

File No: _____
Registry: Victoria

In the Provincial Court of British Columbia

REGINA

v.

B.K.

**RULING RE DISCLOSURE APPLICATION
OF
THE HONOURABLE JUDGE S. WISHART**

COPY

Crown Counsel:	R. Fowler
Defence Counsel:	R. Neary
Place of Hearing:	Victoria, B.C.
Date of Judgment:	March 19, 2013

[1] THE COURT: This is my ruling with respect to a disclosure application. This is an application by the accused, Mr. K, for disclosure of information contained in source debrief notes or related notes relating to two confidential informants. The Crown opposes that application on the grounds of informer privilege.

[2] The circumstances here are very different from most such applications. Here the arrest of Mr. K was effected without a warrant. There was no information to obtain and obviously no search warrant.

[3] In the report to Crown counsel, which was disclosed to Mr. Neary and entered as Exhibit 1 on this application, Constable E indicates that two confidential informants, Sources A and B, provided information to him and, as set out in the RTC, that information is as follows [as read in]:

Over the past months, Source A has provided information about B.R. and his dial-a-dope operation. Source A stated B.R. is the boss and one of his runners [it says] his _____, a young black kid. Source A stated they drive rentals, always have dope on them, and they operate _____.

It also sets out in the RCC:

The most recent information regarding them came on 2012-01-10.

[4] With respect to Source B, the information contained in the RCC is as follows [as read in]:

Over the past month, Source B has provided information about B.R. and his dial-a-dope operation. Source A stated B.R. is the boss and one of his runners is _____, a young black kid. Source B stated they drive rentals, always have dope on them, and they operate _____. Source B stated one of the runners goes by _____ and that he is a young black kid.

[5] Also disclosed in the general occurrence reports is the following regarding Source A [as read in]:

That Constable E showed a picture of K. to Source A. Source A stated that the male in the picture was _____. Neither source commented on K.'s vehicle.

I take it that to mean both Sources A and B.

[6] Also disclosed in the occurrence report is the following [as read in]:

Three days before the arrest, Constable E observed Mr. K driving the rental. Constable E was off duty at the time and observed Mr. K driving on Ravine Way in Saanich. He made a note in his BlackBerry, since deleted. No paper note was made.

[7] The arrest of Mr. K was based largely on the information received from the confidential sources. Police called a phone number provided by Sources A and B and arranged a meeting. Mr. K was arrested in the area of the arranged meeting place and was seen to toss a bag of crack cocaine onto the ground when police activated their lights. That is all information that is contained in the report to Crown counsel.

[8] Mr. Neary, counsel for Mr. K, wishes to assess and

possibly challenge the credibility of Constable E as it relates to the grounds for the arrest of Mr. K. Mr. Neary articulated the basis for this as the fact that the wording in the RCC with respect to the information provided by Sources A and B is almost identical, and I note that it is identical, including a word that is misused, and the fact that Constable E deleted his notes about seeing Mr. K driving a rental vehicle three days prior to the arrest.

[9] Mr. Neary argues that in order to be able to properly test the credibility of Constable E and the grounds for the arrest, he needs disclosure of information contained in the source debriefing reports.

[10] An important factor in this case, and what distinguishes it from all others, is the fact that Mr. Neary is not seeking any information that is not already contained in the report to Crown counsel. He is seeking confirmation, or not, that the same information is contained in the source debriefing reports or other notes related to the two sources.

[11] Mr. Neary says that this will have no impact on informer privilege, as the information he seeks is already in the report to Crown counsel. The police have already determined that this information is not privileged.

[12] Mr. Fowler says that as the innocence at stake exception

does not apply here, the information sought in the source debriefing reports cannot be disclosed. The court is not permitted to balance the competing interests of the rights of an accused to make full answer and defence with informer privilege. Informer privilege must prevail.

[13] Counsel referred me to a number of authorities, and it is clear from these authorities that courts have ordered the disclosure of information contained in source debriefing reports and other notes related to confidential informants where information will not impact informer privilege.

[14] I agree with the comments made by Justice LaVigne in *R. v. Perron*, 2010 NBQB 2, that source debriefing reports themselves are not privileged. It is information contained within those reports that might reveal the identity of the informant that is privileged. If there is other relevant information that could not reveal the identity of the informant, then there is no rule of privilege that would exclude the information from being disclosed to the defence.

[15] Whether information could reveal the identity of the confidential informant is a very important caveat. I agree with Mr. Fowler that this requires careful consideration. Mr. Fowler referred me to the case of *R. v. McLellan*, 2013 BCSC 175, in which Mr. Justice Willcock reviewed the

principles relating to editing of information provided by a confidential informant.

[16] It is clear from this and other cases that the smallest detail, which may seem innocuous to even the police, the Crown or the court, could be sufficient to reveal the identity of the source.

[17] I am going to refer to specific paragraphs of that decision, starting with paragraph 34. Mr. Justice Willcock refers to the case of *R. v. Omar*, 2007 ONCA 117, and quotes from that case as follows:

Other courts have recognized that even the smallest details may provide an accused person with all he or she needs to identify the informer . . . In *Leipert, supra*, McLachlin J. quoted a portion of the passage from McEachern C.J.B.C.'s reasons quoted above and observed at para. 16 that "[a] detail as innocuous as the time of the telephone call may be sufficient to permit identification. In such circumstances, courts must exercise great care not to unwittingly deprive informers of the privilege which the law accords to them."

[18] At paragraph 35, Mr. Justice Willcock refers to the case of *R. v. Sahid*, 2011 ONSC 979, and quotes from that case as follows:

. . . [T]he police officers involved in the investigation and Crown counsel clearly have an understanding and sensitivity to what may or may not be compromising to the life and safety of the source that the court does not, and it does not seem to me appropriate for the court, having no knowledge base concerning the milieu in which the defendant and the informant exist, to second guess the police and

Crown counsel on this issue.

[19] Mr. Justice Willcock also considered the Supreme Court of Canada decision in *R. v. Leipert*, [1997] 1 S.C.R. 281, and Mr. Justice Willcock stated at paragraph 38 as follows, after considering the *Leipert* decision:

It is therefore open to a trial judge to edit information provided by a known informant where there is a certainty that doing so will not result in the identity of the informant being disclosed, and to produce a redacted version of the information to the accused. Because it is "virtually impossible" to know what details of a tip might tend to identify an anonymous informant, it will rarely be possible to have the requisite certainty in cases where the informant is anonymous.

[20] In the case here, we are dealing with known informants. It is clear from the *McLellan* case that disclosure of relevant information, where there is a certainty that doing so will not result in the identity of the informant being disclosed, can be appropriate depending on the circumstances.

[21] I am satisfied that in this case Mr. Neary has established that the information he requests is relevant, as the credibility of the officer as it relates to the grounds for the arrest of Mr. K is clearly relevant. I am also satisfied that this is not merely a fishing expedition, because Mr. Neary has confined his request to essentially confirming what is contained in the report to Crown counsel. The information Mr. Neary seeks is not privileged, as

evidenced by the fact that it is contained in the report to Crown counsel.

[22] Source debriefing reports and related notes are not, by their definition, privileged, but it may be that some, most, or all of the information contained within them is if it might reveal the identity of the source. It is not a matter of simple editing, even in this case where Mr. Neary seeks to confirm information that has already been disclosed. Even editing the source debriefing notes to the information sought by Mr. Neary could reveal a detail that might identify the sources.

[23] I find that the accused, in order to make full answer and defence, is entitled to know if the information in the report to Crown counsel also appears in the source debriefing reports or other notes related to Sources A and B. This will be accomplished by the Crown reviewing those reports and notes and providing Mr. Neary with answers to specific questions that I will outline in a moment.

[24] In this way, I can be satisfied that there is no chance that information which might reveal the identity of the sources will be disclosed. All that will be disclosed is information already contained in the report to Crown counsel and nothing more.

[25] I have directed that Mr. Fowler conduct a review and provide the answers. Given that this issue is the credibility of police officers who dealt with sources, in my view it is not appropriate for the police to do this review.

[26] I am not ordering that the police provide a copy of these documents to Mr. Fowler. I will leave it to Mr. Fowler and the police to determine the best approach. It may be that the review can be done without making a copy, as it could be done in the company of the police or not, so long as Mr. Fowler has access to the relevant records and can answer the questions that I am about to indicate. I will leave that process up to Mr. Fowler and the police, but the police are to provide Mr. Fowler with the source debriefing reports and any other notes related to Sources A and B. Once Mr. Fowler has conducted that review, he is to provide the answers to the questions to Mr. Neary.

[27] The questions that Mr. Fowler is to answer are as follows. Dealing firstly with Source A, and counsel, in drafting these questions, I have just taken the information from the report to Crown counsel, so the questions in relation to Source A are as follows:

[28] Do the source debriefing reports or other notes in relation to Source A contain information that Source A

provided information over the past month; that Source A provided information about B.R. and the dial-a-dope operation; that Source A had provided information that B.R. is the boss and one of his runners is _____, who is a young black kid; that Source A provided information that they drive rentals; that Source A provided information that they always have dope on them; that Source A provided information that they operate _____; that Source A did not comment on Mr. K's vehicle; that the most recent information was provided on 2012-10-12.

[29] The questions with respect to Source B will be identical, except the last one. My reading of the RCC is the notation about when the last or the most recent information was provided was in relation to Source A. So all of the same questions with respect to Source B, except for the question about the most recent information.

[30] With respect to the issue of the photo, the following question will be answered by Mr. Fowler: Do the source debriefing reports or other notes in relation to Source A contain information that Constable E showed a picture of Mr. K to Source A, and that Source A stated that the male in the picture was _____.

[31] Mr. Fowler, I know I went through that fairly quickly. I do not know if there is anything you wish me to repeat?

[32] MR. FOWLER: I was wondering, in fact, if it might be possible on some kind of expedited basis to get a written copy of that, either a transcript or something that -- I just want to be sure that I'm complying with exactly all the questions that have been listed, and I don't want to accidentally miss something if my notes aren't totally accurate. I don't know how realistic that is though.

[33] THE CLERK: Transcripts can be ordered, I think, on --

[34] THE COURT: Or can we burn a copy of the DARS for Mr. Fowler?

[35] THE CLERK: Yes, we can do that, Your Honour. I'm just -- I'm pretty sure the DARS CDs can play on any computer, so --

[36] THE COURT: Yes.

[37] THE CLERK: -- we can burn a copy of that, probably today.

[38] MR. FOWLER: I think we've had an issue in our office where we received some version of a DARS recording that we weren't able to actually play, unfortunately, but that may have been a one-off problem, I don't know.

[39] THE COURT: The other thing I can do, counsel, is I have made a note of what I have -- is I can type this out and

provide it to counsel by the end of this morning, if that is --

[40] MR. FOWLER: If Your Honour's able to do that --

[41] THE COURT: Yes.

[42] MR. FOWLER: -- that would certainly be of great assistance. I -- as I say, I just prefer not to --

[43] THE COURT: So I think I will --

[44] MR. FOWLER: -- inadvertently miss something, if --

[45] THE COURT: Yes, I had hoped to be able to do that this morning anyways, I simply ran out of time, but I will have time between now and 12:30 to do that, and I will make sure that a copy gets to both counsel.

[46] MR. NEARY: Thank you very much, Your Honour.

[47] MR. FOWLER: Thank you. Sorry, Your Honour, just one other fine point, just so that --

[48] THE COURT: Yes.

[49] MR. FOWLER: -- it's clear, I guess, on the record. I presume that the order isn't specifically limited to myself personally reviewing the items, but someone on behalf of Crown counsel?

[50] THE COURT: Yes.

[51] MR. FOWLER: I expect I will likely do it, but I don't want to have to.

[52] THE COURT: I think I said Crown at one point and then I did put your name in there, but --

[53] MR. FOWLER: No, fair enough.

[54] THE COURT: -- yes, Mr. Fowler or Crown on behalf of Mr. Fowler --

[55] MR. FOWLER: Thank you.

[56] THE COURT: -- to conduct that review. Thank you.

(RULING CONCLUDED)