VOLUME THREE
THE RELATIONSHIP BETWEEN INTELLIGENCE AND EVIDENCE AND THE CHALLENGES OF TERRORISM PROSECUTIONS

CHAPTER VI: THE ROLE OF PRIVILEGES IN PREVENTING THE DISCLOSURE OF INTELLIGENCE

6.0 Introduction

Evidentiary privileges are complex rules developed by the courts to keep information which is valued by society confidential. The best known privilege is the one ensuring the confidentiality of information that passes between lawyers and their clients during the provision of legal advice. The disclosure requirements in *Stinchcombe* do not apply to material covered by evidentiary privileges. This important limit is not always fully understood.

Another important privilege is the "police informer privilege." This privilege protects all identifying information about an informer who has supplied the police with information in exchange for a promise of secrecy and anonymity. The privilege is designed both to protect informers who provide information under a promise of anonymity and to encourage others to come forward with information.

Police informer privilege is a "class," or "absolute," privilege because it protects information without any need to balance the competing interests in disclosure and non-disclosure. The police informer privilege binds police, prosecutors and judges, and cannot be waived unilaterally by the Crown. The privilege can be waived only with the informer's consent. It effectively gives an informer a veto about being called as a witness. An exception to police informer privilege is allowed when such information is the only means to establish the innocence of an accused.[1] Another class privilege at the federal level is that applying to all Cabinet confidences.[2]

Class privileges can be contrasted with "qualified" privileges, which involve balancing the interests in disclosure and non-disclosure, while taking into account the facts of the particular case.[3] Class privileges offer maximum advance certainty that the information covered by the privileges will not be disclosed.

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1 *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 252.
2 *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 39 [*Canada Evidence Act*].
3 Qualified privileges under the *Canada Evidence* Act, such as specified public interest immunity privilege (s. 37) and national security privilege (s. 38), are examined in Chapter VII.

The police informer privilege creates a tension between competing demands for secrecy and for disclosure. The stakes are high. On the one hand, a promise of anonymity to an informer may be necessary to obtain information that is vital for preventing terrorism. On the other hand, such a promise may make terrorism prosecutions more difficult, if not impossible, by giving the informer a virtual veto over whether he or she will testify in support of the prosecution case.

The police informer privilege does not extend to individuals who act as state agents or who become material witnesses to a crime – a frequent occurrence in terrorism investigations, where the best informers often play an active role or become witnesses to crimes.

It is not clear whether CSIS informers are protected by police informer privilege at all, or even whether they can be protected by the privilege if responsibility for their "handling" is transferred to the RCMP.

The proper management of informers, which includes making informed decisions about when the public interest warrants promises to informers that may produce a finding of police informer privilege, is essential for the success of terrorism investigations and prosecutions.

The first part of this chapter focuses on the important, but uncertain, role played by police informer privilege in terrorism investigations. Later, the chapter examines the case for recognizing a new class privilege to protect the deliberations of the National Security Advisor (NSA). This privilege would be designed to offer maximum certainty that information shared with the NSA, as well as the deliberations within the NSA's office, would be protected against compelled disclosure. The goal would be to give the NSA a "zone of confidentiality" that would allow the NSA to discharge the additional responsibilities that are recommended in Chapter II without fear of publicity. The privilege would facilitate the sharing of information, central coordination, dispute resolution and central oversight that are necessary to ensure the effectiveness of Canada's national security activities.

6.1 The Role of Police Informer Privilege in Terrorism Investigations and Prosecutions

Despite the importance of the police informer privilege, its precise parameters are not clear. The jurisprudence does not provide definitive answers to basic questions such as the point at which the privilege is established and whether it applies to CSIS informers.

It is important to know whether CSIS informers can benefit from informer privilege, either because of their relationship with CSIS or because of promises made by the RCMP if handling of the informer is transferred to the RCMP. The answer to this question will determine the extent to which both agencies can protect the informers they handle. Potential informers may refuse to provide

information, including information that may be vital for preventing a deadly terrorist act, unless they are promised anonymity and they are confident that they will not be compelled to testify.

The prosecution of Talwinder Singh Parmar and others for an alleged conspiracy to commit terrorist acts in India collapsed in 1987 when an informer did not agree to have identifying information disclosed or to enter a witness protection program.[4] Informers may be inclined to rely on informer privilege and may refuse to testify if they view witness protection programs as inadequate.

In another case, a conviction for a conspiracy to blow up an Air India aircraft in 1986 was overturned, and a stay was eventually entered, because of the unwillingness of the police to reveal the identity of an informer known as "Billy Joe." The courts held that this individual was not protected by informer privilege because the individual had acted as an active agent of the state and was a material witness to the alleged terrorist conspiracy.[5]

Informers who get too close to terrorist plots may lose the benefits of informer privilege by acting as a police agent or by becoming a material witness to terrorist crimes.[6] Losing the protection of the privilege can have dramatic consequences for the informer. The informer's identity may be disclosed in court and the informer might be compelled to be a witness. In some cases, the safety of the informer and that of the informer's family may be threatened, or other forms of intimidation may occur. Adequate witness protection programs are therefore essential. These programs are examined in Chapter VIII.

The authority of police officers to make enforceable promises of anonymity to informers has long been recognized as an important tool for law enforcement. The Supreme Court of Canada recently remarked on this in *Named Person v. Vancouver Sun*:

> Police work, and the criminal justice system as a whole, depend to some degree on the work of confidential informers. The law has therefore long recognized that those who choose to act as confidential informers must be protected from the possibility of retribution. The law's protection has been provided in the form of the informer privilege rule, which protects from revelation in public or in court of the identity of those who

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4 *R. v. Parmar* (1987), 31 C.R.R. 256 (Ont. H.C.J.), discussed in Kent Roach, "The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence" in Vol. 4 of Research Studies: The Unique Challenges of Terrorism Prosecutions, pp. 103-111 [Roach Paper on Terrorism Prosecutions].

5 *R. v. Khela* (1998), 126 C.C.C. (3d) 341 (Que. C.A.), discussed in Roach Paper on Terrorism Prosecutions, pp. 157-165.

6 For arguments that the most useful informers are "active" and that they may be subject to claims of entrapment and attacks on their credibility, see Jean-Paul Brodeur, "The Royal Canadian Mounted Police and the Canadian Security Intelligence Service: A Comparison Between Occupational and Organizational Cultures" in Vol. 1 of Research Studies: Threat Assessment RCMP/CSIS Co-operation, pp. 207-208.

> give information related to criminal matters in confidence. This protection in turn encourages cooperation with the criminal justice system for future potential informers.[7]

The Court stressed the breadth of the privilege, noting that "… [a]ny information which might tend to identify an informer is protected by the privilege. The protection is not limited simply to the informer's name, but extends to any information that might lead to identification." The privilege imposes a duty on the police, the Crown, lawyers and judges "…to keep an informer's identity confidential."[8]

The Supreme Court states that "… [p]art of the rationale for a mandatory informer privilege rule is that it encourages would-be informers to come forward and report on crimes, safe in the knowledge that their identity will be protected."[9] Unlike a case-by-case confidentiality privilege or public interest immunity, or national security confidentiality privileges determined under sections 37 and 38 of the *Canada Evidence Act*[10], the police informer privilege is absolute, once it is found to exist, subject only to the innocence-at-stake exception:

> Informer privilege is of great importance. Once established, the privilege cannot be diminished by or 'balanced off against' other concerns relating to the administration of justice. The police and the court have no discretion to diminish it and are bound to uphold it.[11]

In contrast, in making a claim to a privilege by using section 38 of the *Canada Evidence Act*, the Attorney General of Canada must demonstrate that the disclosure of the information would harm national security, national defence or international relations. Moreover, the judge must determine whether the harm in that case of disclosing secret information outweighs the harm of not disclosing it.

Police informer privilege has been recognized in several situations involving national security. The Supreme Court held that the privilege extends even to police intelligence work involving confidential health records, and when the investigation is not tied to any particular prosecution. In *Solicitor General of Canada v. Royal Commission (Health Records)*, Martland J. stated for the Court that the foundation of the police informer privilege "…is even stronger in relation to the function of the police in protecting national security":

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7 2007 SCC 43, [2007] 3 S.C.R. 252 at para. 16.
8 2007 SCC 43, [2007] 3 S.C.R. 252 at para. 26.
9 *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 252 at para. 39.
10 R.S.C. 1985, c. C-5.
11 *R. v. Leipert*, [1997] 1 S.C.R. 281 at para. 28.

> The rule of law which protects against the disclosure of informants in the police investigation of crime has even greater justification in relation to the protection of national security against violence and terrorism.[12]

These comments were made in 1981. The subsequent bombing of Air India Flight 182 and the 9/11 attacks further underscored the importance of the state interest in obtaining information about terrorist suspects and in preventing terrorist acts. The ability of the police to rely on informer privilege to obtain such information is of supreme importance, even if the privilege may make it much more difficult to conduct certain terrorism prosecutions.

In 1983, the Supreme Court stated in *Bisaillon v. Keable*[13] that informer privilege and "Crown privilege" – which today might be called national security confidentiality privilege under section 38 of the *Canada Evidence Act* – are both rooted in the fact that secrecy is sometimes in the public interest.

6.1.1 Loss of Informer Privilege When the Informer Is or Becomes an Agent or Material Witness

The police informer privilege does not apply when the police informer is or becomes an agent acting for the state or a material witness to the alleged crime. This is simply because the accused's right in these situations to make full answer and defence becomes more important than protecting the informer's identity. This qualification of the police informer privilege is especially relevant in terrorism investigations because informers who become privy to a secret terrorist plot may often be material witnesses to the plot, act as state agents in trying to foil the plot, or both.

The limits of the police informer privilege were revealed in a terrorism prosecution that stemmed from an alleged conspiracy to blow up an Air India aircraft in 1986. The Quebec Court of Appeal held that the identity of the informer "Billy Joe" was not protected by police informer privilege because the informer had become a material witness. The informer's testimony was relevant to whether a crime had been committed and to whether the accused had an entrapment defence.[14] This prosecution was eventually stayed by the courts because of persistent non-disclosure by the Crown of the informer's identity and of other information, including notes from police interviews with the informer.[15] This case demonstrates how restrictions on the police informer privilege designed to protect the accused's right to a fair trial can make terrorism prosecutions and the protection of informers difficult. When an informer's identity must be revealed because the informer has become a material witness or state agent, the prosecution has only two options: provide

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12 *Solicitor General of Canada, et al. v. Royal Commission (Health Records)*, [1981] 2 S.C.R. 494 at 537.
13 [1983] 2 S.C.R. 60.
14 *R. v. Khela* (1991), 68 C.C.C. (3d) 81 (Que. C.A.).
15 *R. v. Khela* (1998), 126 C.C.C. (3d) 341 (Que. C.A.).

partial anonymity and adequate witness protection for the informer, or abandon the prosecution. The adequacy of witness protection programs, as well as "partial anonymity" devices that allow those like "Billy Joe" to be identified only by false names or to testify in court by means of video links or behind screens,[16] are examined in Chapter VIII.

Promises of anonymity that are not kept erode the trust between informers and the authorities and may lead informers to switch stories or have "memory lapses" when asked to testify. Generally, it is best for security intelligence and police agencies to be honest with informers about the possible disclosure of their identities and the possible need for them to testify if they become material witnesses or agents.

The authorities should also be given the means to address informers' safety concerns. When necessary, both police and security intelligence agencies should have access to flexible witness protection programs.

In many cases, disruption of a terrorist plot should take priority over a subsequent prosecution for the resulting terrorist act, and it may be necessary to promise anonymity to achieve this. Such promises should not, however, be made routinely. It must be remembered that a promise, if honoured, may make a subsequent prosecution difficult, if not impossible. In general, individual officers or agents should not have the sole discretion to decide whether to promise anonymity. Procedures should be established to allow consideration of all the available evidence. There must be sound decision making and respect for the chain of command within organizations.

The reliability of the informer should be one factor to consider in offering anonymity, because an unreliable informer might change his or her story, yet remain protected by informer privilege. Legal advice should be obtained, whenever possible, both about the legal effects of promises made to informers and about the impact on subsequent prosecutions of granting informer privilege. Legal advice will also be necessary to determine whether an informer may have already lost, or is likely to lose, the benefit of informer privilege because he or she has become an agent or a material witness.

In some cases, protecting an informer through a witness protection program might be offered as an alternative to a grant of police informer privilege.

Recommendation 15:

The RCMP and CSIS should each establish procedures to govern promises of anonymity made to informers. Such procedures should be designed to serve the public interest and should not be focused solely on the mandate of the particular agency.

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16 *Criminal Code*, R.S.C. 1985, c. C-46, s. 486.2(4)-(5).

6.2 Informer Privilege and the Transfer of Sources from CSIS to the RCMP

In a pre-trial ruling during the Air India trial, Justice Josephson held that CSIS was subject to *Stinchcombe* disclosure requirements. He added:

> …[T]he submission that the Witness should be characterized as a confidential informant subject to informer privilege is contrary to all of the evidence in relation to her treatment by C.S.I.S. While it is not necessary to determine whether in law C.S.I.S. can cloak a source with the protections of informer privilege, it is clear that its subsequent actions in passing the Witness's information and identity to the R.C.M.P. suggest that it never regarded or treated her as such.[17]

Although this comment was not strictly necessary for the judgment, the comment would mean that any chance that a source could be protected by informer privilege would be lost whenever CSIS passed information about a source to the police under section 19(2)(a) of the *CSIS Act*[18]. Because CSIS has a statutory duty to ensure the secrecy of its sources, it might therefore be reluctant to share information about its sources with the RCMP.

Chapter IV recommended that CSIS should no longer have a discretion under section 19(2)(a) to withhold information that is relevant to police investigations or prosecutions. For this recommendation to work, it would be necessary to allow CSIS to pass information about a source to the RCMP or to the NSA without the source losing the possibility of obtaining informer privilege. This does not mean that informer privilege should be promised in every case or that CSIS officials should be permitted by law to make promises that will result in informer privilege. Nevertheless, there must be a mechanism that allows information about informers to be shared between CSIS and the RCMP, or between CSIS and the NSA, without losing the possibility of claiming informer privilege.

Information sharing between CSIS and the RCMP should be a two-way flow. In some cases, the RCMP might wish to tell CSIS about one of its informers without losing the possibility of informer privilege.

Some courts have indicated that information can be shared among the police and with Crown counsel without losing informer privilege. In one case, a judge held that police informer privilege was preserved even though the identity of the informer had been revealed to three members of the RCMP, one member of the OPP, two judges, a court registrar, a lawyer in private practice working for the federal Department of Justice and a federal prosecutor. The judge commented:

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17 *R. v. Malik and Bagri*, 2004 BCSC 554, 119 C.R.R. (2d) 39 at para. 18.
18 R.S.C. 1985, c. C-23.

> Since police officers, judges and Crown attorneys routinely share information subject to the privilege, it is clear that such information can be shared in a limited way without breach of the guarantee and without the consent of the informer. In fact, the circle of people entitled to share the information expands over time, and is dependant on the facts. The expansion of this circle occurs without breach of the guarantee, without the consent of the informer and, most importantly, without violating the policy upon which the privilege is founded. The Crown attorney in this application, for example, may have to modify the presentation of his case in order to respect the privilege.[19]

The claim of police informer privilege was upheld on appeal. As a result, the RCMP Public Complaints Commission (since renamed the Commission for Public Complaints Against the RCMP) did not gain access to the informer's identity. However, Justice Létourneau expressed concern about the number of people with access to the informer's identity:

> Safety and secrecy are major preoccupations surrounding police informer privilege. I confess that I am deeply troubled by the number of persons who had access to the privileged information in this case, thereby increasing the risk of disclosure and of defeating the purpose of the privilege. If potential informers were made aware of the way information was shared in this instance, I am not sure that many of them would be keen on coming forward in the future. Furthermore, the fact that information may have been improperly shared in this case cannot serve as support for the appellant's position. To add the Chairperson of the Commission and some of her staff to an already long list would be to add persons who are interested in accessing the privileged information in order "to ensure the highest possible standard of justice". However, as laudable as this goal may be, it cannot justify granting access to persons who are not persons who need to know such information for law enforcement purposes as required in the context of police informer privilege: see *Bisaillon*. I am persuaded that, if consulted, informers would, for safety reasons, strongly oppose the opening of an additional circuit of distribution of their names, especially where the justification for this distribution is the furtherance of a purpose other than that of law enforcement in the strict sense.[20]

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19 *Canada (Royal Canadian Mounted Police Public Complaints Commission) v. Canada (Attorney General)*, 2004 FC 830, 255 F.T.R. 270, Arguments at para. 20.

20 *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General)*, 2005 FCA 213, 256 D.L.R. (4th) 577 at para. 46.

Justice Létourneau held that "…in the context of the police informer privilege, the notion of 'Crown' should be narrowly defined and refers to those persons who are directly involved in the enforcement of the law,"[21] and, as such, did not include the RCMP Public Complaints Commission.

This decision raises the issue of whether, for the purpose of claiming informer privilege, the "Crown" would include CSIS. Although it could be argued that CSIS is not "…directly involved in the enforcement of the law," such a conclusion would be unrealistic and impractical in the context of terrorism investigations. CSIS, unlike the Commission for Public Complaints, plays a vital role in terrorism investigations and has statutory obligations to protect the identity of its sources. Section 19(2)(a) of the *CSIS Act* should be amended to make it clear that information about an individual which is exchanged by CSIS with a police force or with the NSA does not prejudice a claim of informer privilege.

Recommendation 16:

Section 19 of the *CSIS Act* should be amended to provide that information about an individual which is exchanged by CSIS with a police force or with the NSA does not prejudice claiming informer privilege.

6.3 Should CSIS Informers Be Protected by Informer Privilege

The courts have not yet given clear guidance about whether promises of anonymity by CSIS to its informers create police informer privilege. In the pre-trial ruling discussed earlier, Justice Josephson did not decide whether CSIS could cloak its human sources with informer privilege.[22] He simply held that the actions of CSIS in disclosing an informer's identity and information to the RCMP were inconsistent with any subsequent claim of informer privilege. For the reasons set out above, the idea that the transfer of information between CSIS and the police would not permit subsequent claims of informer privilege is unworkable and should be rejected.

Canadian courts have generally been reluctant to extend informer privilege beyond the law enforcement context. In *Reference re Legislative Privilege*,[23] the Ontario Court of Appeal refused to extend informer privilege to whistleblowers who contacted members of the legislature. In the United Kingdom, however, there has been a willingness to extend the privilege to those who assist public authorities to uncover wrongdoing such as abuse of children[24] and gaming

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21 2005 FCA 213, 256 D.L.R. (4th) 577 at para. 43.
22 *R. v. Malik and Bagri*, 2004 BCSC 554, 119 C.R.R. (2d) 39.
23 (1978) 39 C.C.C. (2d) 226 (Ont. C.A.).
24 *D. v. National Society for the Prevention of Cruelty to Children*, [1978] A.C. 171 (C.A.).

frauds.[25] Colin Gibbs, a Crown prosecutor from the United Kingdom, testified that the informer privilege applies to sources for UK intelligence services.[26]

In a recent case involving an unsuccessful attempt by special advocates to cross-examine human sources in a security certificate case, Federal Court Justice Noël concluded that the police informer privilege did not apply to CSIS human sources. He reasoned:

> The covert human intelligence source(s) at issue in this motion for production are recruited by a civilian intelligence agency; they are not "police" informers providing information to police in the course of their duties.... Covert human intelligence sources are individuals who have been promised confidentiality in return for their assistance in gathering information relating to the national security concerns of Canada. Thus the common law privilege protecting police informers and the innocence at stake exception to that privilege are not applicable *per se* to the covert human intelligence sources recruited by the Service.[27]

Although he concluded that the privilege did not apply to CSIS sources, Justice Noël nevertheless found that the sources were protected on the basis of a case-by-case confidentiality privilege because of the great importance of confidentiality and the injury to national security that could be caused by revealing the identity of CSIS sources.[28] He stressed that "…[c]onfidentiality guarantees are essential to the Service's ability to fulfill its legislative mandate to protect the national security of Canada while protecting the source from retribution."[29] The CSIS informer privilege that he recognized was, however, not as protective as police informer privilege, which is limited only by the innocence-at-stake exception and by the fact that it does not apply in non-criminal proceedings. The new CSIS informer privilege would be subject to a "need-to-know" exception that would apply if there was no other way to "…establish that the proceeding will otherwise result in a flagrant denial of procedural justice which would bring the

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25 *Rogers v. Home Secretary; Gaming Board for Great Britain v. Rogers*, [1973] A.C. 388 (H.L. (E.)). In a 1977 deportation case, Lord Denning held "…[t]he public interest in the security of the realm is so great that the sources of the information must not be disclosed, nor should the nature of the information itself be disclosed, if there is any risk that it would lead to the sources being discovered. The reason is because, in this very secretive field, our enemies might try to eliminate the source of information. So the sources must not be disclosed. Not even to the House of Commons. Nor to any tribunal or court of inquiry or body of advisers, statutory or non-statutory, save to the extent that the Home Secretary thinks safe": *R. v. Secretary of State for the Home Department, ex parte Hosenball* [1977] 3 All ER 452 at 460 (C.A.). Geoffrey Lane similarly stated that "…once a potential informant thinks that his identity is going to be disclosed if he provides information, he will cease to be an informant. The life of a known informant may be made, to say the least, very unpleasant by those who, for reasons of their own, wish to remain in obscurity": at 462.

26 Testimony of Colin Gibbs, vol. 84, November 28, 2007, pp. 10812-10813.

27 *Harkat (Re)*, 2009 FC 204 at para. 18.

28 2009 FC 204 at paras. 27-29.

29 2009 FC 204 at para. 31.

administration of justice into disrepute."[30] This exception could arise "…where, in the judge's opinion, there is no other way to test the reliability of critical information provided by a covert human intelligence source except by way of cross-examination."[31]

Whether Canadian courts might one day recognize a police informer privilege for CSIS informers is impossible to know. There are strong arguments both for and against finding the existence of the privilege in such circumstances. The following are arguments against extending the privilege to CSIS informers:

- Parliament made a decision not to give CSIS law enforcement powers. The informer privilege, at least in Canada, has traditionally been reserved for police informers;
- CSIS deals with informers under its mandate to investigate threats to the security of Canada. It will often be premature at the time of such investigations to make promises that effectively give informers a veto over whether they can be called as witnesses or whether any identifying information about them is disclosed in a subsequent terrorism prosecution;
- The identities of CSIS sources can already be protected through applications for public interest immunity and national security confidentiality under sections 37 and 38 of the *Canada Evidence Act* or through the recognition of a case-by-case privilege. CSIS dealings with its sources would fall under the first three Wigmore criteria: (1) the communications originated in a confidence that they will not be disclosed; (2) the confidentiality is essential to the maintenance of the relation between the parties; and (3) the relation is one that should be fostered.[32] The critical question in most cases would be whether the injury to the relation by disclosure of the communication would be greater than the benefit gained for the correct disposal of litigation;

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30 2009 FC 204 at at para. 61.
31 2009 FC 204 at para. 46.
32 *R. v. Gruenke*, [1991] 3 S.C.R. 263.

- Extending informer privilege to CSIS informers is not necessary because section 18 of the *CSIS Act* makes it an offence punishable by up to five years imprisonment to disclose information about a confidential source of information or assistance to CSIS. However, this protection, unlike informer privilege, does not bind courts when they make disclosure orders;[33] and
- Extending police informer privilege to CSIS sources might lead to judges weakening the protections of informer privilege by gradually allowing the privilege to be defeated by exceptions in addition to the existing innocence-at-stake exception.

On the other hand, there are several arguments in favour of extending the privilege to CSIS informers:

- Although CSIS does not have law enforcement powers, there is often a close nexus between CSIS investigations of threats to security and terrorist crimes, treason, espionage and violations of the *Security of Information Act;*[34]
- It may be contrary to the public interest to allow a police officer to make enforceable promises of anonymity to obtain information about what may only be minor crimes, while a CSIS agent could not make similar promises even where the promises might be needed for the agent to obtain information about an imminent terrorist act;
- Better coordination of CSIS and RCMP counterterrorism investigations may reduce the risk that CSIS promises would prematurely trigger a police informer privilege;
- As a class privilege subject only to the innocence-at-stake exception, informer privilege provides greater protection for the identity of informers than the protections now available to CSIS sources under section 18 of the *CSIS Act* and sections 37 and 38 of the *Canada Evidence Act,* or under a confidentiality privilege recognized under common law; and
- Current CSIS practice seems to be to give human sources "… absolute promises that their identity will be protected,"[35] and such promises encourage sources to provide information relating to security threats.

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33 Section 18(2) of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 provides that a person may disclose information about a person who is or was a confidential source of information or assistance to CSIS "…for the purposes of the performance of duties and functions under this Act or any other Act of Parliament or the administration or enforcement of this Act or as required by any other law or in the circumstances described in any of paragraphs 19(2)(*a*) to (*d*)." Section 19(2)(a) in turn allows disclosure of information "…where the information may be used in the investigation or prosecution of an alleged contravention of any law of Canada or a province, to a peace officer having jurisdiction to investigate the alleged contravention and to the Attorney General of Canada and the Attorney General of the province in which proceedings in respect of the alleged contravention may be taken".

34 R.S.C. 1985, c. O-5.

35 *Harkat (Re)*, 2009 FC 204 at para. 31.

CSIS generally sees promises of anonymity to its sources as essential to obtain their cooperation. As Justice Noël recently stated, such promises "…not only foster long-term, effective relationships with the sources themselves, but increase, exponentially, the chances for success of future intelligence investigations. Confidentiality guarantees…also [encourage] others to come forward with essential information that would not otherwise be available to the Service."[36]

Given the preventive nature of CSIS counterterrorism investigations and their use during the early stages of suspicious activities, CSIS may have difficulty determining whether its investigations will later uncover criminal behaviour that would warrant police investigation and criminal prosecution. CSIS promises of anonymity to human sources might often be premature and could, if the promises were enforceable, jeopardize subsequent terrorism prosecutions. Yet, given its mandate, CSIS will have a strong incentive to make promises to sources that will assist it to collect intelligence, and much less incentive to help make sources available to testify in a terrorism prosecution. Indeed, the available public evidence suggests that CSIS gives "covert human intelligence sources" absolute promises that their identities will be protected.[37]

The Commission does not recommend that police informer privilege be extended by statute to CSIS informers. However, if police informer privilege is extended by statute or by the common law to CSIS informers, there must be even greater integration of CSIS and RCMP counterterrorism investigations, and the proposed Director of Terrorism Prosecutions[38] must advise both agencies about the impact of promises of anonymity on subsequent terrorism prosecutions.

In some cases, it will be necessary to make enforceable promises of anonymity to a source to obtain information that may prevent an act of terrorism, but such promises should not become routine. Rather, they should be made only in the public interest and on the basis of the most complete information available.

In the absence of a clear judicial decision that CSIS informers can be protected by police informer privilege, closer cooperation between CSIS and the RCMP and a change to the *CSIS Act* may achieve the same effect. The *CSIS Act* should be amended to allow CSIS to transfer the handling of a human source to the RCMP or other police force while preserving the ability of the police to make promises that will trigger police informer privilege.

Recommendation 17:

CSIS should not be permitted to grant police informer privilege. CSIS informers should be protected by the common law "Wigmore privilege," which requires the court to balance the public interest in disclosure against the public interest in confidentiality. If the handling of a CSIS source is transferred to the RCMP, the source should be eligible to benefit from police informer privilege.

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36 *Harkat (Re)*, 2009 FC 204 at para. 31.
37 *Harkat (Re)*, 2009 FC 204 at para. 31.
38 The role of the proposed Director of Terrorism Prosecutions is discussed in Chapter III.

6.4 Are New National Security Privileges Necessary

The modern trend has been away from class (absolute) privileges that promote secrecy over disclosure. For example, the Supreme Court of Canada has refused to recognize a new class privilege that would apply to religious communications[39] or that would apply to private therapeutic records.[40] In the latter case, Justice L'Heureux-Dubé explained this reluctance:

> Generally, class privilege presents many impediments to the proper administration of justice and, for that reason, has not been favoured in Canada and elsewhere in criminal trials. A class privilege is a complete bar to the information contained in such records, whether or not relevant, and the onus to override it is a heavy one indeed. The particular concerns raised by the recognition of a class privilege in favour of private records in criminal law relate to: (1) the truth-finding process of our adversarial trial procedure; (2) the possible relevance of some private records; (3) the accused's right to make full answer and defence; (4) the categories of actors included in a class privilege; and (5) the experience of other countries.[41]

The Court did not create a new class privilege to protect therapeutic records from disclosure. The Court recognized that class privileges provide the greatest certainty against disclosure, but that they also can inhibit the truth-seeking function of the criminal trial and impair the accused's right to make full answer and defence.

In 1982, the Supreme Court upheld a class privilege that prevented the disclosure of information whenever a minister of the Crown certified that the disclosure of a document "…would be injurious to international relations, national defence or security, or to federal-provincial relations"[42] or would disclose a Cabinet confidence. The Court based its ruling on "parliamentary supremacy."[43] The case was decided without referring to the *Charter* and despite the fact that the British common law had evolved away from absolute privileges, even in the national security context.[44] Parliament soon repealed the Canadian absolute privilege, in part because of concerns that it would be found to be inconsistent with the *Charter*. In subsequent years, even established class privileges, such as the informer privilege[45] and solicitor and client privilege,[46] have been subject to

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39 *R. v. Gruenke*, [1991] 3 S.C.R. 263.
40 *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536.
41 [1995] 4 S.C.R. 536 at para. 65.
42 *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, s. 41(2).
43 *Commission des droits de la personne v. Attorney General of Canada*, [1982] 1 S.C.R. 215 at 228.
44 The absolute approach taken in *Duncan v. Cammell, Laird & Co., Ld.*, [1942] A.C. 624 (H.L. (E.)) should be compared with the more flexible approach contemplated in *Conway v. Rimmer*, [1968] A.C. 910 (H.L. (E.)).
45 *R. v. Leipert*, [1997] 1 S.C.R. 281.
46 *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445.

innocence-at-stake exceptions. Such exceptions ensure that the privileges are consistent with the *Charter* and, in particular, with the accused's right to make full answer and defence.

6.4.1 Cabinet Confidences

One exception to the trend away from absolute privileges is that attaching to Cabinet deliberations. In *Babcock v. Canada*, the Supreme Court of Canada upheld the constitutionality of section 39 of the *Canada Evidence Act*, which provides that the disclosure of Cabinet confidences must be refused "…without examination or hearing of the information by the court, person or body," upon certification by the Clerk of the Privy Council or by a minister. The Court articulated the rationale for this broad class privilege in the following terms:

> Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny....[47]

The Court stated that section 39 of the *Canada Evidence Act* contained "absolute language" that "…goes beyond the common law approach of balancing the public interest in protecting confidentiality and disclosure on judicial review. Once information has been validly certified, the common law no longer applies to that information."[48]

Despite the absolute language in section 39, the Court held that the certification of a document as a Cabinet confidence would have to be done for the "…*bona fide* purpose of protecting Cabinet confidences in the broader public interest."[49] A certification would be invalid if done for purposes not authorized by the legislation or if it related to information that had previously been disclosed.[50] When interpreted in this manner, section 39 does not infringe constitutional principles relating to the separation of powers and the independence of the judiciary.[51] It provides a broad, but not unlimited, protection for Cabinet confidences.

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47 *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 at para. 18.
48 2002 SCC 57, [2002] 3 S.C.R. 3 at para. 23.
49 2002 SCC 57, [2002] 3 S.C.R. 3 at para. 25.
50 2002 SCC 57, [2002] 3 S.C.R. 3 at paras. 25-26.
51 The Court explained that "…s. 39 has not substantially altered the role of the judiciary from their function under the common law regime. The provision does not entirely exclude judicial review of the determination by the Clerk that the information is a Cabinet confidence. A court may review the certificate to determine whether it is a confidence within the meaning provided in s. 39(2) or analogous categories, or to determine if the certificate was issued in bad faith. Section 39 does not, in and of itself, impede a court's power to remedy abuses of process": 2002 SCC 57, [2002] 3 S.C.R. 3 at para. 60.

6.4.2 A New National Security Privilege for Deliberations of the National Security Advisor

Statutory recognition should be given to a new national security privilege. Following the model of Cabinet confidentiality under section 39 of the *Canada Evidence Act*, this new national security privilege would extend only to material prepared to assist the deliberations of the NSA and to material that recorded the NSA's deliberations.

The new privilege would not protect material already held by CSIS, the RCMP or other agencies if that material was not specifically prepared for the NSA. It would also not protect material prepared by these agencies after a decision by the NSA or after the NSA disclosed the information onwards.

The privilege would also apply to work done by the NSA to evaluate and oversee the effectiveness of Canada's national security activities and systems. This would help to ensure that gaps in Canada's security were not publicized while remedial steps were being taken to close them.

The justification for this new privilege might in some respects be even stronger than that for privileges related to Cabinet confidences. The privilege relating to the NSA would be justified by the need to promote candour in discussions and because all the material covered by the privilege would relate to national security. Under the proposed amendments to section 19 of the *CSIS Act* discussed in Chapter IV, CSIS would submit to the NSA only the intelligence that CSIS believed should not be disclosed to the police – for example, intelligence relating to particularly sensitive ongoing national security investigations.

The NSA would also produce and receive material that was relevant to the oversight of national security activities and that might reveal gaps and weaknesses in security systems. The new privilege would give the NSA the freedom to receive the broadest range of candid views and consider the greatest range of options. Because the privilege would not apply to original materials held by the various agencies, including CSIS and the RCMP, or to material disclosed by the NSA, intelligence that would be disclosed to the police would not be shielded by the privilege. This would protect an accused's right to disclosure and to make full answer and defence. However, sections 37 or 38 of the *Canada Evidence Act* could still be used to try to prevent intelligence that has been given to the police from being disclosed.

The new national security privilege should apply once the Clerk of the Privy Council certifies that the information relates to confidences that were shared with the NSA or to deliberations of the NSA. As under the 2002 Supreme Court of Canada decision in *Babcock*,[52] judicial review would be possible, but only on narrow grounds. Judicial review would be permitted if the information had

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52 *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3.

previously been disclosed, or to address allegations that the certification was not made for a *bona fide* reason authorized by the *Canada Evidence Act*.

The new privilege should not apply if it was determined that the accused's innocence was at stake and if there was no other manner to obtain the information.[53] It is unlikely, however, that this situation would arise, because the privilege would not apply to information that the NSA disclosed to police or prosecutors. The normal rules of disclosure dictated by *Stinchcombe* for material held by the Crown, and by *O'Connor* for material held by CSIS, would apply.[54]

Any attempt to secure access to the deliberations of the NSA would require the Attorney General of Canada to invoke the national security confidentiality provisions of section 38 of the *Canada Evidence Act*. For this reason, only courts that have jurisdiction under section 38 should have the ability to determine whether the conditions of this new privilege are satisfied.[55] This limitation should not thwart the important work of SIRC because it would still have full access to information held by CSIS.

Even if no new privilege is legislated, material prepared for the NSA and the deliberations of the NSA would likely be protected from disclosure under the national security confidentiality provisions in section 38 of the *Canada Evidence Act*. Most of the information prepared for and produced by the NSA has a strategic and policy character. For this reason, it is unlikely that a court would conclude that the information has a significant benefit for the correct disposal of litigation. As a result, it would be very unlikely that the court would order the material disclosed. Even so, a new class privilege is necessary to provide maximum certainty to CSIS, and to other agencies providing information to the NSA, that the information will not be subject to disclosure.

Recommendation 18:

The *Canada Evidence Act* should be amended to create a new national security privilege, patterned on the provision for Cabinet confidences under section 39 of the Act. This new class privilege should apply to documents prepared for the National Security Advisor and to the deliberations of the office of the National Security Advisor.

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53 *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 252.

54 See Chapter V for discussion of these disclosure requirements.

55 Although the Supreme Court has not decided this issue, it has suggested that all bodies with jurisdiction to compel the production of information would also be able to determine whether a s. 39 claim is valid: *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 at paras. 42-43.