gave rise to a reasonable belief by the putative informants that they were protected by former privilege.
 5. The trial judge erred at law by finding that one or more putative informants had impliedly waived their informer privilege when such waiver at law requires an express waiver.

6. The trial judge erred by failing to advise the putative informants of the OTR proceedings at any time, either during the OTR proceedings or prior to them being called to testify at the trial.
7. The trial judge's errors as enumerated above left no factual basis for the appellant's claim of an abuse of process related to police misconduct thereby implicitly rejecting the abuse of process claim.
- [4] O'Donnell's amended notice of appeal identifies the same errors in the conduct of the OTR proceedings as those alleged in Manolakos's notice of appeal.
- [5] The Crown respondent applies for an order quashing the above grounds of appeal, arguing: first, the appellants do not have standing to appeal from the decision made at the OTR hearing on these grounds; and second, the findings are now moot. For reasons set out below, I would allow the application of the Crown on the basis that the appellants have no standing and strike all of the grounds of appeal relating to the OTR proceedings. As a result, in my opinion, it is unnecessary to consider the mootness argument.

Background

- [6] The indictment charged Podolski and O'Donnell with the August 1, 2004 first degree murder of David Barry Marnuik near Vernon, British Columbia (count 1). Podolski was convicted as charged; O'Donnell was convicted of second degree murder. Manolakos was charged with and convicted of manslaughter in relation to Marnuik's death (count 2). O'Donnell and Manolakos were both charged with and convicted of the May 31, 2005 first degree murder of Ronald James Thom near Vernon, British Columbia (count 3). O'Donnell was charged with and convicted of the November 26, 2004 second degree murder of Thomas Edward on November 9, 2004, near Vernon, British Columbia (count 4).

OTR #4

- [7] Before the trial proper commenced, the judge considered an application by the Crown to determine whether a person should have been treated as a confidential informant. Before that application was concluded, on February 23, 2009 the Court ruled that defence counsel could be present at and participate in an in camera hearing on limited terms described in reasons indexed at 2009 BCSC 220 (unpublished).
- [8] The February 23, 2009 reasons indicate that at the continuation of the hearing the judge would decide whether informant privilege applied, whether the innocence at stake exception applied, whether the privilege should be reinstituted, and if so, how. The hearing proceeded on the basis that it was clear the information provided to the police was privileged. That was not a "live issue". The question was whether the existing privilege was lost by police actions.

- [9] The decision to permit defence counsel to participate appears not to have been made for the purpose of permitting participation in what is described, in *R. v. Basi*, 2009 SCC 52, as the "first stage" of proceedings: the inquiry into the existence of an informer privilege.
- [10] On March 31, 2009, the judge, for reasons indexed at 2009 BCSC 508 (unpublished), held that confidential informant "X" had not waived informant privilege explicitly or implicitly. There does not appear to have been any express consideration of whether X should have been considered to be a confidential informant, which is the question at the first stage of the proceedings.
- [11] The in camera hearing continued and resulted in a further order, on June 9, 2009, made for reasons indexed at 2009 BCSC 765 (unpublished), setting out terms for the reconstitution of informant privilege.
- [12] Following that decision, defence counsel applied for a judicial stay of proceedings of all charges, grounded in the allegation that a number of other informants had their informant privilege improperly taken away from them by the police during the course of the investigation. Defence counsel submitted that the actions of the police were illegal and so abusive as to shock the conscience of the community.

OTR #5

- [13] In the course of considering the application for a judicial stay, the judge concluded he had a responsibility to determine whether informant privilege had been breached in relation to other individuals and, if so, to determine whether the privilege should be reconstituted. For that purpose, at his initiative, OTR #5 took place. It proceeded in the same manner as OTR #4. The Crown was to provide the Court with whatever evidence it considered relevant to the Court's inquiry. The Court would determine what could be provided to defence counsel and whether defence counsel should be permitted to participate in the hearing.
- [14] Following submissions in relation to the role of defence counsel, the judge ruled on defence participation in OTR #5 on September 11, 2009 (reasons indexed at 2009 BCSC 1265 (unpublished)). He rejected the submission that the accused should have standing at the hearing, but exercised his discretion to permit their counsel to participate on limited terms in OTR #5.
- [15] Further reasons for judgment were issued on September 21, 2009 describing the process and procedure for OTR #5.
- [16] Following the decision of the Supreme Court of Canada in *R. v. Basi*, the Crown applied for an order discontinuing OTR #5. In reasons issued December 2, 2009, the judge concluded the *Basi* decision had not changed the law he applied in reaching his decisions with respect to the conduct of OTR #5.

- [17] OTR #5 concluded on February 1, 2010 with an order made for reasons indexed at 2010 BCSC 152 (unpublished). After engaging in a lengthy analysis of the facts surrounding the provision of information to the police by each of the alleged informants, the judge found that one of the alleged informants should be treated as a confidential informant whose identity should be protected by informant privilege. The alleged informants did not participate in OTR #5 nor were they aware of the hearing. Amicus curiae were not appointed to represent their interests.

Argument

- [18] The Crown says the appellants have no standing to argue the judge erred in determining how the first stage of OTR #5 was conducted or erred in making any order in relation to that hearing.
- [19] The argument there is no standing to appeal from any decision made in relation to OTR #5 is founded upon the Crown's position that the appellants did not have standing in the first place to participate in the OTR. Relying upon *Named Person v. Vancouver Sun*, 2007 SCC 43, the Crown says the only parties with standing to participate in a first-stage hearing to determine whether the informant privilege applies are those to whom the privilege might belong: the Attorney General and the person claiming the protection of such privilege. The Crown says the Supreme Court of Canada has clearly stated that no other parties have standing in this part of the proceeding. By exercising his discretion to permit defence counsel a limited opportunity to participate with respect to the manner in which informant privilege should be addressed, the judge did not recognize the accused's standing or right to attend the first-stage hearings. Inability to attend and participate fully in such hearings as of right means the appellants have no right of appeal from the resultant decision.
- [20] The Crown relies on *R. v. Barros*, 2011 SCC 51, as authority for the proposition that defence counsel have no duty to protect informer privilege. It says the decision in *Barros* undermines the judge's rationale for permitting limited participation in the first stage of the hearing in this case.
- [21] Further, the Crown says the appellants do not have standing to assert the privilege of informants for the appellants' own benefit and there is no remedy this Court can now grant which would affect the result at trial. The notices of appeal do not seek an order setting aside the judge's finding that the persons in question were not confidential informants or an order for the exclusion of any of their testimony. The appellants did not pursue an abuse of process application at trial and the Crown says there is no judgment denying the appellants a stay of proceedings from which an appeal may be brought.

- [22] In response, the appellants acknowledge a division of this Court may strike grounds of appeal if they are devoid of merit or substance or would be an abuse of the procedure of the court. They further acknowledge that if there is clearly no standing to raise an issue on appeal, a division may quash an appeal or certain grounds of appeal for that reason. They argue that the Crown can only succeed on this application if the appellants have no standing or if the issues on appeal are clearly moot.
- [23] The appellants say they have standing to invoke the mishandling of informant privilege by the Crown or the police as a basis upon which the judge could have concluded that there had been an abuse of process. In support of this proposition they rely upon *R. v. Bains*, 2010 BCCA 178, wherein this Court observed that a violation of the informant privilege rule could call into question the integrity of the justice system in such a manner as to permit an accused to argue that the conduct amounted to a violation of s. 7 of the Charter. The appellants say: "This argument remains as the foundation stone for standing in this court."
- [24] The appellants point to *R. v. Caster*, 2001 BCCA 633, as support for their position that they have standing to assert an abuse of process, even if the genesis of that abuse is in actions of the police or the Crown in relation to third parties.
- [25] The Crown's answer to the appellants' reliance upon this Court's decision in *Bains*, said to be the foundation of the appeal, is that in *Bains* there was no question whether the privilege existed: the individual involved was indisputably an informant, and the only question was whether the Crown had in fact disclosed material that would identify him. Therefore, the Crown submits, *Bains* can only be regarded as authority for the right of defence counsel to address the scope of the privilege - that is, to determine what disclosure must be made, a second-stage issue - after the first-stage consideration whether there are privileged communications to protect. *Bains* does not recognize any right of defence counsel to participate at the first stage itself.

Analysis

- [26] In my view, the appellants do not have standing to appeal the judge's ruling that the persons in question were not confidential informants.
- [27] The appellants did not have standing to participate in the first stage of OTR #5. Such standing was not recognized by the judge, who expressly declined to address the question of standing and afforded counsel for the accused only a limited right to participate in the hearing. While judges have a broad discretion to receive submissions from defence counsel with respect to such hearings, where the outcome of the process may have an impact upon disclosure at the trial, neither the reception of such submissions nor limited participation in such proceedings affords standing to a party or implies they will have standing to appeal from the resulting decision.

- [28] It would have been an error to have afforded standing to the appellants at the first-stage hearing. As a general rule, an accused has no standing to assert or oppose the recognition of a third party's status as a confidential informant. In *Named Person v. Vancouver Sun*, Bastarache J., writing for the majority, held:
- [47] While the judge is determining whether the privilege applies, all caution must be taken on the assumption that it does apply. This means that under no circumstances should any third party be admitted to the proceedings, and even the claim of informer privilege must not be disclosed. The only parties admitted in this part of the proceeding are the person who seeks the protection of the privilege and the Attorney General. It is the responsibility of the judge at this stage to demand from the parties some evidence which satisfies the judge, on balance, that the person is a confidential informer. Once it has been established on the evidence that the person is a confidential informer, the privilege applies. I cannot overemphasize the importance of this last point. The judge has no discretion not to apply the privilege: *Bisaillon v. Keable* [[1983] 2 S.C.R. 60], at p. 93. If the person is an informer, the privilege applies fully.
- [49] In the course of the determination of whether or not the privilege applies, the proceedings will be carried on in camera. During this determination, the only parties with standing will be the Attorney General and the person claiming the protection of the privilege, in addition to an amicus with the mandate set out above, in those unusual situations in which the judge finds this to be necessary. No other parties have standing in this part of the proceeding. The reason for this is simple: since the determination of the applicability of the privilege is a simple matter of determining whether the person is indeed a confidential informer -- I repeat that no balancing of competing legal interests or rights is at stake -- no one else will have any arguments of value to contribute to this determination. Furthermore, allowing third parties standing at this stage would needlessly increase the risk of disclosure of the identity of the confidential informer.

[Emphasis added.]

- [29] It is rare that the status of an informant is in issue. As Hubbard et al note (R.W. Hubbard, S. Magotiaux and S.M. Duncan, *The Law of Privilege in Canada*, loose-leaf current to Oct. 2015 (Toronto: Canada Law Book) at 2-23):

Usually, there is no question when informer privilege is in play; it is only a question whether it can be breached, on the basis that the innocence at stake threshold can be met. In rare cases, however, the preliminary question requiring resolution is whether the person claiming informer privilege is justified in invoking the protection of the privilege in the first instance.

[30] Hubbard et al suggest that the manner in which the claim to privilege should be resolved without breaching the privilege is set out in *Named Person*: there should be an ex parte and in camera hearing to determine whether the person is a confidential informant. At 2-23 they submit that *Named Person* stands for the axiom that: "In any event, because no balancing of competing legal interests or rights is at stake, no one else will have any arguments of value to contribute to this determination." Further, they note at 2-78:

In *Named Person v. Vancouver Sun*, the Supreme Court took pains to distinguish between proceedings held in camera to determine: (i) the status of a claim of informer privilege and to identify the nature of the information that may tend to identify the informer and, (ii) those proceedings subsequent to a determination that informer privilege is extant. In relation to the former it is perfectly proper to conduct proceedings that involve only the informer and/or the counsel for the Attorney General who is usually the person invoking informer privilege on behalf of the informer and the judge. Because informer privilege is a class privilege that is absolute subject to the innocence at stake exception, the judge is authorized to conduct a determination of informant privilege to the exclusion of third parties.

[31] Referring to the proceedings subsequent to the first-stage hearing, the Court in *Named Person* held:

[51] In determining the proper way of protecting informer privilege and realizing the open court principle, the judge must concern himself or herself with minimal intrusion. He or she may allow submissions from individuals or organizations other than the Attorney General and the informer at this point. This is of course because the Attorney General and the confidential informer will argue strenuously in favour of restricting any and all disclosure of information related to the proceeding, eliminating the efficiencies of the adversarial process. Restricted disclosure will of course be necessary to protect the privileged information, but the protection of the open court principle demands that all information necessary to ensure that meaningful submissions, which can be disclosed without breaching the privilege, ought to be disclosed. Therefore, standing may be given at this stage to individuals or organizations who will make submissions regarding the importance of ensuring that the informer privilege not be overextended and the way in which that can be accomplished in the context of the case.

[Emphasis added.]

[32] The procedure to be followed at the first stage of the inquiry into informant privilege was revisited in *Basi*, where Fish J., for the Court, held that the trial judge had erred in permitting defence counsel to attend the in camera hearing sought by the Crown to establish its claim of informer privilege.

[33] Before elaborating on the appropriate procedure on the first stage of the inquiry, the Court in *Basi* restated the following propositions, which had previously been canvassed in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *R. v. Leipert*, [1997] 1 S.C.R. 281; and *Named Person*:

- (a) The privilege arises where an agent of the state, usually a police officer, in the course of an investigation, guarantees protection and confidentiality to a prospective informant in exchange for information. (para. 36)
 - (b) The informant privilege has been described as "nearly absolute". It is safeguarded by a protective veil that will be lifted by judicial order only when the innocence of the accused is demonstrably at stake. (para. 37)
 - (c) Whenever informant privilege is claimed, or the court of its own motion considers that the privilege appears to arise, its existence must be determined by the court in camera at a "first stage" hearing. (para. 38)
 - (d) Ordinarily, only the putative informant and the Crown may appear before the judge. (para. 38)
 - (e) An amicus curiae may be necessary or appropriate, particularly where the interests of the informant and the Crown are aligned. (para. 38)
 - (f) In determining whether the privilege exists, the judge must be satisfied, on a balance of probabilities, that the individual concerned is indeed a confidential informant. (para. 39)
 - (g) The informant privilege belongs jointly to the Crown and to the informant. Neither can waive it without the consent of the other. (para. 40)
 - (h) The right to make full answer and defence does not alone trigger an exception to the informant privilege; it is only where innocence is at stake that the privilege yields and information tending to reveal the identity of the informant can be disclosed. (para. 43)
- [34] These principles were reflected in the Court's directions with respect to the conduct of first-stage hearings:
- (a) The accused and defence counsel should be excluded from the proceedings only when the identity of the confidential informant cannot be otherwise protected. And, even then, only to the necessary extent. (para. 53)
 - (b) The interest of accused persons in being present or represented at any proceeding relating to the charges they face remains a fundamental one, even where s. 650 of the Criminal Code, by its very terms, has no application. (para. 54)
 - (c) Trial judges should adopt all reasonable measures to permit defence counsel to make meaningful submissions regarding what occurs in their absence. Trial judges have broad discretion to craft appropriate procedures. (para. 55)
 - (d) Trial judges may wish to consider measures such as inviting submissions on the scope of the privilege - including argument as to who constitutes a confidential informant entitled to the privilege - and its application in the circumstances of the case. (para. 56)

and

- (e) The trial judge is in the best position to craft safeguards to mitigate potential unfairness arising from the ex parte nature of the proceedings. (para. 58)
- [35] The suggested measures reflect some concern for the potential effect of exclusion of defence counsel from any stage of the proceedings. That concern was described as follows:
- [52] Of course, withheld material over which the informer privilege is claimed might in some instances assist the defence, for example, by providing a trail to other relevant and helpful evidence, or in preparing and conducting the cross-examination of Crown witnesses. The withheld material might even be indicative of innocence, while still falling outside the narrow "innocence at stake" exception to the privilege. It is therefore essential that claims of privilege be resolved accurately and fairly, bearing in mind that ex parte proceedings raise serious procedural fairness concerns of particular significance in the conduct of criminal prosecutions, where the liberty of the accused is at stake.
- [36] The approach described recognizes a discretion in the hands of the trial judge to invite submissions, both with respect to procedure and with respect to the substantive question of who is a confidential informant, even from counsel for accused persons who, according to Named Person, do not have standing at the first stage.
- [37] It is that discretion that was exercised by the judge in this case. That is reflected in his conclusion that the decision of the Supreme Court in *Basi* had not changed the law he applied in reaching his decisions with respect to the conduct of OTR #5. He did not, and had not intended to, recognize the standing of defence counsel in the first-stage hearing.
- [38] There is a basis upon which the exercise of the discretion to permit defence counsel to participate in the first-stage hearing, with a view toward arguing that the persons in question were entitled to informant privilege and had it wrongfully taken from them, might have been challenged by the Crown in this case. The decision in *R. v. Barros* undermines the basis upon which the judge allowed limited participation by defence counsel in OTR #5 for that purpose. His express conclusion that defence counsel have a duty to uphold informant privilege and a duty to ensure that the law is correctly applied was rejected in *Barros*, and can no longer be considered an accurate view of the law. The question on this application, however, is not whether the judge erred in allowing participation by defence counsel, but, rather, whether the appellants have standing to argue that he erred in the manner in which he addressed the questions on the first stage of the informant privilege inquiry.
- [39] The appellants suggest the fact the judge placed an evidentiary burden upon them suggests that they had standing at the hearing, or is a basis for saying they should have standing to appeal. I do not accept that submission. In his February 1, 2010 judgment indexed at 2010 BCSC 152 (unpublished), the judge spoke of a specific burden in relation to an allegation made by defence counsel in relation to the abuse of process argument: to demonstrate on a balance of probabilities that informant privilege had been improperly taken from individuals by the police. That burden might have been borne by the appellants if the persons in question had been found to be confidential informants. In my view that is a

question that ought to have been addressed, if at all, after the conclusion of the first-stage hearing. In any event, because the persons in question were not entitled to informant privilege, the burden placed upon the appellants was immaterial.

- [40] In relation to the question whether an accused has standing to challenge a person's status as a confidential informant, Barros contains statements that may be read in such a manner as to cast doubt upon the Crown's position. The majority decision in Barros includes the following description of the role of defence counsel:
- [32] A claim to informer status is always open to challenge by the defence. The Crown is better able to meet that challenge if it can point to clear evidence of informer status being conferred explicitly rather than after-the-fact supposition.
- [35] The courts will enforce the privilege where it is applicable whether it is claimed or not (Bisaillon, at pp. 84 and 88; Basi, at para. 38), and, as stated, without the balancing of competing interests that applies to some other forms of privilege such as journalistic privilege, *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, or public interest privilege generally, *Carey v. Ontario*, [1986] 2 S.C.R. 637, unless the protection is waived by the informer and the state: Basi, at para. 40; Named Person, at paras. 22-23; Leipert, at paras. 12-15; and Bisaillon, at p. 93.
- [36] These general principles accommodate the rights of the accused and the interests of society and it is important that this equilibrium be retained. The argument of Mr. Barros is that the extension of informer privilege to prohibit any efforts by an accused to identify independently of the state the identity of the source would upset this equilibrium. I agree with that concern.
- [39] Criminalizing efforts by the defence to ascertain the identity of the source independently of the Crown would in many cases render illusory the right to challenge his or her "informer" status. The Crown ought not to be able to rely on the prohibition against disclosure by the state of allegedly privileged information to prevent an independent defence investigation that may yield information which will result in the rejection of the privilege claim itself.

[Emphasis added.]

- [41] How is that right to challenge the assertion of status as a confidential informant to be reconciled with the Court's rejection of standing at the first stage of the inquiry? In my view, it is by reading Barros in context. The accused there did not, in fact, seek to challenge a finding by the court that a person was a confidential informant. Rather, the accused tried to learn the identity of an informant by his own devices. The judgment stands for the rule that the defence is not precluded from engaging in efforts that are otherwise legal, to determine who has provided the police with information - even information furnished on a confidential basis. The efforts to challenge the informant's status referred to by the Court were not efforts to intervene in the first-stage inquiry into the status of a person claiming informant privilege but removed and distinct from that inquiry. Accordingly, in my view, the

Supreme Court's comments in *Barros* do not go so far in support of the appellants' position as they have argued.

- [42] The fact the appellants seek to challenge the conclusion that persons were not informants in order to advance an abuse of process argument does not give them standing to advance the impugned grounds of appeal. The appellants say *Bains* is a complete answer to the Crown's application. In my view, *Bains* is of no assistance to the appellants in this regard. Although the appellants in *Bains*, like the appellants in the case at bar, sought to argue that a violation of informant privilege called into question the integrity of the justice system, in *Bains* there was no question that the informant was in fact entitled to the protection afforded by informant privilege. That privilege having been breached, the question then became whether the appellants had standing to argue there had been an abuse of process. That question did not arise in a first-stage hearing. It is not suggested in *Bains* that the accused had standing to establish the existence of a privilege (which in that case was presumed or previously determined).
- [43] In the case at bar, the appellants would have had standing to argue the proceedings were an abuse of process if the judge had found informant privilege had been intentionally or wrongly breached. It was open to the appellants to advance claims of the sort considered in *R. v. X.Y.*, 2011 ONCA 259, based upon the "residual category" of official misconduct: see *R. v. Regan*, 2002 SCC 12 at para. 54; *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 75; and *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391. They cannot, however, appeal the decision that the persons in question were not confidential informants, even if the appellants' abuse of process claim hinged upon the result. Put simply, there was nothing standing in the way of the appellants' pursuit of a claim for abuse of process, but advancing such a claim cannot, by itself, give the appellants standing to challenge the trial judge's findings at the first-stage hearing. I say this recognizing that the appellants' interests might be affected by the substance of the judge's decision at that first-stage hearing.
- [44] In my opinion, there is no basis upon which it may be argued that standing to appeal from the rulings or the decision on the first-stage hearing is broader than standing at the hearing itself.
- [45] The appellants say if they do not have standing to appeal the judge's decision that certain persons were not confidential informants, that decision will be "immunized from appeal". If that is so, it is only immune from appeal at the instance of third parties to the first-stage hearing, including the appellants. The fact the first stage of the assessment of informant privilege will occur in camera; the fact the accused do not have standing to appear on that hearing; and the fact they do not have standing to appeal the determination as to whether privilege exists, are all consequences of the nature of informant privilege. Appropriate recognition and protection of the privilege will occasionally preclude a party from making full answer and defence. As the Supreme Court noted in *Named Person*:

- [28] In this Court's decision in Leipert, it was clearly established that innocence at stake is the only exception to the informer privilege rule. The rule does not allow an exception for the right to make full answer and defence.
- [46] J.A.S. v. H.M., 2008 BCCA 5, provides some answer to the appellants' assertion that the resolution of the privilege issue should not be immunized from appeal. The judgment in that case recognizes that certain decisions with respect to privilege are unassailable by third parties, even if those third parties are adversely affected by the result. Prowse J.A., for the Court in J.A.S., after citing a passage to that effect from Wigmore, Evidence in Trials at Common Law, McNaughton Revision, vol. 8 (Boston: Little, Brown & Co., 1961) at para. 2196, noted:
- [22] In my view, this analysis can be applied to the solicitor-client privilege in this case. While B. [the client] had standing to appeal the orders denying her the benefit of her solicitor-client privilege in the communications with her lawyers, H.M. [the appellant], who claimed no personal privilege in those communications, had no basis for appealing on her own behalf.
- [47] There is no doubt that the informant and the Crown, those who "own" the privilege, have standing to appeal a decision determining a person's status as an informant. Named Person was an appeal brought by the person seeking the protection of informant privilege, as was R. v. Named Person B, 2013 SCC 9. Basi was a Crown appeal.
- [48] Appellate courts have heard appeals brought by third-party accused persons seeking to establish an error in the manner in which informant privilege has been addressed, where there is an issue with respect to the extent (as opposed to the existence) of the privilege or disclosure.
- [49] The appeal in Bains was brought by the accused but, as noted above, it was an appeal from a decision dismissing an application for a voir dire in the trial to determine whether an abuse of process amounted to a breach of the accused's s. 7 Charter rights. Similarly, in R. v. Xenos (1991), 70 C.C.C. (3d) 362, 43 Q.A.C. 212, the accused appellant obtained a stay for abuse of process without challenging the status of the informant as such. In the leading appeals brought by accused persons, Leipert; R. v. Castro, 2001 BCCA 507; R. v. Lucas, 2014 ONCA 561 (application for leave refused, 2015 CanLII 1812); and R. v. G., [2004] EWCA Crim 1368, the appellants had not challenged the informant's status. The substantive appeals were from decisions at the second stage.
- [50] In R. v. Pilotte (2002), 163 C.C.C. (3d) 225, 156 O.A.C. 1, the accused appealed his conviction, in part, on the ground that the trial judge had not conducted a s. 37 hearing in accordance with the requirements of the Criminal Code but, as the court clearly noted, the material complaint arose out of a second-stage inquiry:
- [2] The main ground of appeal relates to a pre-trial application by the defence for disclosure of all contacts between one of the Crown witnesses and the Royal Canadian Mounted Police. The appellant argues that he was improperly excluded from his trial as a result of the trial

judge meeting in private with counsel for the federal Crown and the investigating officer during the course of adjudicating on this application to review whether the informer privilege extended to certain materials. He submits that this private meeting contravened the express requirement under s. 650 of the Criminal Code that he be present during the whole of his trial, and that a new trial should be ordered on this ground alone.

[Emphasis added.]

- [51] In *Bisaillon*, the appellant was a witness who had been compelled by a Commissioner appointed under the Public Inquiry Commission Act of Quebec to answer questions trenching upon informant privilege. Again, this is a second-stage question, not touching upon the status of the informant or the existence of the privilege.
- [52] The material questions that engaged the Court in *Lucas* arose out of the conduct of the second-stage hearing, referred to in the judgment at para. 68 as the "editing hearing", where the standing of the accused would not have been in doubt. The grounds of appeal did include the following question (at para. 31): "Did the application judge err in conducting an *ex parte*, in camera hearing in respect of the Crown's assertion of informer privilege over portions of the ITO submitted in support of the wiretap authorization?" However, the question of standing to advance that appeal is not expressly addressed in the judgment and *Lucas* certainly does not expand the scope for third-party participation in the first-stage hearing or otherwise suggest that an appeal will lie from the determinations at such hearings.
- [53] The appellants in *Lucas*, relying upon passages from the judgment in *Basi*, argued, first: that they should have been present at the stage one hearing; and second: that in any event they had the right to make submissions about the procedure that ought to have been followed in that hearing. The Court squarely rejected the first argument, holding:
- [65] We disagree with the appellants' interpretation of these passages for the following reasons. First, these passages do not undermine the ratio of the decision, which is that there is no right for the accused or their counsel to be present at a "first stage" in camera hearing on a claim of informer privilege; to the contrary, *Basi* anticipates that the first stage hearing will be conducted in the absence of the accused.
- [66] Second, the Supreme Court confirms in these passages that the trial judge has broad discretion to craft appropriate procedures to safeguard the interests underlying informer privilege and to protect the interests of the accused. By way of example, *Fish J.* suggests that in some circumstances, defence counsel may be invited to suggest questions to be put by the trial judge to witnesses that will be called to the *ex parte* hearing, or the court may be required to furnish the defence with a redacted or summarized version of the evidence presented *ex parte* so as to permit the trial judge to receive additional submissions on whether the privilege applies in the particular circumstances of the case.

- [54] As for the second argument, the Court noted that the Crown acknowledged it may have been preferable for defence counsel to have been given notice of the procedure to be followed at the first stage but held that was immaterial:
- [69] The respondent argues, however, that the failure to [advise defence counsel of the proposed manner of addressing privilege questions] in these circumstances did not result in any prejudice to the appellants, or a denial of their right to make full answer and defence. Keeping in mind the broad discretion judges possess to craft procedures when faced with an assertion of informer privilege, we agree. The application judge adopted adequate measures to safeguard the interests of the appellants in connection with the determination of the question of confidential informer status.
- [55] If Lucas stands as some authority for the proposition that an accused has standing to appeal from the initial decision to engage in an ex parte and in camera hearing of a pre-trial motion on appeal (a question we need not decide), it is of no assistance to the appellants in the case at bar because they do not challenge the decision to engage in a first-stage inquiry. To the contrary, they assert the status of the persons in question as confidential informants. They do not say an OTR was unnecessary; they challenge the procedure employed by the judge at the hearing - a hearing at which they had no standing - and the result of that inquiry into their status.
- [56] There is good reason for the lack of authority for standing to appeal a first-stage ruling. A party with no right to notice and no right to attend cannot have a right to appeal decisions arising out of the first-stage in camera hearing. To grant such standing would be to open a door that has been closed to third parties. The denial of standing to the appellants to make the impugned arguments in this case is consistent with one of the principal justifications for a law of standing identified by Thomas A. Cromwell in *Locus Standi: A Commentary on the Law of Standing in Canada* (Carswell, 1986) at 191: "the need to ensure that only justiciable questions proper for adversarial determination are presented to the courts".
- [57] In my opinion, the appellants do not have standing to appeal:
- (a) the decision to receive submissions and evidence from the Crown and/or police in ex parte proceedings where defence counsel and the accused were prohibited from attending with no amicus appointed to represent the interests of the accused;
 - (b) the decision not to appoint amicus to represent the putative informants in OTR proceedings;
 - (c) the decision to rely upon hearsay or a "flawed record" at the hearing;
 - (d) the drawing of inferences or speculation as to the beliefs of the putative informants;
 - (e) the application of the wrong legal test to the creation of informer privilege;
 - (f) the finding that one or more putative informants had impliedly waived informer privilege;
- or

(g) the decision not to advise the putative informants of the OTR proceedings.

Conclusion

[58] I would grant the relief sought by the Crown and strike the impugned grounds of appeal from the notices of appeal of the appellants Podolski, O'Donnell and Manolakos.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Madam Justice Fenlon"

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Prepared on 26 October 2026 · Esheria