Confidential Informer Privilege

This paper examines the nature and scope of confidential informer privilege, focusing in particular on the following topics:

(1) informer privilege and its rationale;
(2) determining whether informer privilege is engaged;
(3) the innocence-at-stake exception to informer privilege;
(4) the case-to-meet principle;
(5) informer privilege and challenging search warrants; and
(6) defence investigations regarding an informer’s identity.

(1) Informer Privilege and Its Rationale

Informer privilege imposes a duty on the police, the Crown and the courts not to release any information that risks revealing the identity of a police informer.\(^\text{1}\) The privilege has been described as being “of fundamental importance to the workings of a criminal justice system.”\(^\text{2}\) Its rationale is to protect those who provide confidential information to police from the risk of retribution, and more generally to encourage cooperation by future informers.\(^\text{3}\) As recently observed in *R. v. Barros* (2011), 273 C.C.C. (3d) 129 (S.C.C.), at para. 30:

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\(^{3}\) *Named Person*, Note 1, para. 17; *R. v. Scott* (1990), 61 C.C.C. (3d) 300 (S.C.C.), para. 31 (QL); *Leipert*, Note 2, paras. 9-10.
Police rely heavily on informers. Because of its almost absolute nature, the privilege encourages other potential informers to come forward with some assurance of protection against reprisal. A more flexible rule that would leave disclosure up to the discretion of the individual trial judge would rob informers of that assurance and sap their willingness to cooperate. See *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *R. v. Hunter* (1987), 57 C.R. (3d) 1 (Ont. C.A.); *R. v. Scott*, [1990] 3 S.C.R. 979; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253; *Leipert*; and *Basi*. The obligation to protect confidential sources clearly goes beyond a rule of evidence and is not limited to the courtroom. As the trial judge in this case put it, "[t]he police need help, but people who are available to provide information typically won't give that information to the police unless they are protected" (A.R., at p. 7).

The privilege is very broad in scope, extending beyond the source’s name to cover “any information which might tend to identify an informer”. Consequently, while it will often be possible to release some information provided by the informer without compromising the privilege, where the nature of the information risks revealing its source, disclosure will be precluded. For instance, where the identity of the informer is unknown to police, as in the case of an anonymous Crimestoppers tip, the privilege may cover all of the information provided, because it may be difficult if not impossible to know what information, if released, might tend to reveal the source’s identity.

Informer privilege must be enforced once it has been shown to apply. The court enjoys no discretion with respect to whether to enforce the privilege, nor can the court engage in any weighing of the justification for the privilege to determine whether it should be

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4 *Named Person*, Note 1, para. 16.
5 *Leipert*, Note 2, para 18.
6 *Leipert*, Note 2, para 16.
upheld in the particular case.\footnote{Leipert, Note 2, paras. 12-14; Named Person, Note 1, para. 30.} Informer privilege is thus a “class privilege”, one of only two recognized at common law.\footnote{R. v. Basi (2009), 248 C.C.C. (3d) 257 (S.C.C.), para. 22; R. v. Y.(X.) (2011), 269 C.C.C. (3d) 534 (Ont. C.A.), para. 22. The other common law class privilege is solicitor-client privilege.}


(2) Determining Whether the Privilege is Engaged

Informer privilege is not engaged simply because an individual provides information to the police in the hope that his or her identity remain secret. Rather, the privilege only arises where confidentiality is sought by the individual and agreed upon by the police, whether expressly or by implication.\footnote{Basi, Note 8, para. 36; Barros, Note 1, para. 31.}

The privilege cannot be claimed by or on behalf of an so-called “agent provocateur”; i.e. a person who goes into the field as a police agent and thus participates in the investigation as a State actor.\footnote{Barros, Note 1, para. 33.} On the other hand, the fact that an individual is a police
agent in relation to one matter does not in itself preclude him or her from being a protected informer regarding another.\textsuperscript{14}

It is often said that informer privilege does not apply where the individual who has provided the information is a “material witness” to the crime.\textsuperscript{15} Yet individuals who provide information to police in exchange for a promise of confidentiality will not infrequently have witnessed the crime in question (e.g. by seeing drugs or firearms stored at a house). Are they thus “material witnesses”, meaning that the privilege cannot apply? It appears not. The better view is that the “material witness” category is but a manifestation of the “innocence-at-stake” exception to the privilege, discussed below, which only applies where several very demanding preconditions are met.\textsuperscript{16}

The Crown has the onus of proving that the privilege is engaged on the balance of probabilities.\textsuperscript{17} Unless and until the trial judge decides the issue against the Crown, the information in question must remain secret.\textsuperscript{18} The hearing to determine whether the privilege applies will be \textit{in camera} and \textit{ex parte}, to the extent required to ensure that possibly privileged information is not released.\textsuperscript{19} Defence counsel is not permitted access to the contested information for the purpose of making submissions regarding

\textsuperscript{15} \textit{Barros}, Note 1, para. 33; \textit{Named Person}, Note 1, para. 29; \textit{Scott}, Note 3, paras. 38-39 (QL).
\textsuperscript{17} \textit{Basi}, Note 8, para. 39.
\textsuperscript{18} \textit{Basi}, Note 8, para. 44.
\textsuperscript{19} \textit{Basi}, Note 8, paras. 38, 41-44.
the application of the privilege, not even on an undertaking not to share the information with anyone else including his or her client.  

The court must nonetheless strive to ensure that defence counsel is able to make meaningful submissions regarding the application of the privilege, at least to the extent possible without revealing any material that may be covered by the privilege. Options in this regard include: (a) providing the defence with redacted or summarized versions of the information; (b) permitting the defence to relay questions to the trial judge, which can then be posed to Crown counsel or a witness in an ex parte, in camera proceeding; (c) appointing amicus curiae to attend the ex parte proceeding to provide assistance in assessing the privilege claim.

(3) Innocence-at-Stake Exception

Informer privilege operates as a legitimate derogation from the accused’s constitutional right to disclosure. The only exception to the privilege occurs where the accused can show that his or her innocence is at stake. The innocence-at-stake test is a difficult one to meet. It requires that the accused jump several daunting hurdles.

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20 Basi, Note 8, para. 44 fwd. In X, Note 9, paras. 126-31, defence counsel were permitted to attend most of the in camera proceedings, albeit on undertakings and without their clients being present, because the material had already been disclosed by the Crown; the issue to be decided was whether the Crown’s initial decision to disclose the material was in error because the privilege properly applied and had not been waived by the source.

21 Basi, Note 8, paras. 53-58.

22 Leipert, Note 2, paras. 23-25; Named Person, Note 1, para. 28; Basi, Note 8, para. 43.

First, the accused need establish that the privileged information is not available from any other admissible source.\footnote{R. v. Brown (2002), 162 C.C.C. (3d) 257 (S.C.C.), paras. 4, 35, 67-72. Though the authorities are divided on the point, the law in this province appears to be that an accused who can testify about the same facts must be viewed an available source, even though he or she has a right not to be compelled to testify: see \textit{X}, Note 23, paras. 34-66}\footnote{Brown, Note 24, paras. 45, 70-71.} It matters not that the evidence from the other source is of lesser reliability – in such an event, the exception will not apply.\footnote{Brown, Note 24, paras. 4, 46-50, 54.}

Second, the accused must show that he or she will be convicted if access to the privileged information is not provided.\footnote{Brown, Note 24, paras. 52-54. Thus, in \textit{X}, Note 23, the application was brought at the close of the Crown case. Potential concerns about waiting until this point to decide the application are noted in \textit{R. v. Schertzer}, [2008] O.J. No. 245 (S.C.J), paras. 17-19. To these I would add another: if a trial judge is sitting without a jury, can he or she properly decide whether the exception applies prior to closing submissions without being accused of having predetermined guilt? For a case where the application was brought, and granted, before the close of the Crown case, see \textit{Unnamed Person}, Note 23, paras. 59-60.}\footnote{Brown, Note 24, paras. 4, 59; Barros, Note 1, para. 17. These cases emphasize that the existence of an evidentiary basis is crucial: mere speculation that the information might assist the defence is not} It may be difficult to say whether a conviction is certain absent the evidence, especially in the early stages of the trial. The court will usually therefore defer hearing the “innocence-at-stake” application until after the close of the Crown’s case, or will dismiss the application without prejudice to the accused reapplying if the merits of his or her defences grow dimmer as the trial progresses.\footnote{Brown, Note 24, paras. 52-54.} In some cases, the certainty of conviction absent the privileged information may only crystallize with the jury’s verdict, in which case a fresh evidence application can presumably be made on appeal.

If the accused can satisfy these two preconditions, he or she must then demonstrate an evidentiary basis to conclude that the privileged information could raise a reasonable doubt as to guilt.\footnote{Brown, Note 24, paras. 4, 59; Barros, Note 1, para. 17. These cases emphasize that the existence of an evidentiary basis is crucial: mere speculation that the information might assist the defence is not} If the accused can do so, the trial judge will review the information in

question to determine whether, if available to the defence, it is likely to raise such a
doubt.\textsuperscript{29} If so, the judge must order the disclosure of as much information as is
necessary to enable the accused to attempt to raise a reasonable raise, but no more.\textsuperscript{30}

Where the innocence-at-stake test is met, the Crown should be given the option of
staying the case rather than disclosing the privileged information.\textsuperscript{31}

\section*{(4) The Case-to-Meet Principle}

It is beyond question that the Crown cannot rely on material that has been withheld from
the defence pursuant to informer privilege to help prove the guilt of the accused. In
other words, the trade-off for recognizing the privilege is a strict prohibition against the
withheld information being used against the accused. This prohibition flows inexorably
from the case-to-meet principle, which is expressed in the context of informer privilege

\begin{quote}
This case concerns an application for disclosure only. The Crown does not seek
to rely upon the redacted portions of the documents in order to prove guilt. Indeed, the Crown could not introduce the withheld information as evidence at trial without providing it to the defence. This is therefore not a case where the Crown seeks to use information against a person without permitting that person to see the information. Compare \textit{Charkaoui v. Canada (Citizenship and Immigration)}, 2007 SCC 9, [2007] 1 S.C.R. 350.\textsuperscript{32}
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\textsuperscript{29} Brown, Note 24, para. 4.
\textsuperscript{30} Brown, Note 24, paras. 4, 74-77.
\textsuperscript{31} Leipert, Note 2, para. 33.
\textsuperscript{32} The importance of the case-to-meet principle is discussed in greater detail in the \textit{Charkaoui} decision referred to by Mr. Justice Fish, at paras. 28-29 and 53-64, albeit in the context of national security certificate proceedings. A more recent case where the principle is endorsed in a criminal setting is \textit{R. v. Ahmad} (2011), 264 C.C.C. (3d) 345 (S.C.C.), para. 7.
(5) Informer Privilege and Challenging Search Warrants

Police typically use information supplied by an informer to conduct further investigations, which may in turn lead to evidence upon which the Crown can rely in prosecuting an accused at trial. This sometimes involves including the information received from an informer in an Information to Obtain (ITO) put before a justice on an application for a search warrant, or in an affidavit used in an application for a Part VI Criminal Code authorization to intercept private communications.

The accused has a constitutional right to disclosure of the material used to obtain a search warrant or Part VI authorization, but this right does not extend to informer-privileged information. Accordingly, the ITO or affidavit will be disclosed only after any such information has been redacted. Moreover, it is highly unlikely that the innocence-at-stake exception will apply in this context. The mere fact that the privileged information may, or even will, demonstrate a breach of the accused’s s. 8 Charter rights appears to be insufficient to engage the privilege. Rather, it is necessary to show that the information is likely to raise a reasonable doubt with respect to an element of the offence, something that will be well-nigh impossible in the vast majority of cases.

34 Leipert, Note 2, paras. 23-27; Named Person, Note 1, para. 28; Basi, Note 8, para. 43.
35 Leipert, Note 2, paras. 26-27.
36 R. v. McClure (2001), 151 C.C.C. (3d) 321 (S.C.C.), para. 58. This same point is implicitly supported by Leipert, Note 2, para. 26, where the example provided of how the innocence-at-stake exception might apply in the context of an ITO focuses on information that, if disclosed, would enable the accused to mount a defence on the basis that the contraband was planted by the informer.
The accused can nonetheless ask the trial judge to review the Crown’s editing of an ITO or affidavit to ensure that no more information than is necessary has been redacted to protect the privilege.\(^{37}\) The accused can also obtain a judicial summary of the edited information, where such can be provided without risking the revelation of the informer’s identity.\(^{38}\) To ensure that judicial editing or summaries do not inadvertently breach the privilege, the trial judge should canvass the proposed editing/summaries with Crown counsel before making a final decision.\(^{39}\)

While the accused is not entitled to disclosure of informer-privileged material used to obtain a search warrant or Part VI authorization, the case-to-meet principle operates to prevent the Crown from relying on the undisclosed information to rebuff a s. 8 Charter challenge to the search in question. The Crown can only look to the material that has been disclosed to the accused in seeking to uphold the search on review.\(^{40}\) As stated by Mr. Justice Watt in *R. v. Parmar*(1987), 31 C.R.R. 256 at 276, 284 (Ont. S.C.), affirmed (1989), 53 C.C.C. (3d) 489 at 491 (Ont. C.A.), restricting the Crown in this way ensures “anonymity without conferring unfair advantage on the party seeking to preserve it”.

It may be that some or all of the information provided by the informer can be disclosed without tending to reveal his or her identity. If so, the Crown can rely upon the disclosed


\(^{38}\) *Garofoli*, Note 37, p. 194”g“.

\(^{39}\) For a case where the trial judge’s editing was found to violate informer privilege, see *R. v. Omar*(2007), 218 C.C.C. (3d) 242 (Ont. C.A.), in particular at paras. 40-44. As already noted at the text accompanying Notes 5-6, caution must be exercised, by both Crown counsel and the court, because even the smallest detail may result in the informer’s identity being revealed.

\(^{40}\) *Leipert*, Note 2, paras. 37-39. The test on review is whether the supporting materials, as amplified on the *voir dire*, contain reliable evidence upon which the warrant or authorization could have issued: *R. v. Araujo*(2000), 149 C.C.C. (3d) 449 (S.C.C.), para. 51.
information in seeking to uphold the warrant on review. This may lead to a genuine concern as to the reliability of the informer’s information. After all, informers are usually part of a criminal milieu, and not infrequently provide their information in exchange for some benefit. These hallmarks of unsavouriness, combined with the anonymity afforded by the privilege, make it imperative that the reviewing court be confident the disclosed information is reliable before relying upon it on review.

A number of factors must be considered in determining whether disclosed information that originates from an informer is sufficiently reliable to be accepted by a judge on review. These include: (a) the degree of detail provided by the informer; (b) the informer’s source of knowledge; and (c) indicia of the informer’s reliability such as past performance or confirmation from other investigative sources. The fact that the informer’s information is borne out by the results of the search in question cannot be used to bolster his or her reliability.

As noted above, the basic rule is that the Crown cannot rely on informer-privileged material that has not been disclosed to the defence in an effort to meet a challenge to the constitutionality of a search. Yet two recent developments suggest a modification – some might say an unjustifiable weakening – of this basic rule.

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41 Of course, the police and issuing judge must also take these factors into account in deciding whether to include the informer’s tip in the ITO/affidavit, or to issue the warrant/authorization, as the case may be.
43 R. v. Greffe (1990), 55 C.C.C. (3d) 161 at 187, 189-90 (S.C.C.); Garofoli, Note 37, p. 191“g”.
First, in *R v. Blake* (2010), 251 C.C.C. (3d) 4 (Ont. C.A.), Mr. Justice Doherty held that, where the material remaining after an ITO was edited could not support the issuance of the warrant on review, resulting in a breach of s. 8, the Crown could nonetheless rely on the good faith of the police in obtaining and executing the warrant in considering whether the evidence should be excluded under s. 24(2). He allowed, however, that the situation might be different where the accused had sought to challenge the privilege or the extent of the Crown’s editing, or there was evidence pointing to impropriety or an inattention to constitutional standards on the part of the police.

The British Columbia Court of Appeal recently faced a similar issue in *R. v. Bacon*. There, the Crown had proceeded on the basis of a warrantless search because the redacted ITO could not support the warrant on review, and thus conceded the s. 8 breach, but argued under s. 24(2) that the breach was merely technical or minor because it was caused by the need to protect informer privilege. Of course, the operation of the privilege meant that the defence was unable to test the Crown’s implicit assertion, at the s. 24(2) stage, that the unredacted ITO contained sufficient reliable information to support the warrant on review. The trial judge nonetheless accepted the Crown’s argument. On appeal, the defence argued that she erred in doing so, given

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44 *R. v. Goncalves* (1993), 81 C.C.C. (3d) 240 (S.C.C.), is an older case that provides some support for Mr. Justice Doherty’s view. However, as suggested by MacFarlane, Frater and Proulx, in *Drug Offences in Canada*, 3rd ed., ¶18.800, the two-sentence endorsement in *Goncalves* is too brief to provide much guidance on the issue of admissibility under s. 24(2) where a warrant cannot be upheld because privileged material has been excised from the ITO.


47 *R. v. Bacon* 2010 BCPC 1, paras. 57-69, 85. No other case appears to have addressed whether the Crown can proceed on the basis of a warrantless search after having edited informer-privileged material from an ITO, yet rely on the police having obtained a warrant in arguing against exclusion under s. 24(2). This very issue was raised, but not determined, by Watt J. in the early case of *R. v. Parmar* (1987), 31 C.R.R. 256 at 272, 273 (Ont. S.C.).
that the Crown bears the onus of proving good faith under s. 24(2), and in the absence of any explanation as to the grounds for the search a s. 8 breach is presumed to be serious at the first stage of the Grant test. The decision in Bacon is currently on reserve.

The second, closely related development of note in this area involves the so-called Step 6 Garofoli procedure, named after the Supreme Court of Canada's well-known decision of the same name. This procedure was proposed as a means by which the Crown could rely on redacted informer-privileged material to support the constitutionality of a search warrant or Part VI authorization where, as in the Blake and Bacon cases, the ITO or affidavit as edited could not support the warrant on review. Garofoli describes the Step 6 procedure as follows:

6. If, however, the editing renders the authorization insupportable, then the Crown may apply to have the trial judge consider so much of the excised material as is necessary to support the authorization. The trial judge should accede to such a request only if satisfied that the accused is sufficiently aware of the nature of the excised material to challenge it in argument or by evidence. In this regard, a judicial summary of the excised material should be provided if it will fulfill that function. It goes without saying that if the Crown is dissatisfied with the extent of disclosure and is of the view that the public interest will be prejudiced, it can withdraw tender of the wiretap evidence.

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48 The good faith of the officers who execute the warrant is of little moment if those who drafted it were neither diligent nor mindful of the duty to make full and frank disclosure (R. v. Morelli (2010), 252 C.C.C. (3d) 373 (S.C.C.), para. 100). By proceeding on the basis of a warrantless search, the Crown does not rely upon the material that the drafting officers put before the issuing justice on review, and in any event those portions that have been redacted due to informer privilege cannot be tested by the defence.


50 Garofoli, Note 37.
Very few if any reported cases even mentioned, let alone employed, the Step 6 procedure in the years following Garofoli. Until, that is, the decision in R. v. Learning (2010), 258 C.C.C. (3d) 68 (Ont. S.C.J.). In Learning, Mr. Justice Code cautiously endorsed the procedure as a way of ensuring that searches that are in fact supported by sufficient grounds are not found to have violated the Charter.

Since Learning was decided, Step 6 applications have been brought and allowed in at least two Ontario Superior Court trials. The judges in both cases ruled that, although the Step 6 procedure attenuated somewhat the case-to-meet principle, this was acceptable in the context of a pre-trial application dealing with the admissibility of evidence, where the guilt or innocence of the accused was not at stake. They were not overly troubled by the opposing concern, mentioned by Mr. Justice Code in Learning, that a procedure by which the court ends up deciding a constitutional issue on the basis of information that the defence has never seen or tested, other than through

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51 A rare case from that time in which the Step 6 procedure was mentioned as a possible option for the Crown where the ITO or affidavit as edited did not support the warrant or authorization on review is R. v. Alekseev, 1992 CanLII 612 (B.C.S.C.), p. 38.
52 R. v. Learning (2010), 258 C.C.C. (3d) 68 (Ont. C.A.), paras. 103-06. In Learning itself, the Crown elected not to utilize the Step 6 procedure. However, Code J. reviewed the unedited ITO for the purpose of creating a judicial summary of the edited portions for the defence, and having done so expressly commented that, subject to a successful attack on the sub-facial validity of the ITO, the affiant had abundant grounds to obtain the search warrant (paras. 96-99).
54 Sahid, Note 53, paras. 31-32; Brown, Note 53, para. 33. The same argument is mentioned in Learning, Note 52, para. 106, although Code J. did not find it necessary to decide whether the Step 6 procedure represented an acceptable limit on the case-to-meet principle.
the vehicle of a judicial summary, “raises the spectre of secret trials and violations of ‘the right to meet the case’.” 55

As a final point, Garofoli mentions the possibility of using judicial summaries to afford the defence an opportunity to challenge the redacted information under the Step 6 procedure. Where necessary to ensure fairness, a court might be also open to appointing an amicus curiae or special advocate to review the redacted material and make submissions advancing the interests of the defence at an in camera hearing at which the trial judge and Crown counsel are the only others present. 56

(6) Defence Investigations Regarding an Informer’s Identity

In the 2010 case of R. v. Barros, 57 a majority of the Alberta Court of Appeal held that the defence was prohibited from attempting to discover the identity of an informer mentioned in the disclosure materials, even where doing so could legitimately advance the accused’s case at trial. If correct, this holding would impose a restriction on defence counsel beyond that established by the implied undertaking attaching to disclosure

55 Learning, Note 52, para. 105. As noted in the text above, as well as Note 54, Mr. Justice Code nonetheless seemed more inclined than not to endorse the Step 6 procedure as an available mechanism for deciding Charter applications involving informer-privileged information.

56 The use of an amicus in the context of confidential informer proceedings is discussed in Basi, Note 8, para. 57. See also R. v. Bath 2010 BCSC 1131, p. 3, para. 1. The use of special advocates has received favourable mention in Re Charkaoui (2007), 44 C.R. (6th) 1 (S.C.C.), paras. 80-84, and Ahmad, Note 32, paras. 47-48, albeit regarding other types of privilege.

materials received from the Crown, which only prevents counsel from using the materials for matters collateral to the client’s defence.58

In October of last year, the Supreme Court of Canada rejected the Alberta Court of Appeal’s view of the law, holding instead that defence counsel is entitled to take lawful steps to ascertain a confidential informer’s identity for the proper purpose of putting forward the client’s case at trial.59 This is so, said Mr. Justice Binnie, writing for the unanimous Court on this point, even though the police, Crown and court are duty-bound to prevent the release of any information that might reveal a confidential informer’s identity. Informer privilege thus justifies the Crown in restricting the amount of information disclosed to the accused, but it does not prevent defence counsel from attempting to discover the identity of the informer so that full answer and defence can be made on behalf of the client.60

The Supreme Court of Canada’s decision in Barros is a welcome one for defence counsel, affirming as it does counsel’s staunch duty to act as zealous advocate for the client in making full answer and defence. Yet Barros makes equally clear that defence counsel cannot use unlawful means to obtain an informer’s identity (e.g. by employing threats), nor can counsel seek out such information for an illegal purpose (e.g. to threaten release of the informer’s identity in the criminal milieu unless a stay of proceedings is entered).61

59 Barros, Note 1.
60 Barros, Note 1, paras. 1-2, 37-43.
61 Barros, Note 1, paras. 40-43.
In other words, disclosure can never be used for an illegal or otherwise unethical purpose, not even where doing so holds a real prospect of assisting the client in avoiding a conviction.\textsuperscript{62} \textit{Barros} does \textbf{not} provide defence counsel with \textit{carte blanche} to carry out any investigations whatsoever into the identity of the informer or to use the fruits of such investigations for whatever purpose counsel desires. The investigation must always be carried out, and any resulting information handled, in a legal and ethical manner.

\footnote{See, e.g., the LSBC \textit{Professional Conduct Handbook}, Chapter 1, Rule 1(1); Chapter 1, Rule 3(5); Chapter 2, Rule 1; Chapter 4, Rule 6; and Chapter 8, Rule 1, all of which stress, in one way or another, that a lawyer must never knowingly act in contravention of the law, regardless of the benefits that might thereby be obtained for the client.}