

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** R. *v.* Durham Regional Crime Stoppers Inc., 2017 SCC 45, [2017] 2 S.C.R. 157 | **Appeal heard:** January 20. 2017**Judgment rendered:** September 22, 2017**Docket:** 37052 |

Between:

Durham Regional Crime Stoppers Inc. and X.Y.

Appellants

and

Her Majesty The Queen

Respondent

- and -

Director of Public Prosecutions

Intervener

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

|  |  |
| --- | --- |
| **Reasons for Judgment:**(paras. 1 to 50) | Moldaver J. (McLachlin C.J. and Abella, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ. concurring) |

R. *v.* Durham Regional Crime Stoppers Inc., 2017 SCC 45, [2017] 2 S.C.R. 157

Durham Regional Crime Stoppers Inc. and

X.Y. Appellants

v.

Her Majesty The Queen Respondent

and

Director of Public Prosecutions Intervener

**Indexed as: R. *v.* Durham Regional Crime Stoppers Inc.**

2017 SCC 45

File No.: 37052.

2017: January 20; 2017: September 22.

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

on appeal from the ontario superior court of justice

 *Criminal law — Evidence — Informer privilege — Anonymous informer — Whether informer privilege applies to anonymous tip made to Crime Stoppers by caller with intention of interfering with administration of justice — Procedure for court to follow when Crown challenges claim of informer privilege over anonymous tip made to Crime Stoppers.*

 Following a fatal shooting, Crime Stoppers received an anonymous tip from a caller. The caller reported that on the day of the shooting he observed four men in the backyard of a house neighbouring on the crime scene and that he then saw the men drive to a lake where they threw things into the water. Soon after the call, X.Y. was charged with second degree murder for the shooting. The Crown brought a pre‑trial application to introduce evidence of the anonymous tip. The Crown maintained that the call was made by X.Y. to divert attention away from himself during the police investigation. X.Y. denied making the call. In addition, he and Crime Stoppers submitted that the call was covered by informer privilege. The application judge, at an *in camera* hearing, found that informer privilege did not apply. His ruling was appealed to this Court pursuant to s. 40(1) of the *Supreme Court Act*.

 *Held*: The appeal should be dismissed.

 The informer privilege rule is a common law rule of long standing and is particularly important in the context of anonymous informers. Apart from the innocence at stake exception, the informer privilege rule is absolute. It therefore acts as a complete bar on the disclosure of the informer’s identity, and the police, the Crown and the courts are bound to uphold it. However, informer privilege cannot be interpreted to apply where it would compromise the very objectives that justify its existence, namely: furthering the interests of justice and the maintenance of public order. It follows that informer privilege does not exist where a person has contacted Crime Stoppers with the intention of furthering criminal activity or interfering with the administration of justice. In such circumstances, shielding this person’s identity behind the near absolute protection of informer privilege would compromise, if not negate, the privilege’s objectives.

 In cases where the Crown alleges that informer privilege does not apply to a Crime Stoppers tip because the caller acted with the intention of furthering criminal activity or interfering with the administration of justice, the onus rests with the Crown to show, on a balance of probabilities, that the person made the tip with the requisite intention such that he or she is excluded from the scope of the privilege. This intention requires a heightened mental element and involves a high degree of moral blameworthiness. It is a high bar to meet, and in the vast majority of cases, informer privilege will apply to an anonymous tip made to Crime Stoppers.

 When a judge is determining whether informer privilege applies to an anonymous tip made to Crime Stoppers, he or she must proceed on the assumption that the privilege exists. Accordingly, where the Crown challenges the validity of a privilege claim over a tip, the court must consider whether privilege in fact exists at an *in camera* hearing. The assumption that privilege exists also means that this *in camera* hearing will likely require an *ex parte* proceeding, in which the accused and defence counsel are excluded. In order to protect the interests of accused persons, the judge should adopt all reasonable measures to permit defence counsel to make meaningful submissions regarding what occurs in their absence. Further, the judge may review the record of the tip to determine whether informer privilege exists. Whether the privilege exists will often turn on what the caller said, and whether it conveyed an intention to further criminal activity or interfere with the administration of justice.

 When the Crown brings an application to introduce evidence of an anonymous tip over which privilege has been claimed, this may result in significant costs to the trial process and the probative value of the evidence may be marginal. Therefore, it may make sense for the application judge to require a preliminary *in camera* showing by the Crown in support of its claim that the evidence is admissible, before proceeding to a determination of whether informer privilege exists. This may involve the Crown being required to outline the basis upon which it is alleging that informer privilege does not apply; the Crown being required to demonstrate that there is a realistic prospect that the probative value of the evidence will outweigh its prejudicial effect; or both. The preliminary *in camera* showing will likely need to be heard *ex parte*. The application judge, however, retains a wide discretion when it comes to procedure and a reasonable determination in that regard should be accorded considerable deference.

 In this case, it was reasonable for the application judge to find, on a balance of probabilities, that X.Y. had made the call and that he had done so with the intention of diverting attention away from himself during the investigation. This was well‑supported by the evidence. The application judge therefore did not err in concluding that the tip was excluded from the scope of informer privilege. In addition, the procedure followed by the application judge was reasonable. The judge held an *in camera* hearing to determine whether informer privilege applied. There was no need for an *ex parte* proceeding because the Crown had earlier disclosed the tip to the defence. The Crown, however, should not have disclosed it because informer privilege is not a matter of discretion for the Crown, the police or the courts to apply. In addition, the judge reasonably determined that he could view the record of the tip to determine whether informer privilege existed.

**Cases Cited**

 **Referred to:** *R. v. Hiscock* (1992), 72 C.C.C. (3d) 303, leave to appeal refused, [1993] 1 S.C.R. vi; *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253; *R. v. Leipert*, [1997] 1 S.C.R. 281; *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368; *People v. Callen*, 194 Cal.App.3d 558 (1987); *R. v. Scott*, [1990] 3 S.C.R. 979; *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981] 2 S.C.R. 494; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *R. v. Campbell*, [1999] 1 S.C.R. 565; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *R. v. Cox and Railton* (1884), 14 Q.B.D. 153; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908; *R. v. White*, [1998] 2 S.C.R. 72; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659; *R. v. Kutynec* (1991), 7 O.R. (3d) 277; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 139.

*Supreme Court Act*, R.S.C. 1985, c. S‑26, s. 40(1).

**Authors Cited**

Paciocco, David M. “Simply Complex: Applying the Law of ‘Post‑Offence Conduct’ Evidence” (2016), 63 *Crim. L.Q.* 275.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 7th ed. Toronto: Irwin Law, 2015.

 APPEAL from a decision of the Ontario Superior Court of Justice (McKelvey J.), No. 15/13823, April 14, 2016, that informer privilege did not apply to the Crime Stoppers tip in this case. Appeal dismissed.

 *Robert S. Gill* and *Michelle E. Booth*, for the appellant Durham Regional Crime Stoppers Inc.

 *Jennifer Penman* and *Karen Heath*, for the appellant X.Y.

 *Susan Magotiaux* and *Mabel Lai*, for the respondent.

 *Bradley Reitz* and *François Lacasse*, for the intervener.

 The judgment of the Court was delivered by

 Moldaver J. —

1. Overview
2. The informer privilege rule is a common law rule of long standing — and it is fundamentally important to the criminal justice system. Informers play a critical role in law enforcement by providing police with information that is otherwise difficult or impossible to obtain. By protecting the identity of individuals who supply information to the police — and encouraging others to do the same — informer privilege greatly assists the police in the investigation of crime and the protection of the public. Subject to the innocence at stake exception, the privilege acts as a complete bar on the disclosure of the informer’s identity, and the police, the Crown and the courts are bound to uphold it.
3. The primary issue raised by this appeal is whether informer privilege exists where a caller makes an anonymous tip to Crime Stoppers with the intention of interfering with the administration of justice. A secondary issue concerns the procedure to be followed when the Crown challenges a claim of informer privilege over an anonymous tip made to Crime Stoppers.
4. Factual and Procedural Background
5. The anonymous tip in this case concerned the fatal shooting of Shabir Niazi on February 19, 2014. That same day, X.Y., one of the appellants, made a statement to the police indicating that three men were responsible for the shooting of Mr. Niazi. He later gave the police a second statement to that effect. X.Y. became a suspect in the shooting and was placed under police surveillance.
6. About a week after the shooting, Officer Edwards, the Crime Stoppers Coordinator for Durham Regional Police, received an anonymous tip. The caller reported that on the day of the shooting, he was on the back porch of a house and could see into the backyard of another house neighbouring on the crime scene. There, he observed four men, whom he proceeded to describe. He reported that the four men waited near the crime scene for five to ten minutes before getting into a car and driving to a lake. At the lake, the men got out of the car and began throwing things into the water. Following Crime Stoppers’s standard practice, the call was not recorded and no effort was made to trace its source. Officer Edwards entered the information from the caller into a tip sheet and then gave the sheet to investigators at the Durham Regional Police Major Crime Unit.
7. A few days after Crime Stoppers received the anonymous tip, X.Y. was charged with the second degree murder of Mr. Niazi. During pre-trial proceedings, X.Y. acknowledged that he was the person who shot Mr. Niazi and that he had acted alone. He further advised that he would be relying on the defence of self-defence at trial.
8. The Crown brought a pre-trial application seeking to introduce evidence of the anonymous tip made to Crime Stoppers. Prior to any rulings being made by the application judge, the Crown disclosed to the defence the anonymous tip and all relevant information about it in its possession. The Crown maintained that the call was made by X.Y. to divert attention away from himself in the police investigation. It sought to use the call at trial as evidence relevant to X.Y.’s general credibility: see the reasons of the application judge at A.R. (Crime Stoppers), vol. I, at p. 3. X.Y. denied making the call. In addition, he and Crime Stoppers submitted that the call was covered by informer privilege. In response, the Crown asserted that informer privilege did not apply to the tip.
9. The application judge, McKelvey J. of the Ontario Superior Court of Justice, determined that the question of whether informer privilege applied to the tip should be decided at an *in camera* hearing: Decision No. 15/13823, April 14, 2016. He ruled that X.Y. and his counsel could be present at the hearing because the Crown had earlier disclosed the tip to the defence. However, since X.Y. denied having made the call to Crime Stoppers, it did not lie with him to advance a claim of privilege over the tip. In view of this, the application judge permitted counsel for Crime Stoppers to advance a claim of privilege and make submissions at the hearing in a role akin to that of *amicus curiae.* In the result, he found that X.Y. had made the call and that he had done so with the intention of diverting attention away from himself in the police investigation. It followed, in his view, that informer privilege did not apply to the tip because its application would, in the circumstances, undermine the objectives which underlie the privilege.
10. Crime Stoppers appealed the application judge’s ruling to this Court, pursuant to s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26. The Crown takes no issue with Crime Stoppers’ standing to bring this appeal in the circumstances.
11. For reasons that follow, I would dismiss the appeal. As regards the primary issue, the application judge excluded the tip from the scope of informer privilege on the basis that X.Y. made the call to Crime Stoppers in order to divert attention away from himself in a police investigation. In my view, he did not err in doing so. Informer privilege does not exist where a person has contacted Crime Stoppers with the intention of furthering criminal activity or interfering with the administration of justice.[[1]](#footnote-1) In such circumstances, shielding this person’s identity behind the near absolute protection of informer privilege would compromise, if not negate, the privilege’s objectives. Accordingly, I would vacate the following portions of the judgment on the application for leave to appeal issued by this Court on October 20, 2016: (1) the publication ban on X.Y.’s name and all information identifying the source of the anonymous tip and (2) the sealing order on the materials filed by the parties.
12. With respect to the secondary issue, I am satisfied that the procedure followed by the application judge was reasonable. That said, this case provides the Court with an opportunity to clarify the procedure that should be followed and the safeguards that can be put in place when the Crown challenges the applicability of informer privilege over an anonymous tip made to Crime Stoppers.
13. Issues

[10a] 1. Does informer privilege apply to the anonymous tip made to Crime Stoppers in this case?

 2. What is the procedure to be followed by a court when the Crown challenges a claim of informer privilege over an anonymous tip made to Crime Stoppers?

1. Analysis
	1. Does Informer Privilege Apply to the Anonymous Tip Made to Crime Stoppers in This Case?
		1. The Underlying Rationales of the Informer Privilege Rule
2. Informer privilege is a common law rule that prohibits the disclosure of an informer’s identity in public or in court. As a class privilege, informer privilege is not determined on a case-by-case basis. It exists where a police officer, in the course of an investigation, guarantees confidentiality to a prospective informer in exchange for information: *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389, at para. 36; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60,at p. 105. The privilege acts as “a complete and total bar” on any disclosure of the informer’s identity, subject only to the innocence at stake exception: *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253,at para. 30. All information which might tend to identify the informer is protected by the privilege: *ibid*. The privilege belongs both to the Crown and to the informer and neither can waive it without the consent of the other: *ibid.*,at para. 25.
3. As with all privileges, informer privilege is granted in the public interest. Informers pass on useful information to the police which may otherwise be difficult or even impossible to obtain. They thus play a critical role in the investigation of crime and the apprehension of criminals. The police and the criminal justice system rely on informers — and society as a whole benefits from their assistance: see *R. v. Leipert*, [1997] 1 S.C.R. 281,at para. 9; *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, at para. 30. In fulfilling this important role, informers often face the risk of retribution from those involved in criminal activity: *Leipert*, at para. 9. Accordingly, informer privilege was developed to protect the identity of citizens who provide information to law enforcement: *ibid*. By protecting those who assist the police in this manner — and encouraging others to do the same — the privilege furthers the interests of justice and the maintenance of public order: see *R. v. Hiscock* (1992), 72 C.C.C. (3d) 303 (Que. C.A.), at p. 328, leave to appeal refused, [1993] 1 S.C.R. vi. As this Court noted in *Bisaillon*:

The public interest which requires secrecy regarding police informers’ identity is the maintenance of an efficient police force and an effective implementation of the criminal law. [p. 97]

Likewise, in *Named Person*, LeBel J., writing in dissent, but not on this point, stated that

the social justification for this privilege was found in the need to ensure performance of the policing function and maintenance of law and order. [Citation omitted; para. 111.]

1. Informer privilege is particularly important in the context of anonymous informers. In *Leipert*, this Court noted that preserving the anonymity of callers to Crime Stoppers and other public service organizations working to combat crime is critical to the effectiveness of law enforcement:

It is the promise of anonymity which allays the fear of criminal retaliation which otherwise discourages citizen involvement in reporting crime. In turn, by guaranteeing anonymity, Crimestoppers provides law enforcement with information it might never otherwise obtain.

(Para. 11, quoting *People v. Callen*, 194 Cal.App.3d 558 (1987), at p. 563.)

In *Leipert*, the Court recognized that informer privilege may apply where an anonymous tip is made to Crime Stoppers.

1. Informer privilege is of such fundamental importance to the criminal justice system and to society at large that it is “near-absolute” and is subject to only the innocence at stake exception: *Basi*,at para. 37; *Barros*,at para. 1. This exception provides that where disclosure of the informer’s identity is necessary to show the innocence of an accused, the informer’s identity can be disclosed for that limited purpose: *Leipert*,at para. 20. Our abhorrence of wrongful convictions requires no less. As such, the right of an accused to establish his or her innocence by raising a reasonable doubt takes precedence over protecting an informer’s identity: *R. v. Scott*, [1990] 3 S.C.R. 979, at pp. 995-96.
2. Apart from the innocence at stake exception, the informer privilege rule is absolute. Courts must give effect to it and are not entitled to balance the benefit of the privilege against countervailing considerations: *Leipert*,at paras. 12-13. Through informer privilege, the law recognizes that the public interest in protecting the identity of informants prevails over other policy concerns: see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at p. 302. The police, the Crown and courts are bound by the rule and are under a duty to protect the informer’s identity: *Barros*,at para. 37.
	* 1. The Scope of Informer Privilege
			1. The Scope of Informer Privilege Is Limited by Its Underlying Rationales
3. X.Y. and Crime Stoppers submit that all persons who call Crime Stoppers are confidential informers and are entitled to informer privilege. They assert that the “privilege attaches automatically: literally, as soon as the phone rings”: A.F. (Crime Stoppers), at para. 54. I would not give effect to this submission. As I will explain, informer privilege does not apply where a person has made a communication to Crime Stoppers with the intention of furthering criminal activity or interfering with the administration of justice. In such circumstances, unlike a claim of innocence at stake which is treated as an *exception* to a communication that otherwise comes within the scope of informer privilege, a communication in furtherance of criminality is excluded from the scope of informer privilege.
4. The scope of informer privilege is limited by its underlying rationales. As Binnie J. noted in *Barros*, “it is important not to extend [the privilege’s] scope beyond what is necessary to achieve its purpose of protecting informers and encouraging individuals with knowledge of criminal activities to come forward to speak to the authorities”: para. 28. In other words, informer privilege cannot be interpreted to apply where it would compromise the very objectives that justify its existence. As indicated, informer privilege is granted in the public interest, to assist the police in the investigation of crime and the apprehension of criminals — and thus to further the interests of justice and the maintenance of public order. Where someone acts with the intention of furthering criminal activity or interfering with the administration of justice — for example, by making a call to Crime Stoppers with the intention of misleading the police in a criminal investigation — shielding this person’s identity behind the near absolute protection of informer privilege would compromise, if not negate, the privilege’s objectives. Informer privilege therefore does not arise in these circumstances, even though the person may have been promised confidentiality by law enforcement in exchange for information.
5. This point was made persuasively by the Quebec Court of Appeal in *Hiscock*. In that decision, LeBel J.A., as he then was, considered whether informer privilege applied to wiretap evidence that consisted of recordings of conversations in which the accused, a police informer, discussed his narcotics business. The wiretap evidence was used at trial to convict the informer of trafficking and possession of narcotics. On appeal, the informer argued that the wiretap evidence was inadmissible because it was protected by informer privilege.
6. Justice LeBel observed that informers often operate in morally grey zones and that people who engage in misconduct in the course of providing information to the police may still be entitled to informer privilege. In this regard, he referred to *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*,[1981] 2 S.C.R. 494, a case in which a majority of this Court found that informer privilege applied to doctors and hospital employees, who had improperly obtained private medical information, because they had provided that information to the police for investigative purposes. Even though the doctors and the hospital employees had engaged in misconduct, protecting their identities did not undermine the objectives underlying informer privilege. Rather, their actions assisted police investigations and encouraged others in similar circumstances to do the same.
7. By contrast, in *Hiscock*, the police informer was acting with the intention of furthering his own personal criminal activity. In these circumstances, Justice LeBel noted that interpreting informer privilege to exclude the wiretap evidence would

grant [the accused] a license to commit criminal offences solely in the interests of the accused. . . . If one were to accept [the accused’s] argument, the privilege invoked would be completely diverted from its goal, since it was used for an end and interests which are contrary to those which justify it in Canadian public law. [p. 330]

1. Likewise, in *Named Person*, LeBel J., in dissent, but not on this point, stated:

I concluded [in *Hiscock*] that the privilege should not be interpreted and applied so as to authorize the commission of criminal acts in the sole interest of the accused and therefore could not be used by the accused as they proposed to use it . . . . The opposite interpretation would have endorsed an abuse of the privilege, given its objective. [para. 111]

1. I agree with Justice LeBel’s observations in *Hiscock* and *Named Person*. In sum, informer privilege does not arise where the person is engaging in conduct which is intended to further criminal activity or interfere with the administration of justice, even if this person has received a promise of confidentiality from police in exchange for information. And in the context of an anonymous tip to Crime Stoppers, the privilege will not avail in circumstances in which a caller provides a tip with the intention of misleading the police — thus effectively obstructing justice — nor where a person engages in criminal activity solely in his or her personal interest, as was the case in *Hiscock*.
2. The existence of the privilege in these circumstances would allow people who are acting to subvert the law to shield their identity behind a near absolute form of legal protection. These individuals are not confidential informers and should not have the benefit of the privilege. They are excluded from its scope. If privilege was found to exist in these circumstances, it might encourage others to engage in similar conduct, knowing that they too could shelter behind the privilege. This would constitute an abuse of a privilege that is designed to assist the police in their investigative work and the enforcement of the criminal law. In short, it would turn the principle on its head.
	* + 1. The Scope of Solicitor-Client Privilege Is Also Limited by Its Underlying Purposes
3. In excluding persons who act with the intention of furthering criminal activity or interfering with the administration of justice, informer privilege is consistent with another class privilege: solicitor-client privilege. This privilege arises from a “communication between a lawyer and the client where the latter seeks lawful legal advice”: *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at para. 36. Solicitor-client privilege is designed to facilitate the administration of justice by encouraging clients to speak freely to their lawyers, so that lawyers can advise clients to the best of their abilities: see *McClure*,at para. 33.
4. Not all communications between a client and his or her lawyer, however, are covered by solicitor-client privilege: see *McClure*,at para. 36. For privilege to apply, the communications must be made for the “legitimate purpose of obtaining lawful professional advice or assistance”: *ibid.*,at para. 37. The privilege will not exist where the communications between a lawyer and a client “are criminal or else made with a view to obtaining legal advice to facilitate the commission of a crime”: *R. v. Campbell*,[1999] 1 S.C.R. 565, at para. 55. As this Court noted in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 881, citing *R. v. Cox and Railton* (1884), 14 Q.B.D. 153, at p. 167, the rule does not apply to these communications, because “the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice”. In these circumstances, the relationship is no longer that of the client and the lawyer in “the ordinary scope of professional employment” — rather, it is between two co-conspirators or a person planning the commission of a crime and an “unwitting dupe”: *Campbell*,at para. 55, citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at pp. 835-36. The application of the privilege to these communications would shelter the identity of persons who are seeking legal advice to facilitate the commission of crimes or conspiring to commit crimes. If solicitor-client privilege existed to protect such communications, “the result would be that a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity”: *Cox and Railton*,at pp. 165-66.
5. The rule of solicitor-client privilege thus recognizes that in exceptional circumstances — where communications between a lawyer and client are criminal or where legal advice is sought for the purpose of facilitating a crime — the privilege does not exist, because otherwise it would undermine the interests of justice and thus the very reason for granting the privilege in the first place. Likewise, informer privilege does not exist where it would compromise the underlying rationales for the rule.
	* + 1. The Policy Concern About Chilling Effects
6. Crime Stoppers and X.Y. submit that if privilege does not automatically apply to anonymous tips made to Crime Stoppers, this will have a chilling effect on citizens who provide information to Crime Stoppers: A.F. (Crime Stoppers), at para. 78. The privilege must apply “as soon as the phone rings” at Crime Stoppers, otherwise callers who are misinformed about the details of suspects or events, or those who deliberately distort or disguise certain details to protect themselves, may be investigated by the police or exposed to the risk of criminal sanction: *ibid.*, at paras. 74 and 78. This, they say, will dissuade citizens from providing information to Crime Stoppers.
7. With respect, I do not share their concern. In the case of anonymous tips made to Crime Stoppers, informer privilege will apply except in those cases where it can be shown that the person called with the intention of furthering criminal activity or interfering with the administration of justice. This is a high bar to meet. It requires a heightened mental element and involves a high degree of moral blameworthiness. Callers who are *bona fide* informers have no cause to be concerned about being excluded from the protection of the privilege. In the vast majority of cases, informer privilege will apply to a tip made to Crime Stoppers. Only those who possess the requisite intent need be concerned.
8. Furthermore, informer privilege is not an absolute rule. As indicated, it is subject to one exception: where an accused’s innocence is at stake. Callers cannot know whether their identities will be disclosed through the innocence at stake exception, yet this has not been shown to deter people from providing information to Crime Stoppers. By contrast, where a person calls with an intention of furthering criminal activity or interfering with the administration of justice, informer privilege will not apply for precisely that reason — something entirely within the person’s control. Given that the innocence at stake exception has not been shown to deter callers, I fail to see how such an exclusion could have a deterrent effect on *bona fide* informers.
	* + 1. The Determination of Whether Informer Privilege Applies Is Made on a Balance of Probabilities
9. In *Basi*, this Court stated that “[i]n 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. In cases such as this, where the Crown alleges that the privilege does not apply to a Crime Stoppers tip because the caller acted with the intention of furthering criminal activity or interfering with the administration of justice, the onus rests with the Crown to show, on a balance of probabilities, that the person made the tip with the requisite intention such that they are excluded from the scope of the privilege.
10. To be clear, where it has been established that informer privilege *does* exist and the party is seeking to invoke the innocence at stake exception, the party must show that the evidence is necessary to the demonstration of the accused’s innocence: *Leipert*,at para. 21. This stringent threshold is warranted because the claim of privilege has been successful and the other party is seeking to limit or abridge its application.
	* + 1. Application to This Case
11. The application judge did not err in concluding that privilege did not apply to the Crime Stoppers tip. It was reasonable for the application judge to find, on a balance of probabilities, that X.Y. made the tip and that he did so to divert attention away from himself in a police investigation. This finding was well-supported by the following evidence, upon which the application judge relied:
12. The caller’s report that the four men waited near the crime scene for five to ten minutes after the fatal shooting of Mr. Niazi was unlikely to be true;
13. Police examination of the area around the crime scene was inconsistent with the caller’s report that he saw four male persons there;
14. X.Y. was observed by the police ending a call on a public pay phone around the same time the call to Crime Stoppers was terminated; and
15. There were significant similarities between X.Y.’s statements to the police about three male persons at the crime scene — which he later admitted were false — and the descriptions of the four male persons given by the anonymous caller.
16. In light of this evidence, I see no basis for interfering with the application judge’s finding that X.Y. was the caller and that he made the call with the intention of interfering with the administration of justice. I would therefore uphold the application judge’s decision that informer privilege does not apply to the tip.
	1. What Is the Procedure to Be Followed by a Court When the Crown Challenges a Claim of Privilege Over an Anonymous Tip?
17. The second issue concerns the procedure to be followed when the Crown challenges a claim of informer privilege over an anonymous tip made to Crime Stoppers on the basis that the tip was made with the intention of furthering criminal activity or interfering with the administration of justice. In this case, the Crown asserted that no privilege existed because it was X.Y. who made the call to Crime Stoppers and he did so with the intention of diverting the police investigation away from himself. In other cases, it may be the defence seeking to challenge the Crown’s claim of privilege over an anonymous tip.[[2]](#footnote-2) For present purposes, I propose to confine my comments to the procedure to be followed where the Crown brings the challenge.
	* 1. Proceeding *In Camera* and *Ex Parte*
18. When a judge is determining whether informer privilege applies to an anonymous tip made to Crime Stoppers, he or she must proceed on the assumption that the privilege exists: *Basi*, at para. 44; *Named Person*,at para. 47. As this Court stated in *Basi*, “[n]o one outside the circle of privilege [the police, the Crown and the court] may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies”: para. 44. Accordingly, where the Crown challenges the validity of a privilege claim over an anonymous tip to Crime Stoppers, the court must consider whether privilege in fact exists at an *in camera* hearing: *Basi*,at para. 38.
19. The assumption that privilege exists also means that this *in camera* hearing will likely require an *ex parte* proceeding — in which the accused and defence counsel are excluded — to determine whether informer privilege applies to the tip. However, this Court has cautioned that *ex parte* proceedings raise serious concerns about procedural fairness, particularly in the context of criminal prosecutions: *Basi*,at para. 52. In order to protect the interests of accused persons, the judge 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 in this regard.

(*ibid.*,at para. 55)

1. In *Basi*, at paras. 56-58, Fish J. set out the several measures, summarized below, that application judges may wish to implement during an *ex parte* hearing being held *in camera*:
	1. Permitting defence counsel to make submissions on the scope of informer privilege, such as who constitutes a confidential informer entitled to the privilege;
	2. Inviting defence counsel to suggest questions to be put by the application judge to any witness that will be called at the *ex parte* proceeding;
	3. Providing the defence with a redacted or a summarized version of some of the evidence presented *ex parte* after it has been edited to eliminate any possibility of disclosing the informer’s identity; and
	4. Appointing an *amicus curiae* in particularly difficult cases to attend the *ex parte* proceeding in order to provide assistance in assessing the claim of privilege.
		1. The Application Judge Can Review the Record of an Anonymous Tip to Crime Stoppers
2. Where the Crown has challenged a claim of privilege over an anonymous tip and the application judge holds an *in camera* hearing to determine whether informer privilege exists, the question arises whether the application judge may review the record of the anonymous tip. Crime Stoppers and X.Y. submit that the record of an anonymous tip cannot be examined by the application judge until a question of innocence at stake has been raised on the evidence. They submit that, if a court can review the record of the tip before innocence has been shown to be at stake, citizens will be discouraged from providing information to Crime Stoppers.
3. I would not give effect to this argument. Common sense dictates that the judge will require access to the record of the tip to determine whether the privilege exists. This stands to reason because whether the privilege exists will often turn on what the person said during the call to Crime Stoppers — and whether what was said conveyed an intention to further criminal activity or interfere with the administration of justice. Moreover, the court, as a guardian of privilege, has a duty to uphold an informer’s confidentiality. I note that judges routinely review contents of tips from informers in the context of search warrant and wiretap authorizations, as well as *Garofoli* applications. Therefore, in my view, the judge’s review of the record of the tip does not raise any concern that, in doing so, he or she might compromise informer privilege.
	* 1. The Application Judge May Require a Preliminary Showing Before Proceeding to a Determination of Whether Informer Privilege Exists
4. When the Crown brings an application to introduce evidence of an anonymous tip over which privilege has been claimed, this may result in significant costs to the trial process. An application of this nature can give rise to several different forms of prejudice. In all cases, a court’s assessment of whether privilege applies to the anonymous tip will inevitably lengthen and complicate the proceedings. There may also be a risk that the anonymous informer’s identity could be disclosed in breach of the court’s duty to uphold the privilege. In this regard, it may be difficult (and sometimes impossible) to determine which details of the information provided by an anonymous informer will result in that person’s identity being revealed (see *The Law of Evidence*, at p. 303; *Leipert*,at para. 28) and whether procedural safeguards — such as those proposed in *Basi* (see above at para. 37) — can adequately address the risk. This risk is heightened when one considers that the determination of whether informer privilege exists is made not on the criminal standard, but on the lesser balance of probabilities standard.
5. Furthermore, moral and reasoning prejudice may be significant where the Crown alleges that the accused made the tip with the intention of interfering with a police investigation. These concerns are particularly acute in a jury trial. If the jury accepts that the accused made the call to Crime Stoppers to divert attention away from himself, this could discredit the character of the accused in the eyes of the jury and create a risk of impermissible propensity reasoning: see *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 31. In addition, reasoning prejudice may result from introducing the tip into evidence. The allegation that the accused made the call will inevitably lengthen the trial and may distract the jury’s focus from the offence for which the accused is being tried: *ibid.*
6. Another concern is that the probative value of such evidence may be low. In some cases, the evidence may not be particularly relevant to the material issues in dispute. For example, in this case, X.Y. admitted that he alone was responsible for the shooting. Therefore, the evidence is not needed to prove the identity of the shooter; identity will be a non-issue. Additionally, such evidence may not be particularly relevant to proving that X.Y. was conscious of the fact that he had committed a culpable act. He may have had other reasons for misleading the police in their investigation. For example, where a person has killed another person in self-defence, that person may seek to throw the police off the trail for fear that he or she will be charged with murder: see *R. v. White*, [1998] 2 S.C.R. 72,at para. 36; D. M. Paciocco, “Simply Complex: Applying the Law of ‘Post-Offence Conduct’ Evidence” (2016), 63 *Crim. L.Q.* 275. Another relevant factor is whether the Crown can lead other less prejudicial evidence to support its position: *Handy*,at para. 83. For example, in this case, there is less prejudicial evidence that the Crown can lead to make the point that X.Y. intended to deflect attention away from himself during the police investigation, namely, his statements to the police which he subsequently admitted were false.
7. In sum, applications of this nature can come with significant costs to the trial process and the probative value of the evidence may be marginal. In view of these concerns, it may make sense for the application judge to require a preliminary *in camera* showing by the Crown in support of its claim that the evidence is admissible, before proceeding to a determination of whether informer privilege exists: see *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659,at para. 38; *R. v. Kutynec* (1991), 7 O.R. (3d) 277 (C.A.), at pp. 288-89; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.). This may involve an “exclusion showing”, a “probity showing”, or both.
8. For an exclusion showing, the Crown would be required to outline the basis upon which it is alleging that informer privilege does not apply. This may include a submission by the Crown about the evidence it expects to adduce to establish the identity of the informer and the requisite intent of furthering criminal activity or interfering with the administration of justice. The judge may decide that a hearing is unwarranted if he or she finds that the challenge is based on evidence that is weak or speculative.
9. The probity showing requires the Crown to demonstrate that there is a realistic prospect that the probative value of the evidence will outweigh its prejudicial effect.[[3]](#footnote-3) If the judge is satisfied that there is no realistic prospect that the probative value of the proposed evidence outweighs its prejudicial effect — which includes any increased trial time and moral and reasoning prejudice — then the judge should exercise his or her discretion to dismiss the challenge to the privilege claim.
10. Both the exclusion showing and the probity showing will likely need to be heard *ex parte* and the judge may consider providing a redacted or summarized version of the submissions to the defence or appointing an *amicus curiae*, as suggested in *Basi*.
11. To be clear, I should not be taken as suggesting that a preliminary *in camera* exclusion or probity showing must always be conducted in cases like the present one. The application judge retains a wide discretion when it comes to process and a reasonable determination in that regard should be accorded considerable deference.
	* 1. Application to This Case
12. Before I turn to the procedure followed by the application judge in the instant case, I wish to address a concern that arises from the conduct of the Crown. Prior to any rulings being made by the application judge, the Crown disclosed to the defence the Crime Stoppers tip sheet and all relevant information in its possession about it. This, in my view, should not have occurred. As discussed, informer privilege is not a matter of discretion for the police, the Crown, or the courts to apply. Rather, they are bound by the rule and must assume that the privilege exists until a court has determined otherwise.
13. Turning to the procedure followed in this case, in my view, the application judge carefully considered the court’s duty to uphold informer privilege and adopted a reasonable procedure. The application judge held an *in camera* hearing to determine whether informer privilege applied to the Crime Stoppers tip. There was no need for an *ex parte* proceeding in this case because the Crown had earlier disclosed the tip sheet to the defence, albeit improperly. The application judge reasonably determined that he could view the content of the tip sheet to determine whether informer privilege existed. Once the application judge decided that informer privilege did not apply to the Crime Stoppers tip, he reconvened in open court to assess the probative value of the evidence against its prejudicial effect. His determination that the probative value of the evidence outweighed its prejudicial effect is not in issue on this appeal.
14. Conclusion
15. For these reasons, I would dismiss the appeal.

 *Appeal dismissed.*

 Solicitors for the appellant Durham Regional Crime Stoppers Inc.: Clay & Company, Victoria; Michelle E. Booth, Barrister and Solicitor, Toronto.

 Solicitors for the appellant X.Y.: Derstine Penman, Toronto.

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

 Solicitor for the intervener: Public Prosecution Service of Canada, Toronto.

1. The issue of an informer who engages in criminal activity for the purpose of assisting a legitimate police investigation or operation is not before us: see *R. v. Hiscock* (1992), 72 C.C.C. (3d) 303 (Que. C.A.), at pp. 329-30. [↑](#footnote-ref-1)
2. For example, this could occur where the defence believes that privilege does not apply to a tip because it was made by a witness or a police officer with the intention of furthering criminal activity or interfering with the administration of justice. [↑](#footnote-ref-2)
3. This assessment applies where the evidence does not relate directly to the offence with which the accused is charged. Where the evidence relates directly to the elements of the offence — for example, a charge of obstruction of justice contrary to s. 139 of the *Criminal Code*, R.S.C. 1985, c. C-46— then clearly the evidence will pass this test and a preliminary showing of probity will likely be unnecessary. [↑](#footnote-ref-3)