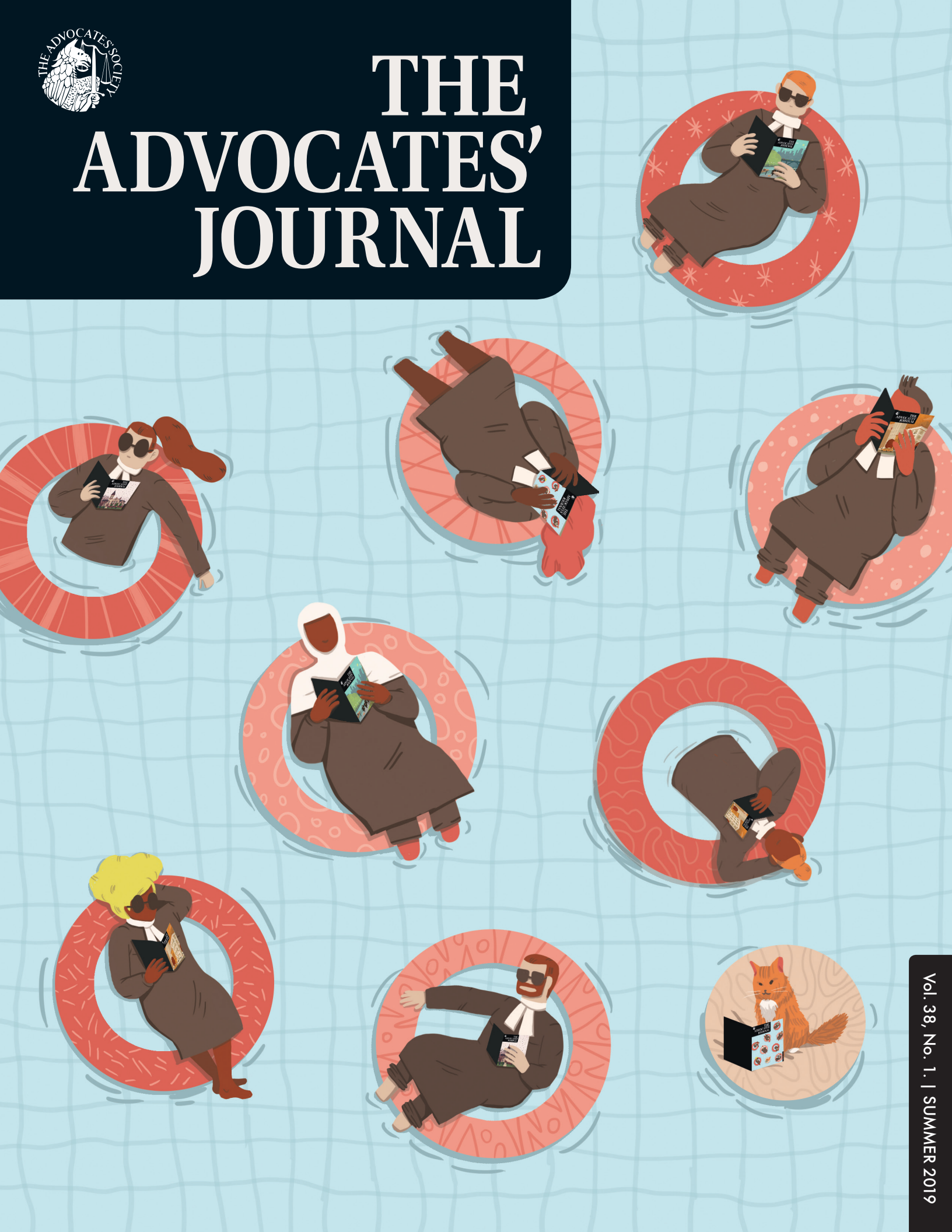
THE ADVOCATES' JOURNAL



Vol. 38, No. 1. | SUMMER 2019

Informer privilege and an illustration of illegitimate delay

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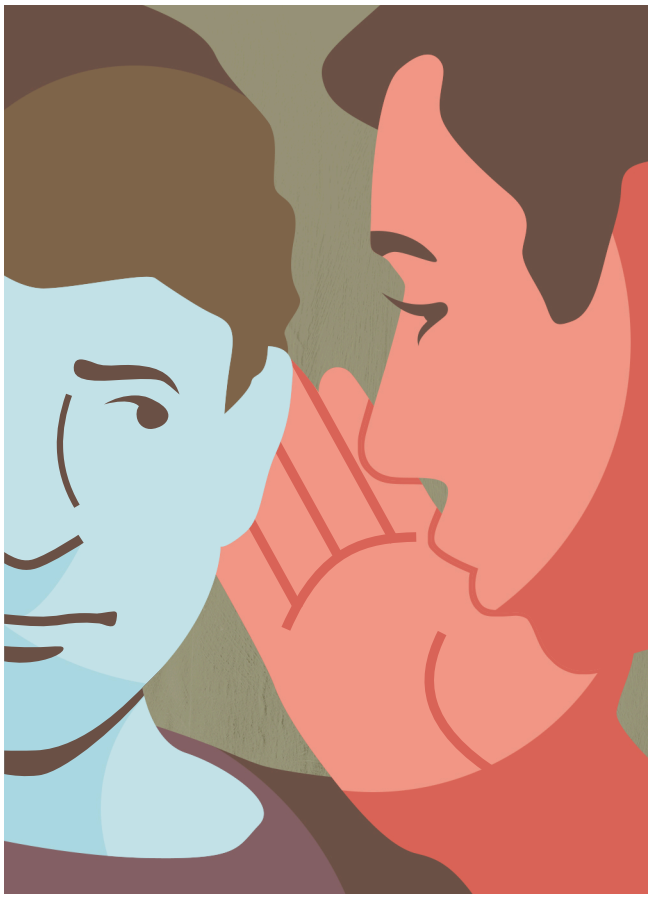
On May 6, 2005, former Edmonton police detective Ross Barros arranged an important meeting with detectives Kevin Brezinski and Kelly Krewenchuk. Barros had recently left policing to become a private investigator. One of his clients was Sid Tarrabain, a lawyer defending Irfan Qureshi on charges of drug trafficking. Barros decided to investigate the identity of an informer who allegedly tipped the police on Qureshi. The lead officer in the Qureshi investigation was Detective Brezinski.

The morning of May 6, Brezinski and Krewenchuk were scheduled to golf together but made time to see Barros before their game. When they sat down with him at the clubhouse, Barros told them he had identified the informer. The conversation ended Barros's friendship with Brezinski, who once saw Barros as a mentor. It also resulted in charges against Barros for extortion and obstruction of justice.

Barros was fully acquitted in both a first trial in 2007 and a retrial in 2015. The retrial followed Barros's appeal to the Supreme Court of Canada, where Binnie J., writing for the majority, made the following observations in directing a new trial on two of the three counts:

> The duty to protect and enforce informer privilege rests on the police, the Crown, and the courts [...] From the perspective of an accused, discovery of the identity of a source, and the circumstances under which his or her information was obtained by the police, may legitimately play a role in making out a full answer and defence.[1]

Barros had undertaken his own investigation to determine the informant's identity. But when may an accused legitimately seek the court's assistance in pursuing inquiries that will likely identify a confidential informer? And what should be the consequences of seeking this assistance at the wrong time? In this article, I propose to answer these questions from a complementary reading of the Supreme Court's recent decisions in *R. v. Brassington* and *R. v. Cody*.[2]



Informer privilege and *R. v. Brassington*

My short answer to the first question is that it is never legitimate for an accused to bring any type of court proceeding to identify anyone protected by informer privilege unless this is the only way to stop a wrongful conviction.

Like solicitor-client privilege, informer privilege is a common-law class privilege. It arises when the police explicitly or implicitly promise confidentiality to a source in exchange for information, provided the information is not given to further criminal activity or interfere with the administration of justice.[3] Judges have no discretion to vary this privilege unless a criminal accused shows that they cannot raise a reasonable doubt without identifying the informer.

Informer privilege has enjoyed this protection for centuries.[4] Informers play an essential role in the investigation and prosecution of crime, but doing so makes them vulnerable to often horrific reprisal if their identity is revealed. Informants' willingness to participate in the justice system depends on their confidence that the system will protect them.

Challenges to this protection should not be decided on a case-by-case basis. This is why "innocence at stake" is the only exception to informer privilege. The only goal more important than protecting confidential police informers is protecting innocent persons from losing their freedom by way of a wrongful conviction.

However, as *Brassington* shows, innocence at stake is a last re-

sort, not a shortcut to plea bargains or withdrawals of charges. In my reading, *Brassington* confirms that the only legitimate process for an accused to raise innocence at stake is to bring a *McClure* application at the close of the Crown's case at trial.

Like *Barros*, *Brassington* also involved former police officers charged with obstruction of justice (and other offences; the specific allegations remain subject to a publication ban). The issue on appeal was whether the officers could discuss information with their counsel that might reveal the identity of confidential informers. The officers brought an application to permit this, not relying on innocence at stake but rather on their need to properly instruct counsel and the possibility that privileged information may be relevant to their defence. The British Columbia Supreme Court granted the application, which the Court of Appeal refused to reconsider on jurisdictional grounds.

The Supreme Court of Canada began its analysis by distinguishing between defence attempts to properly define the scope of informer privilege and attempts to "pierce" it. Defining the scope does not engage innocence at stake because the accused is not seeking access to privileged information, only to receive what is not privileged. *Brassington* involved piercing because the officers, who are bound by informer privilege, wished to disclose privileged information to their counsel, who are not bound by the privilege (as stated in *Barros*).

The Court then moved to the appropriate process for piercing the privilege based on its previous decisions in *R. v. McClure* and *R. v. Brown*.[5] The process involves two threshold questions, followed by a two-step innocence at stake test. At all stages of the process, the burden rests on the accused on a balance of probabilities.[6]

The two threshold questions are:

1. Can the accused obtain the information they are seeking from any other source that is not privileged?
2. Is there any way for the accused to raise a reasonable doubt without the information they want?

To move forward, the accused must show that both answers are no; otherwise, the inquiry goes no further. At this point, even the judge has not reviewed the privileged information.

If the accused passes the two threshold questions, they move on to the first branch of the innocence at stake test (or the third step of the overall process):

3. Can the accused demonstrate an evidentiary basis to conclude that a privileged communication exists that could raise a reasonable doubt?

Again, if the accused cannot do this, the inquiry ends, and the judge still has not reviewed the privileged information. It is only if the accused produces this evidence that the judge will then examine the privileged information on an *in camera* basis in the absence of the accused and their counsel, to consider the second branch of the innocence at stake test, which is the fourth and final step of the overall process:

4. Will the privileged communication likely raise a reasonable doubt as to the guilt of the accused?

The judge will produce the privileged communication to the accused only when satisfied that it is more likely than not to raise reasonable doubt. Even at this stage, the judge will not produce any more than necessary to raise reasonable doubt.

The reason to delay this lengthy process until the end of the Crown's case is to completely avoid it if the Crown has failed to prove its case by that time.[7] This is essential not only to avoid needlessly violating the privilege, as the Court stated in *Brown*, but also for ensuring that criminal cases and trials themselves proceed expeditiously and in keeping with section 11(b) of the *Charter*.

This returns to the second question posed earlier. What consequences should result from an accused raising innocence at stake before the end of the Crown's case at trial?

R. v. Cody and an example of illegitimate delay

The well-known *R. v. Jordan*[8] and *Cody* decisions respectively established and reaffirmed the 18- and 30-month ceilings for provincial and superior court cases during which the accused must be tried and beyond which they are presumptively entitled to a stay of proceedings for unreasonable delay.

Cody also raised the concept of "illegitimate" delay when the accused directly prolongs the proceeding for reasons that do not respond to their charges.[9] Under the *Jordan* and *Cody* framework, any time attributable to this illegitimate delay will be excluded from the 18- or 30-month ceilings. As a general instance of this, the Supreme Court referred to frivolous applications and requests by the accused.

I suggest that, following *Brassington*, any attempt by an accused to access informer privileged information short of bringing a *McClure* application at the close of the Crown's case at trial should be considered illegitimate delay. An even more specific scenario illustrates how this can happen.

In 2016, the Ontario Superior Court released *R. v. McKenzie*,[10] which clarified the scope of the "investigative file" that an accused is entitled to review in a *Garofoli* application to challenge a search warrant. Under *McKenzie*, the investigative file will include any information that an investigating officer reviewed in swearing the information to obtain, including information received from a confidential informer. Based on *R. v. Stinchcombe*,[11] the Superior Court decided that this information should be redacted for informer privilege and then shared with the accused, with the judge having jurisdiction to review the complete information to confirm that the Crown's redactions are proper.

But what if the officer reviewed a confidential tip from an *anonymous* source? Must this be redacted and shared with the accused as well? *McKenzie* did not consider the impact of anonymity, but in *R. v. Leipert*,[12] the Supreme Court did and ruled that an anonymous tip should never be disclosed to an accused unless innocence is at stake, even in redacted form, because the anonymous nature of the source makes it impossible to know what details in the tip information will reveal the identity of the source and thus compromise informer privilege.[13]

Following *McKenzie*, the accused has an understandable and justifiable interest in accessing any and all information supporting a search warrant. But this has its limits, and informer privilege is one of them. *Brassington* stands for the principle that no attempt to "pierce" informer privilege should be made until all other defence approaches to raising reasonable doubt have been exhausted. Following *Brassington*, if one of the items reviewed in preparing an information to obtain is an anonymous tip, any attempt by an accused to obtain this tip, even in redacted form, should be considered illegitimate delay unless sought by way of a *McClure* application at the close of the Crown's case at trial.

The costs of full answer and defence

Cody has attracted some criticism from the defence bar for its concept of illegitimate defence delay.[14] As *Cody* explains, "illegitimate" does not necessarily amount to professional or ethical misconduct on the part of defence counsel. As noted in *Barros*, it is not a crime for the accused or their agents

to identify a confidential informer. Aren't such measures simply instances of the accused exercising their right to make full answer and defence and thus undeserving of stigma?

The problem is that the right to make full answer and defence is not the only value that our justice system protects. As *Brassington* shows, informer privilege can limit that right. Even the section 11(b) right to be tried within a reasonable time requires responsibly exercising the right to make full answer and defence without causing unreasonable delay. When taking this right too far contributes to the culture of delay that *Jordan* spoke so strongly against, there must be a correction. Defence conduct may be legal, professional and ethical, and yet illegitimate when balanced against the many values our legal system must uphold.

An analogous concept from the civil justice system is the costs regime. The discretion of judges to award costs for illegitimate motions or other tactics in civil cases plays an essential role in applying some control on the incentives of litigants. Under *Jordan* and *Cody*, time is the most valuable currency of the criminal justice system. There should be consequences for spending it unnecessarily, especially when done at the expense of protecting confidential informers.

Notes

1. *R v Barros*, [2011] 3 SCR 368 at para 37 [*Barros*]. The decision on the retrial is reported at *R v Barros*, 2016 ABQB 243.
2. 2018 SCC 37 [*Brassington*] and [2017] 1 SCR 659 [*Cody*].
3. *R v Durham Regional Crime Stoppers Inc*, [2017] 2 SCR 157 at paras 11 and 22.
4. In *Barros*, *supra* note 1 at para 28, the Supreme Court dated the origins of this protection to *The Trial of Thomas Hardy for High Treason* (1794) 24 St Tr 199.
5. [2001] 1 SCR 445 [*McClure*] and [2002] 2 SCR 185 [*Brown*].
6. *Brown*, *ibid* at para 56.
7. *Ibid* at para 52.
8. [2016] 1 SCR 631.
9. *Cody*, *supra* note 2 at para 30.
10. 2016 ONSC 242.
11. [1991] 3 SCR 326.
12. [1997] 1 SCR 281.
13. *Ibid* at paras 28–32.
14. See eg Matthew Gourlay, "SCC Took Danger to Heart in Groia," 2 July 2018, *Law Times*; online: <https://www.lawtimesnews.com/author/matthew-gourlay/scc-took-danger-to-heart-in-groia-15933/>.