D. Garofoli Steps 1 and 2

As outlined previously, *Garofoli* steps 1 and 2 contemplate that the ITO will be unsealed and edited by the prosecution. If the defence is not satisfied with the nature of the editing, it can then ask the trial judge to order additional disclosure. The judge may then consider whether the claim of informer privilege is valid and whether the prosecution edited the ITO in a manner that struck the right balance between informer privilege and the accused's right to disclosure.

This raises evidentiary and procedural questions: Should the prosecution be required to tender evidence in support of its position? What evidence should it be permitted to tender? How will the defence participate in the process? Will the hearing be conducted in open court or should it be done *in camera*?

In *R v Basi*,[30] the Supreme Court made it clear that trial judges have broad discretion in determining the procedure for addressing disputes in the context of disclosure and informer privilege. In that case, the defence challenged a claim of informer privilege and the trial judge ruled that an *in camera* hearing would be held with defence counsel present, as long as defence counsel submitted to an order not to disclose information from the hearing with the accused. The prosecution then invoked section 37 of the *Canada Evidence Act* (CEA),[31] which provides as follows:

> [A] Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

The trial judge then ordered that defence counsel could be present for the hearing under section 37 of the CEA. The prosecution appealed immediately, and the Supreme Court considered whether the trial judge was correct in ordering that defence counsel be permitted to be present during the hearing.

Fish J held that defence counsel and the accused should be excluded from the room when the trial judge is determining whether a claim of privilege applies. One problem with permitting the defence to receive the information, he explained, is that receiving the confidential information tends to erode the trust and confidence in the lawyer–client relationship. It would also be a breach of informer privilege, which requires the prosecution to protect the identity of the confidential source and all information that might tend to reveal his or her identity.

Fish J also held that trial judges have broad discretion to determine how to fairly determine challenges to a claim of confidentiality:

30 *Supra* note 8 at paras 52-53.

31 RSC 1985, c C-5.

> 55 In order to protect these interests of the accused, trial judges 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.
>
> 56 Measures that a trial judge may wish to adopt in assessing a claim of informer privilege include inviting submissions on the scope of the privilege—including argument as to who constitutes a confidential informant entitled to the privilege—and its application in the circumstances of the case. Defence counsel may be invited as well to suggest questions to be put by the trial judge to any witness that will be called at the *ex parte* proceeding.
>
> 57 In appropriate cases, fairness may require the court to provide the defence with a redacted or summarized version of the evidence presented *ex parte*—edited to eliminate any possibility of disclosing the informant's identity—so as to permit the trial judge to receive additional submissions from the defence on whether the privilege applies in the particular circumstances of the case. In particularly difficult cases, the trial judge may appoint an *amicus curiae* to attend the *ex parte* proceeding in order to provide assistance in assessing the claim of privilege.[32]

In *R v McKenzie*,[33] a 2015 case from the Ontario Superior Court, Campbell J crafted a procedure for determining whether the prosecution had edited too much information from an ITO. The prosecution provided defence counsel with a copy of the edited ITO, and defence counsel took the position that "there needed to be a more robust procedure undertaken to ensure that the original ITO was redacted no more than necessary by the Crown."[34] Campbell J decided that he would require the prosecutor to justify the editing:

> 13 In the absence of any expressed justification for the proposed editing of the ITO, however, the trial judge is left to reach the "final determination" on the editing issue based only upon: (1) the contents of the original, unredacted ITO; (2) the contents of the redacted ITO; and (3) the contents of the proposed judicial summary. In some circumstances it may be patently obvious as to why a redaction is necessary in order to preserve the anonymity of the confidential informant. But there will undoubtedly be other circumstances when the need for a redaction is not nearly so self-evident, and an explanation by the Crown seeking to justify the proposed redaction might well prove to be very helpful to the trial judge. After all, at an early stage of the trial proceedings, the Crown is apt to have a broader base of factual knowledge as to the scope of the police investigation and the other circumstances of the case, and will have ready access to consultation with the investigating police officers, the confidential informant's police "handler" or main police liaison, and potentially (at least indirectly) the confidential informant him or herself. In short, if there

32 *Basi*, *supra* note 8 at paras 55-57.

33 [2015] OJ No 7036 (QL) (Sup Ct J). Nathan Gorham, one of this book's authors, was counsel on the case.

34 *Ibid* at para 11.

> is any justification for the proposed editing of the ITO, the Crown is in the best position to provide that explanation. Once advised of any proposed justification, the trial judge will then be in a better position to assess the merits of the justification and the corresponding need for the proposed editing.
>
> 14 This is not, however, only an issue of practical efficacy and common sense. The Crown bears the legal burden of justifying any proposed editing. In *R v Durette* (1992), 9 O.R. (3d) 557 (C.A.), at para. 151, Doherty JA, in a dissenting judgment, ultimately endorsed by the Supreme Court of Canada (*R v Durette*, [1994] 1 S.C.R. 469, at paras. 36, 43-45), made it clear that full disclosure of an ITO is the "starting premise" and any redaction that may interfere with the ability of the accused to make full answer and defence "must be justified by the Crown in accordance with established principles." More specifically, Doherty JA suggested that the editing of an ITO is best viewed as a "necessary evil" even when justified by "public interest concerns" and it follows that the Crown initially, and the court ultimately, must endeavour to minimize any editing. On further appeal, Sopinka J, delivering the judgment of the majority of the Supreme Court of Canada, confirmed, at para. 45, that "full disclosure should be the rule, subject only to certain exceptions based upon overriding public interests which may justify non-disclosure," and suggested that a supporting affidavit or ITO "should only be edited to the extent necessary to protect those overriding public interests."[35]

Campbell J also decided that the appropriate procedure, in the circumstances of the *McKenzie* case, would entail the prosecutor providing the court "with a written explanation and/or justification for each of the proposed redactions to the ITO."[36] However, he declined to issue directions to the Crown concerning the substantive content of its written explanation, how it should be prepared, or whom the Crown should consult in preparing the document.[37]

E. Cross-Examination of the Affiant on the Garofoli Application

During the *Garofoli* process, the defence may seek leave to cross-examine the affiant. Before leave is granted, however, the trial judge must be satisfied that the questioning is likely to result in probative evidence on the application. The defence need not demonstrate that the cross-examination will invalidate the warrant or even yield evidence that is helpful to the defence. Rather, the defence must show that the questioning will assist the trial judge in resolving the issues on the application.[38] This leave requirement aims to prevent prolix proceeds and to protect confidential informant privilege.[39]

35 *Ibid* at paras 13-14.

36 *Ibid* at para 18.

37 *Ibid* at para 19.

38 *Pires, Lising*, *supra* note 13; *Garofoli*, *supra* note 4.

39 *Pires, Lising*, *supra* note 13 at para 3.

F. Garofoli Step 6

At *Garofoli* step 5, the trial judge determines whether the warrant can be upheld on the basis of the edited ITO and the information tendered on the application. If the warrant cannot be upheld, then the prosecution may apply, under *Garofoli* step 6, for an order that the judge consider the unedited ITO. Before the judge grants this application, he or she must be satisfied "that the accused is sufficiently aware of the nature of the excised material to challenge it in argument or by evidence."[40]

In *R v Crevier*, the Ontario Court of Appeal interpreted step 6 as requiring that the defence must "be in a position to mount both a facial and sub-facial attack on the warrant, including a challenge to those parts of the ITO that are redacted but relied on by the trial judge."[41] To put defence counsel in a position to mount these challenges, Rouleau J explained in *Crevier* that it will be necessary to provide the defence with a "well-crafted judicial summary" of what is edited or redacted from the ITO.[42] As we explain in Chapter 4, Charter Issues in Drug Cases, a judicial summary is simply a short summary of the nature of the information redacted from the ITO.

By the time the *Garofoli* hearing reaches step 6, the opportunities for disclosure will have been exhausted. For that reason, it is important that defence counsel seek disclosure at the earlier stages of the proceeding through the use of disclosure requests, the preliminary inquiry, *Garofoli* step 2, and cross-examination of the affiant in the *Garofoli* hearing.

40 *Garofoli*, *supra* note 4 at para 79.

41 2015 ONCA 619 at para 72.

42 *Ibid* at para 81.