**R. v. Barros, [2011] 3 SCR 368, 2011 SCC 51 (CanLII)**

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| Date: | 2011-10-26 |
| Docket: | 33727 |
| Other citations: | 513 AR 1; 273 CCC (3d) 129; 421 NR 270; 530 WAC 1 |
| Citation: | R. v. Barros, [2011] 3 SCR 368, 2011 SCC 51 (CanLII), <http://canlii.ca/t/fnk5t>, retrieved on 2016-11-28 |

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**SUPREME COURT OF CANADA**

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| **CITATION:** R. *v.* Barros, 2011 SCC 51, [2011] 3 S.C.R. 368 | **DATE:** 20111026  **DOCKET:** 33727 |

**BETWEEN:**

**Ross Barros**

Appellant

and

**Her Majesty The Queen**

Respondent

- and -

**Director of Public Prosecutions, Attorney General of Ontario,**

**Canadian Association of Chiefs of Police, Canadian Crime Stoppers**

**Association, Canadian Civil Liberties Association and**

**Criminal Lawyers’ Association of Ontario**

Interveners

**CORAM:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **REASONS FOR JUDGMENT:**  (paras. 1 to 83)    **REASONS DISSENTING IN PART:**  (paras. 84 to 104):    **REASONS DISSENTING IN PART:**  (paras. 105 to 126): | Binnie J. (McLachlin C.J. and LeBel, Deschamps, Abella, Charron and Rothstein JJ. concurring)    Fish J.      Cromwell J. |

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R. *v.* Barros, 2011 SCC 51, [2011] 3 S.C.R. 368

**Ross Barros***Appellant*

*v.*

**Her Majesty The Queen***Respondent*

and

**Director of Public Prosecutions, Attorney General**

**of Ontario, Canadian Association of Chiefs of Police,**

**Canadian Crime Stoppers Association, Canadian Civil**

**Liberties Association and Criminal Lawyers’**

**Association of Ontario***Interveners*

**Indexed as:  R. *v.* Barros**

**2011 SCC 51**

File No.:  33727.

2011:  January 25; 2011:  October 26.

Present:  McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

*Criminal law — Informer privilege — Private investigator hired by defence to identify confidential police informant — Investigator allegedly attempting to obtain stay of charges by identifying informant — Whether investigator bound by informer privilege.*

*Criminal law — Appeals — Powers of court of appeal — Private investigator hired by defence to identify confidential police informant — Investigator allegedly attempting to obtain stay of charges by identifying informant — Investigator charged with one count of obstructing justice and two counts of extortion — Court of appeal overturning acquittals and ordering new trial — Whether trial judge committed errors of law allowing appellate review of acquittals —*[*Criminal Code, R.S.C. 1985, c. C-46*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html)*,*[*s. 676(1)*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec676subsec1_smooth)*(a).*

                    B was a former police officer working as a private investigator.  He was hired by the lawyer for Q, who had been charged with several drug offences based on information from a confidential police informant.  To discover the identity of the informant, B met with several of Q’s associates and requested their phone records and other information.  He then met with the police officer in charge of Q’s case and told the officer he knew who the informant was.  B was later charged with one count of obstruction of justice and two counts of extortion.  The judge directed a verdict of acquittal on the obstruction charge (Count 1), finding B was entitled to take any investigative steps to discover the informant’s identity.  The judge acquitted B of extortion with respect to the conversation with the police officer (Count 2), because the Crown had not established that B had the objective of ending the criminal proceedings against Q when he spoke to the officer.  She also found no legal threat had been made and that the Crown had failed to negate justification or excuse for B’s conduct.  With respect to the extortion committed against Q’s associates, the judge found the Crown proved neither a threat nor the intention required for extortion and acquitted B on Count 3.  The Crown appealed the directed verdict and the acquittals. A majority of the Court of Appeal allowed the appeal and ordered a new trial on all three counts.

*Held* (Fish and Cromwell JJ. dissenting in part):  The appeal should be allowed in part.

*Per* McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Charron and Rothstein JJ.:  The duty to protect and enforce informer privilege rests on the police, the Crown, and the courts.  The latter must not disclose any information that would tend to reveal an informer’s identity.  However, the defence, including in this case B, is not bound by any such duty in undertaking its own investigation independently of the courts and the prosecution.  The defence is entitled to do what it can to identify the informant and otherwise make full answer and defence, provided that the methods used are lawful.  The right to make full answer and defence is fundamental to criminal justice and is protected by [s. 7](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec7_smooth) of the [*Canadian Charter of Rights and Freedoms*](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html).  However, not all attempts to identify an informant will be linked to that right.  It will depend on the circumstances.  Some defence enquiries may amount to an obstruction of justice, or extortion, depending on the manner in which the enquiries are carried out and their intended purpose, and the other circumstances of the case.

                    In this case, the gist of the obstruction of justice charge (Count 1) is not just that B sought the name of the police informer, but that he did so to force the charges against Q to be dropped. This, if established, was not information gathering for a lawful purpose. [Section 139](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec139_smooth) of the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html)describes a crime that is complete upon proof of an attempt without the necessity of success or actual completion.  The offence is framed broadly.  The necessary limit is found in the obligation of the Crown to prove the mental element.  A directed verdict is not available if there is any admissible evidence, which, if believed, would justify a conviction. In this case, there was evidence against B that, if believed, would establish intent to obstruct justice. To direct a verdict of acquittal was an error of law justifying a new trial.

                    As to the extortion charge (Count 2), the trial judge erred in concluding that the indirect suggestions and veiled references by B were not capable, as a matter of law, of satisfying the threats element of extortion.  A veiled reference may constitute a threat if it is sufficient, in light of all the circumstances, to convey to the victim the consequences which he or she fears or would prefer to avoid. In this case, the question is what would a reasonable person in the position of the police officer understand?  The officer testified that he understood well enough that the threat was to his source.  The trial judge erred in her legal analysis of what conduct could qualify as a threat for the purpose of the extortion charge.  Having erred in her legal analysis, the trial judge’s consequential and dependent finding of B’s lack of the requisite intent cannot stand and the Crown is entitled to a new trial on this count.

                    As to any reasonable justification or excuse, the trial judge accepted at face value B’s explanation that he was trying to be helpful to the police rather than threatening.  However, the trial judge should have considered B’s conduct in its entirety, including the gathering of the information in the first place, and delved below the surface of the exchanges between the accused and the police, particularly where, as here, the protagonists spring from the same occupational background.  Much that is understood between them need not be stated explicitly.

                    As to the last count of extortion, however, the legal errors that tainted the trial judge’s analysis had no bearing on her reasons for acquittal.  Count 3 relates to B’s dealings with Q’s associates.  It was rejected on the facts by the trial judge, who found the Crown’s key witness (an associate) to be unreliable.  The only other evidence on that count came from statements given by B to the police which were largely self-exculpatory.  The trial judge thus rejected the existence of any factual foundation to which her admittedly erroneous legal test could be applied.  It would be a serious matter to deprive an accused of the benefit of an acquittal where, as here, the Crown is found to have led no credible evidence to support a conviction beyond a reasonable doubt.  The Crown presumably put forward the case it had on Count 3 at the trial.  The Crown is not entitled to a retrial based on a trial judge’s flawed legal analysis that had no impact on the outcome of the case.  The verdict of the acquittal rendered by the trial judge on Count 3 should stand.

*Per* Fish J. (dissenting in part):  A new trial should be ordered on Count 1 and an acquittal entered on Count 3.

                    As to Count 2, no new trial should be ordered.  The trial judge committed no error of law in acquitting B on that count.  She expressly directed herself in accordance with the Ontario pattern jury instructions, noting that she was required, as a jury would be, to consider B’s entire course of conduct.  In considering whether B had a reasonable justification or excuse for his conduct, the trial judge recognized the need to assess the reasonableness of his conduct in the circumstances, as required by the pattern instructions, and stated that she had indeed reviewed all of the circumstances.  She did not ignore any significant circumstance in applying the law to the facts as she found them.  Nor did the trial judge misdirect herself as to whether B’s conduct was capable in law of constituting a threat.  Nowhere in her reasons did she indicate that, as a matter of law, explicit threats or demands were an essential element of extortion.  In fact, she explicitly directed herself to the contrary.  Moreover, in denying the motion for a directed verdict on Count 2, the trial judge concluded that there was some evidence on every element of the offence.  Thus, the trial judge, applying the proper test for a directed verdict, did recognize that B’s conduct could constitute a threat as a matter of law.  At the conclusion of the trial, she was simply not satisfied as a matter of fact, that the evidence established beyond a reasonable doubt that B had threatened to reveal the identity of the informant.

*Per* Cromwell J. (dissenting in part): The reasons of Binnie J. with respect to Counts 1 and 2 are agreed with.  As to Count 3, a new trial should be ordered as well.  In reaching her decision on this count, the trial judge considered that insofar as the Crown had failed to call certain named and unnamed alleged victims as witnesses at trial, it could not prove that they had been victims of extortion.  The only evidence to consider, in her view, was therefore that given by K.  Finding K’s evidence to be mostly unreliable, she acquitted B on Count 3.

                    It is true that K was the only one of the persons named in the count to testify at trial.  However, to succeed on this count, the Crown did not have to prove that B had threatened K.  Nor did it have to prove that K felt threatened by B’s conduct.  The Crown’s burden was to present evidence, whether from the alleged victims or not, which satisfied each element of the offence.

                    Even without K’s evidence, there was evidence which was capable in law of proving each element of the offence.  Of course, whether the evidence did so is for a trier of fact, not an appellate court, to determine.  However, the trial judge’s legal error coupled with her failure to turn her mind to these elements had a material bearing on her decision to acquit.  That being the case, the correct disposition of this portion of the appeal is to direct a new trial, not reinstate the acquittal.

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By Binnie J.

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By Cromwell J. (dissenting in part)

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                    APPEAL from a judgment of the Alberta Court of Appeal (Berger, Watson and Slatter JJ.A.), [2010 ABCA 116 (CanLII)](https://www.canlii.org/en/ab/abca/doc/2010/2010abca116/2010abca116.html), 25 Alta. L.R. (5th) 326, 477 A.R. 127, 483 W.A.C. 127, 254 C.C.C. (3d) 50, 75 C.R. (6th) 257, 208 C.R.R. (2d) 206, [2010] 10 W.W.R. 36, [2010] A.J. No. 387 (QL), 2010 CarswellAlta 643, setting aside the acquittals entered by Veit J., [2007 ABQB 428 (CanLII)](https://www.canlii.org/en/ab/abqb/doc/2007/2007abqb428/2007abqb428.html), 80 Alta. L.R. (4th) 390, [2007] A.J. No. 694 (QL), 2007 CarswellAlta 848, and ordering a new trial.  Appeal allowed in part, Fish and Cromwell JJ. dissenting in part.

*Hersh Wolch*,*Q.C.*, for the appellant.

*James C. Robb*,*Q.C.*, for the respondent.

*Nancy L. Irving* and *François Lacasse*, for the intervener the Director of Public Prosecutions.

*Paul S. Lindsay*, for the intervener the Attorney General of Ontario.

*Derek Lai*and*Greg Preston*, for the intervener the Canadian Association of Chiefs of Police.

*Robert S. Gill*, for the intervener the Canadian Crime Stoppers Association.

*Anil K. Kapoor* and *Senem Ozkin*, for the intervener the Canadian Civil Liberties Association.

*Susan M. Chapman*and *Jennifer Micallef*, for the intervener the Criminal Lawyers’ Association of Ontario.

                    The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Charron and Rothstein JJ. was delivered by

[1]                              BINNIE J. — The jurisprudence establishes that the identity of police informers is protected by a near-absolute privilege that overrides the Crown’s general duty of disclosure to the defence.  This privilege is subject neither to judicial discretion nor any balancing of competing interests (although qualified by an “innocence at stake” exception).  The trial judge held however that this privilege does not restrict a defence investigation into the identity of a police informant, and further, that the attempt to fetter such a defence investigation would violate the constitutional right of an accused to a full answer and defence guaranteed by [s. 7](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec7_smooth) of the [*Canadian Charter of Rights and Freedoms*](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html).  A majority of the Alberta Court of Appeal disagreed.  In its view, on the contrary, informer’s privilege prohibits the accused or anyone on his behalf from making efforts even wholly independent of the prosecution to discover which of his associates, if any, had “ratted” on him.  This proposed extension of the rule would transform a rule of non-disclosure binding on the police, the prosecutorial authorities and the courts into a general prohibition of investigation into police informers binding on the whole world.  In my view, with respect, this goes too far.

[2]                              An accused is not restricted by the narrow parameters of the “innocence at stake” exception when making his or her own enquiries independently of the state but nor can it be said, as the trial judge seems to have concluded, that all attempts by the accused to identify a confidential informer are constitutionally protected.  What is constitutionally protected is the s. 7 right to make full answer and defence.  Not all attempts to identify an informant will be linked to this right.  It will depend on the circumstances.

[3]                              Some defence enquiries *may* of course amount to an obstruction of justice, or extortion, depending on the manner in which the enquiries are carried out and their intended purpose and the totality of the circumstances of the case.  Here, for example, the Crown alleges that the appellant, Mr. Barros, an investigator hired by the defence counsel in a criminal trial, sought by threats or other unlawful means to find out the identity of the informer for use for an unlawful purpose, namely as a bargaining lever to force the Crown to withdraw the charges rather than risk disclosure of the identity of its informant.  The Crown contends that Mr. Barros sought to discover the identity of the informer — by extortionate means — to have the Crown withdraw the charges against his client, Irfan Qureshi.

[4]                              The prosecution’s case was rejected by the trial judge, who was not satisfied that the activities of Mr. Barros were directed to obstructing justice, nor, in her view, did the Crown establish the elements of extortion beyond a reasonable  doubt.

[5]                              While I disagree with the majority of the Court of Appeal on the scope of the informer privilege, I do agree that the trial judge erred with respect to her legal analysis of the elements of obstruction of justice (Count 1) and extortion in respect of the dealings of Mr. Barros with the police (Count 2).  On these two counts, I agree that there must be a new trial.

[6]                              The second charge of extortion related to the dealings of Mr. Barros  with members of Qureshi’s group (Count 3).  It was rejected on the facts by the trial judge, who found the Crown’s key witness (a group member) to be unreliable.  The only other evidence on that count came from statements given by Mr. Barros to the police which were (as one would expect) largely self-exculpatory.  The legal errors that tainted the trial judge’s view of extortion had no bearing on her reasons for the acquittal on Count 3.  The Crown has no right of appeal from the trial judge’s findings of fact.  In ordering a new trial on Count 3, the Court of Appeal engaged in a reweighing of the evidence and thereby erred, in my respectful opinion.  In that respect, the appeal is allowed.  In other respects, the appeal is dismissed.

I.      Facts

[7]                              In March 2005, Sgt. Kevin Brezinski of the Edmonton drug squad obtained and executed a search warrant at the home of Irfan Qureshi based in part on the information provided by a confidential police informer.  The police seized 1.5 kg each of methamphetamine and cocaine, three handguns, a bulletproof vest and paraphernalia for cooking and packaging cocaine.  In the same month a second search netted a seizure of 4 kg of cocaine, 6 oz. of methamphetamine, a handgun, and $55,000.  Qureshi and others were charged with a number of drug trafficking and firearms offences.

[8]                              Defence counsel retained the appellant Ross Barros, a private investigator, to look into the strengths and weaknesses of the Crown’s case.  Mr. Barros is a retired police officer with 25 years of experience with the Edmonton police service, seven of which were engaged in investigating drug crimes.

[9]                              Mr. Barros decided to take steps to discover the informer’s identity.  According to the theory of the prosecution, he met with Qureshi’s associates, told them he was working for the defence and was going to find out who had informed on Qureshi.  He demanded the associates’ cell phone numbers to see if any of them had been in touch with the investigating officer, Sgt. Brezinski.  Mr. Barros warned them that the informer in their midst should seek legal advice and contact him so that they could “work this thing together”.

[10]                          Mr. Barros obtained the associates’ call records from sources unknown.  He also compared the criminal record of each of the associates against the disclosed criminal record of the informer to eliminate potential candidates.  He helped identify a polygraph operator, and suggested that those of Qureshi’s associates who had not provided their cell phone numbers should instead participate in a polygraph test.  He later began approaching individuals, telling each that he “knew” that person was the informer.

[11]                          Mirza Kassam, the only one of the associates to testify at trial, said he arrived late at the initial meeting in which Mr. Barros requested the associates’ phone numbers.  He left his name and number on a piece of Mr. Barros’s letterhead.  After Kassam missed a subsequent meeting, he was instructed to call Mr. Barros, whom he later met in a parking lot.  Mr. Barros told him, “[Y]ou’re the informant”.  Kassam says he denied the accusation but was afraid of falling under suspicion because “out there, informants get killed”.  Mr. Barros demanded Kassam’s cell phone records.  Kassam said he felt that if he did not comply, Mr. Barros would conclude that he was the informer.  Kassam testified to his belief that Mr. Barros wanted him to confess so that Mr. Barros could put it to the police that he knew who their source was and get the charges dropped.  Kassam said that after this meeting, despite his denial, the other associates became very hostile towards him and he feared that he might be killed.  (The trial judge found this evidence to be wholly unreliable.)

[12]                          Mr. Barros eventually arranged a meeting with Sgt. Brezinski for May 6, 2005, at a local golf course.  Sgt. Krewenchuk was also present at this meeting.  Qureshi had a bail hearing scheduled for the same date.  Sgt. Brezinski had already recommended bail for Qureshi on strict conditions.  Mr. Barros advised Sgt. Brezinski (up until that time a personal friend) that he knew the identity of the informer but that he had not revealed this information to Qureshi.  Nor was he going to advise his retaining counsel of the informer’s identity “at this time”.

[13]                          Mr. Barros told Sgt. Brezinski and Sgt. Krewenchuk of several cases Mr. Barros recalled from his time on the Edmonton police force where the charges against an accused were dropped in order to protect the informer once the identity of an informer was discovered.  Mr. Barros said that although he had not told anyone about the informer’s identity, he would eventually have to report it to defence counsel.  Sgt. Brezinski testified that he understood Mr. Barros to be asking him to drop the charges against Qureshi if he didn’t want the identity of the informer to be revealed.  Sgt. Brezinski told Mr. Barros that he was committing extortion and obstruction of justice.

[14]                          Mr. Barros was charged with one count of obstructing justice for taking investigative steps to identify a confidential police source “for the purpose of interfering with criminal proceedings” against Irfan Qureshi.  He was also charged with two counts of extortion, firstly for attempting to induce Sgt. Brezinski to withdraw the criminal proceedings against Qureshi at the May 6 meeting and, secondly, for inducing or attempting to induce the associates of Qureshi (including Kassam) to give him personal information including cellular phone numbers between March 7 and May 12, 2005.

[15]                          In a cautioned statement to police on May 13, 2005, following his arrest, Mr. Barros said that he knew the identity of the informer and was aware that the person thus identified would be in danger if this were disclosed, even if his “identification” turned out to be mistaken.  He agreed that following the arrest of one of its members, a criminal organization will often attempt to identify and eliminate police informers within their group.

[16]                          Mr. Barros said in his police statement that he knew from previous experience that the protection of an informer’s identity was a paramount concern of the police.  He added that he believed it was routine for the Crown and the police to stay the charges against an accused where this became necessary to protect the identity of an informer.  He offered a number of examples in which he had done so as a police officer.  He said, however, that he had been motivated in his investigation of Qureshi’s associates to ensure that no harm befell the “source” thus identified.

II.   Relevant Statutory Provisions

[17]                          [*Criminal Code*, R.S.C. 1985, c. C-46](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html)

**346.** (1) [Extortion] Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

                           (1.1) [Punishment] Every person who commits extortion is guilty of an indictable offence and liable

                           (*a*)   where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

                           (*b*)   in any other case, to imprisonment for life.

**139.** (1) [Obstructing justice] Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding,

                           (*a*)   by indemnifying or agreeing to indemnify a surety, in any way and either in whole or in part, or

                           (*b*)   where he is a surety, by accepting or agreeing to accept a fee or any form of indemnity whether in whole or in part from or in respect of a person who is released or is to be released from custody,

                    is guilty of

                           (*c*)   an indictable offence and is liable to imprisonment for a term not exceeding two years, or

                           (*d*)   an offence punishable on summary conviction.

                                    (2) [Idem] Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

                                    (3) [Idem] Without restricting the generality of subsection (2), every one shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,

                           (*a*)   dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence;

                           (*b*)   influences or attempts to influence by threats, bribes or other corrupt means a person in his conduct as a juror; or

                           (*c*)   accepts or obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror.

**676.**(1) [Right of Attorney General to appeal] The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

                           (*a*)   against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

                           (*b*)   against an order of a superior court of criminal jurisdiction that quashes an indictment or in any manner refuses or fails to exercise jurisdiction on an indictment;

                           (*c*)   against an order of a trial court that stays proceedings on an indictment or quashes an indictment; or

                           (*d*)   with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.

III.   Judicial History

A.     *Alberta Court of Queen’s Bench (Veit J.), Oral Reasons, December 21, 2007*

[18]                          The trial judge concluded that there was no evidence upon which a reasonable jury could convict on the count of obstruction because Mr. Barros was constitutionally entitled to take investigative steps to identify the informer and his acts were not criminal.  She therefore directed a verdict of acquittal on that charge.  The two counts of extortion proceeded.  Both were dismissed in oral reasons for judgment.

[19]                          In the trial judge’s view, the Crown had not established that Mr. Barros induced or attempted to induce Sgt. Brezinski to withdraw the criminal proceedings against Qureshi.  Sgt. Brezinski did not testify that Mr. Barros had explicitly requested the charges be dropped; only that he interpreted Mr. Barros to be asking for this.  Accordingly, the prosecution had not proven that Mr. Barros threatened Sgt. Brezinski, nor had it negated any reasonable justification or excuse for his actions.  The trial judge emphasized that Mr. Barros had not disclosed the identity to defence counsel and had generally made an effort to “make sure that no one would get hurt” in the course of his dealings with the police (A.R., at p. 17).

[20]                          Regarding the second count of extortion, the trial judge found that the Crown had proven that Mr. Barros did induce or attempt to induce Qureshi’s associates to provide their cell phone numbers, but not that Mr. Barros used threats or violence to do so; nor did it establish the absence of any reasonable justification for his actions.  Extortion had not been established beyond a reasonable doubt.  Mr. Barros was therefore acquitted on all counts.

B*.   Alberta Court of Appeal (Berger, Watson and Slatter JJ.A.),*[*2010 ABCA 116 (CanLII)*](https://www.canlii.org/en/ab/abca/doc/2010/2010abca116/2010abca116.html)*, 25 Alta. L.R. (5th) 326*

[21]                          The Crown appealed both the directed verdict on the charge of obstruction of justice and the acquittals on the two charges of extortion.  A new trial was ordered on all three charges.

(1)      The Majority — Slatter J.A.

[22]                          Writing for himself and Watson J.A., Slatter J.A. held that the trial judgment contained “some factually based errors that are so egregious as to undermine the whole verdict, and so amount to errors of law” (para. 27).  As to the scope of informer privilege rule, he wrote:

Both the existing informer and the potential informer will regard it as equally dangerous regardless of whether their identity is disclosed by the police, or discovered independently by the accused. In either case, their safety is jeopardized, and the willingness of citizens to come forward with important information is compromised. *Leipert*sets out a public policy basis for the privilege that depends on secrecy; the whole privilege cannot be swept away by saying an accused has a private right to expose informers. [para. 46]

Slatter J.A. found that the methods used by Mr. Barros were inherently malevolent and oppressive and inclined to obstruct justice (para. 67).  In his view, taking investigative steps to discover the identity of an informer, without more, *prima facie*amounts to obstruction of justice absent a reasonable justification or excuse (para. 68), of which there was none in this case.

[23]                          On the first extortion charge, Slatter J.A. noted that while the trial judge was entitled to deference on her findings of fact, her conclusions that the meeting between Mr. Barros and Sgt. Brezinski was about Qureshi’s application for bail on the same date, and that Mr. Barros did not threaten Sgt. Brezinski, were unsupported by the evidence.  The threatened harm was the possibility of retribution against the informer by Qureshi or members of his group.

[24]                          On the second charge of extortion, Slatter J.A. concluded that the trial judge had misapprehended the evidence, and that her description of the danger facing a suspected informer as “social pressure” was unreasonable.  Mr. Barros did make threats against the associates in order to obtain their phone numbers and call records without reasonable justification and it was a reversible error to conclude otherwise.

(2)     The Dissent — Berger J.A.

[25]                          Berger J.A. argued that the accused was entitled to take steps to investigate the informer in furtherance of his defence.  The police and the courts have a duty not to disclose the informer’s identity to defence counsel, but the jurisprudence does not place any such prohibition on the accused or those acting on his behalf.  In his view, the majority opinion would transform “the prohibition against revelation to a prohibition against discovery” (para. 117).

[26]                          The trial judge made a finding that the Crown had failed to establish that the purpose of Mr. Barros in arranging a meeting with Sgt. Brezinski was to stop the proceedings against Qureshi: “It follows that the Crown enjoys no right of appeal in respect of [this] finding which alone is sufficient to dispose of the appeal on count 2” (para. 144).

[27]                          On the second extortion count, there was no reason to interfere with the findings of the trial judge that Kassam was an unreliable witness and that the other elements of the offence of extortion had not been proven (paras. 149-52).  Accordingly, Berger J.A. would have dismissed the Crown appeal in its entirety.

IV.   Analysis

[28]                          The right of an accused to do what he or she can to make full answer and defence is fundamental to criminal justice.  Yet informer privilege has been recognized at least since *The Trial of Thomas Hardy for High Treason*(1794), 24 St. Tr. 199, as an essential element in the investigation of crime and the protection of the public.  Once informer privilege is found to exist, no exception or balancing of interests is made except “if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner’s innocence” (*Marks v. Beyfus*(1890), 25 Q.B.D. 494 (C.A.), at p. 498; *R. v. Leipert*, [1997 CanLII 367 (SCC)](https://www.canlii.org/en/ca/scc/doc/1997/1997canlii367/1997canlii367.html), [1997] 1 S.C.R. 281, at paras. 23-24; and *R. v. Basi*, [2009 SCC 52 (CanLII)](https://www.canlii.org/en/ca/scc/doc/2009/2009scc52/2009scc52.html), [2009] 3 S.C.R. 389, at para. 43).  However, precisely because informer privilege can place a significant limitation on the activities of the defence, it is important not to extend its 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.

[29]                          In order to assess the ramifications of the extension of informer privilege endorsed by the majority in the Alberta Court of Appeal, it is convenient to set out some of the broad parameters of the relevant law as it presently exists.

A.   *The Importance of Informer Privilege*

[30]                          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 CanLII 26 (SCC)](https://www.canlii.org/en/ca/scc/doc/1983/1983canlii26/1983canlii26.html), [1983] 2 S.C.R. 60; *R. v. Hunter*(1987), [1987 CanLII 123 (ON CA)](https://www.canlii.org/en/on/onca/doc/1987/1987canlii123/1987canlii123.html), 57 C.R. (3d) 1 (Ont. C.A.); *R. v. Scott*, [1990 CanLII 27 (SCC)](https://www.canlii.org/en/ca/scc/doc/1990/1990canlii27/1990canlii27.html), [1990] 3 S.C.R. 979; *Named Person v. Vancouver Sun*, [2007 SCC 43 (CanLII)](https://www.canlii.org/en/ca/scc/doc/2007/2007scc43/2007scc43.html), [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, “The 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).

[31]                          Of course, not everybody who provides information to the police thereby becomes a confidential informant.  In a clear case, confidentiality is explicitly sought by the informer and agreed to by the police.  As noted in *Basi*,at para. 36:

The privilege arises where a police officer, in the course of an investigation, guarantees protection and confidentiality to a prospective informer in exchange for useful information that would otherwise be difficult or impossible to obtain.

*Bisaillon*, however, added that the promise need not be express.  It may be implicit in the circumstances:

The rule gives a peace officer the power to promise his informers secrecy expressly or by implication, with a guarantee sanctioned by the law that this promise will be kept even in court, and to receive in exchange for this promise information without which it would be extremely difficult for him to carry out his duties and ensure that the criminal law is obeyed.  [Emphasis added; p. 105.]

[32]                          A claim to informer status is always open to challenge by the defence.  The Crown is better able to meet that challenge if it can point to clear evidence of informer status being conferred explicitly rather than after-the-fact supposition.  Keeping in mind that informer’s privilege was created and is enforced as a matter of public interest rather than contract, it might be argued that in a situation of serious potential danger, the informer privilege (or other public interest privilege) might apply even in the absence of the contract-type elements of offer and acceptance.  However, that question does not arise on the facts of this case and I say no more about the issue.

[33]                          Unfounded claims to different types of privilege are made from time to time and, as counsel for Mr. Barros points out, there have been cases where the police have claimed informer status in manifestly inappropriate circumstances; see, e.g., *R. v. McCormack*, [2009 CanLII 76382 (ON SC)](https://www.canlii.org/en/on/onsc/doc/2009/2009canlii76382/2009canlii76382.html), 2009 CanLII 76382 (Ont. S.C.J.).  It would not, I think, be in the interest of justice to accept the proposition of the majority in the Alberta Court of Appeal that would prevent an accused from ascertaining independently of the state whether facts for such a challenge exist.  No protection is afforded to a “source” whose conduct goes beyond the provision of information and acts as an “*agent provocateur*” or is otherwise a material witness to the crime.  Both the *agent provocateur*and the material witness play an active role in criminal investigations and proceedings that goes beyond “tipping” the police.  Once a police informer goes into the “field” and acts as a police agent,the informer privilege is no longer applicable to prevent disclosure of his or her identity in respect of the events in which he or she acted as an agent: *R. v. Broyles*,[1991 CanLII 15 (SCC)](https://www.canlii.org/en/ca/scc/doc/1991/1991canlii15/1991canlii15.html), [1991] 3 S.C.R. 595, at pp. 607-9; *R. v. Davies* (1982), 1 C.C.C. (3d) 299 (Ont. C.A.), at p. 303; *R. v. Babes*(2000), [2000 CanLII 16820 (ON CA)](https://www.canlii.org/en/on/onca/doc/2000/2000canlii16820/2000canlii16820.html), 146 C.C.C. (3d) 465 (Ont. C.A.).  This does not mean, of course, that the informer loses protection in other cases where he or she has not stepped out of the protected role.

[34]                          This Court in *Leipert* held that the rule of non-disclosure binds the state unless the accused can establish “a basis on the evidence for concluding that disclosure of the informer’s identity is necessary to demonstrate the innocence of the accused . . . . [M]ere speculation that the information might assist the defence is insufficient” (*per* McLachlin J., at para. 21 (emphasis added)).  This is the “innocence at stake” exception to the general public interest obligation *of the state* to protect the confidentiality of informer identity.  The importance of informer privilege should not be allowed to trump “the right of an individual accused to establish his or her innocence by raising a reasonable doubt as to guilt [which] has always remained paramount” (*Scott*, at pp. 995-96).

[35]                          The courts will enforce the privilege where it is applicable whether it is claimed or not (*Bisaillon*, at pp. 84 and 88; *Basi*, at para. 38), and, as stated, without the balancing of competing interests that applies to some other forms of privilege such as journalistic privilege, *R. v. National Post*, [2010 SCC 16 (CanLII)](https://www.canlii.org/en/ca/scc/doc/2010/2010scc16/2010scc16.html), [2010] 1 S.C.R. 477, or public interest privilege generally, *Carey v. Ontario*, [1986 CanLII 7 (SCC)](https://www.canlii.org/en/ca/scc/doc/1986/1986canlii7/1986canlii7.html), [1986] 2 S.C.R. 637, unless the protection is waived by the informer *and* the state: *Basi*, at para. 40; *Named Person*, at paras. 22-23; *Leipert*, at paras. 12-15; and *Bisaillon*, at p. 93.

[36]                          These general principles accommodate the rights of the accused and the interests of society and it is important that this equilibrium be retained.  The argument of Mr. Barros is that the extension of informer privilege to prohibit any efforts by an accused to identify *independently of the state*the identity of the source would upset this equilibrium.  I agree with that concern.

B.   *Was Mr. Barros Bound by Informer Privilege?*

[37]                          The duty to protect and enforce informer privilege rests on the police, the Crown, and the courts, but we have been referred to no prior case where the duty has been extended to the accused and his or her representatives such as Mr. Barros apart from the exceptional case of inadvertent disclosure to defence counsel: see *R. v. Hirschboltz*, [2004 SKQB 17 (CanLII)](https://www.canlii.org/en/sk/skqb/doc/2004/2004skqb17/2004skqb17.html), [2006] 1 W.W.R. 174, and R. W. Hubbard, S. Magotiaux and S. M. Duncan, *The Law of Privilege in Canada* (loose-leaf), at pp. 2-43 and 2-44.  There is no authority for the proposition that the substantive rule of confidentiality means that an accused and his representatives are prohibited from attempting to identify an informant for a lawful purpose and by lawful means.   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. There are occasions mentioned in the cases where the “source” turned out to be non-existent, wholly unreliable, or had participated in an entrapment.  In *McCormack*, for example, it was held that the police had deliberately misrepresented three sources, two of whom they had instructed to act as agents and one of whom was a civilian employee of the police force, as confidential informers simply as an “investigative technique” (paras. 7-21).

[38]                          Informers come in all shapes and sizes, from the concerned neighbour who calls “Crime Stoppers” about alleged child abuse next door to the drug dealer or the office whistleblower.  Some informers are model citizens, others not so much so; some act in the public interest while others may be driven by motives that are wholly unsavoury.  The defence is entitled to do what it can to poke holes in the prosecution’s case, provided that the methods used are otherwise lawful.  An accused is within his or her rights to gather whatever information may raise a reasonable doubt even where the conditions triggering the “innocence at stake” exception are not satisfied.  That exception pertains to disclosure *by the state* of the informer’s identity, not to information obtained by the defence through its own resources.

[39]                          Criminalizing efforts by the defence to ascertain the identity of the source independently of the Crown would in many cases render illusory the right to challenge his or her “informer” status.  The Crown ought not to be able to rely on the prohibition against disclosure by the state of allegedly privileged information to prevent an independent defence investigation that may yield information which will result in the rejection of the privilege claim itself.

[40]                          The majority in the court below held that apart from the “innocence at stake” exception an accused has no “right” to disclosure of a confidential informant’s identity (para. 41).  This is true, but the question is not whether he has a “right” to disclosure.  He certainly has a “right” under [s. 7](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec7_smooth) of the [*Charter*](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) to defend himself and, generally speaking, what is not prohibited by law (or professional ethics in the case of defence counsel) is permitted.

[41]                          Whether an investigation has crossed a line into obstruction of justice must be determined on a case-by-case evaluation of the totality of circumstances, which may include the methods and purpose of the defence investigation, and the use to which any information obtained is put.  If all the elements of the offence of obstruction are met, a bald assertion that the investigation furthers the mounting of a full answer and defence will not excuse otherwise unlawful conduct.

[42]                          In much the same vein, the fact that an independent investigation of a police informer is permissible (so long as it is carried out in a manner that does not cross the line into criminality) does not mean that the investigator is free to use the fruits of an investigation as he or she sees fit.  Where an informant is in a position of significant danger, as is frequently the case in dealing with organized crime and drug trafficking offences, the investigation must proceed in a responsible manner with due regard to the potential of obstructing justice.

[43]                          Discussions with prosecutors or police officers carry particular dangers.  These individuals are bound to protect the identity of informers, and efforts to elicit information they are not permitted to disclose will not be tolerated.

[44]                          Accordingly, the general prohibition against defence investigation propounded in the court below is too broad, in my respectful opinion.  The state will refuse to disclose any information that would tend to reveal an informer’s identity, and this will be enforced in the public interest, but the defence, including in this case Mr. Barros in his function as private investigator, is not bound by any such duty in undertaking its own investigation independently of the courts and the prosecution.  Of course, a lawful activity may be pursued by unlawful means or for an unlawful purpose, but that is a different issue and one that is raised on the facts of this case and to which I now turn.

C.     *Obstruction of Justice*

[45]                          This count in the indictment was disposed of by the trial judge by way of a directed verdict.  The Crown alleged that the appellant

did unlawfully and wilfully attempt to obstruct, pervert or defeat the course of justice by taking investigative steps to identify a confidential police source for the purpose of interfering with criminal proceedings against Irfan Qureshi, contrary to [section 139(2)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec139subsec2_smooth) of the [Criminal Code](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html)of Canada.

[46]                          The gist of the charge is not *just* that the appellant sought the name of the police informer, but that he did so “for the purpose of interfering with criminal proceedings”, i.e. to have the charges against Qureshi dropped.  This, if established, was not information gathering for a lawful purpose.  Section 139 describes a crime that is complete upon proof of an attempt without the necessity of success or actual completion:  *R. v. Hearn*, [1989 CanLII 14 (SCC)](https://www.canlii.org/en/ca/scc/doc/1989/1989canlii14/1989canlii14.html), [1989] 2 S.C.R. 1180. The offence is framed broadly.  The necessary limit is found in the obligation of the Crown to prove the mental element: *R. v. Beaudry*, [2007 SCC 5 (CanLII)](https://www.canlii.org/en/ca/scc/doc/2007/2007scc5/2007scc5.html),[2007] 1 S.C.R. 190, at para. 52.  There was evidence against Mr. Barros that, if believed, would establish an intent to obstruct justice.

[47]                          The trial judge directed a verdict of acquittal on this charge because, in part

[t]he doing of a lawful act, here identifying a police informant, does not in itself constitute an obstruction of justice; at the most, it might constitute preparation for an attempt to obstruct justice if the information concerning the police informant is used in a way which tends to obstruct the administration of justice.  Without more, the mere taking of investigative steps to determine the identity of an informant cannot result in an injustice or an affront to the system of justice.  [para. 22]

[48]                          A directed verdict is not available if there is any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction:  *R. v. Charemski*, [1998 CanLII 819 (SCC)](https://www.canlii.org/en/ca/scc/doc/1998/1998canlii819/1998canlii819.html), [1998] 1 S.C.R. 679, at paras. 1-4; *R. v. Bigras*, [2004 CanLII 21267 (ON CA)](https://www.canlii.org/en/on/onca/doc/2004/2004canlii21267/2004canlii21267.html), 2004 CanLII 21267 (Ont. C.A.), at paras. 10-17.  Whether or not the test is met on the facts is a question of law which does not command appellate deference to the trial judge.  An error of law grounds a Crown appeal under [s. 676](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec676_smooth) of the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html).

[49]                          In my view, the trial judge erred in directing a verdict of acquittal on this charge. In characterizing the conduct of Mr. Barros as mere “preparation”, the trial judge failed to take into account the entire chain of events.  There *was* evidence which, if believed, went far beyond the preparation stage.  As Slatter J.A. pointed out, once Mr. Barros thought he had discovered the informer’s identity, he set up a meeting with Sgt. Brezinski to explain his “dilemma”, namely that if the charges were not dropped, Mr. Barros would “be forced to write a letter to [his instructing counsel] outlining his investigation”, and whatever counsel did with that information would be up to him (R.R., vol. I, at pp. 50-56, and vol. IV, at p. 22).  Mr. Barros pointed out to the Edmonton police officers that his invariable experience was that in these circumstances, the charges would be stayed.  He also noted that his retaining counsel had actually used such information in the past to obtain a stay of charges.  He regarded it as a proper and available *modus operandi* for the defence.

[50]                          While I do not agree with the Court of Appeal that “undermining the privilege by attempting to identify an informer *prima facie* amounts to obstruction” (para. 68), I do agree that a trier of fact might reasonably conclude that the evidence in *this* case taken as a whole, if believed, demonstrated an intent to obstruct unlawfully the trial on the merits of the charges against Qureshi.

[51]                          I conclude that to direct a verdict of acquittal on the obstruction of justice charges was an error of law justifying a new trial.

D.   *Extortion to Obtain Withdrawal of Charges Against Qureshi*

[52]                          It is common ground that no appeal lies from the trial judge’s acquittal of Mr. Barros on the extortion charges except on a question of law; see [s. 676(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec676subsec1_smooth)(*a*) of the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html); *R. v. Graveline*, [2006 SCC 16 (CanLII)](https://www.canlii.org/en/ca/scc/doc/2006/2006scc16/2006scc16.html), [2006] 1 S.C.R. 609.  Although in *R. v. Biniaris*, [2000 SCC 15 (CanLII)](https://www.canlii.org/en/ca/scc/doc/2000/2000scc15/2000scc15.html), [2000] 1 S.C.R. 381, the Court held that the reasonableness of a *conviction*raised an issue of law (“[w]hether a conviction can be said to be unreasonable, or not supported by the evidence, imports in every case the application of a legal standard” (para. 23)), there is no corresponding right of the Crown to appeal what it considers to be an unreasonable *acquittal*, as Arbour J. made clear in *Biniaris*itself,at para. 32:

                    There can be no suggestion that the Crown’s right of appeal at first instance is being enlarged or expanded to include “unreasonable acquittals” as a result of the determination that the reasonableness of a verdict is a “question of law” as well as a “question of law alone”.  As before, the Crown is barred from appealing an acquittal on the sole basis that it is unreasonable, without asserting any other error of law leading to it.

However, if a trial judge misdirects himself or herself on the law to be applied to the facts, an error of law will be committed sufficient to ground a Crown appeal under s. 676; see *R. v. B. (G.)*, [1990 CanLII 115 (SCC)](https://www.canlii.org/en/ca/scc/doc/1990/1990canlii115/1990canlii115.html), [1990] 2 S.C.R. 57:

                    . . . the essential caveat [is] that the “misapprehension” or “lack of appreciation” of the relevant evidence must have been the result of the trial judge’s misdirection of himself or herself as to the applicable law . . . .  [p. 75]

I share the view of Slatter J.A. that the trial judge misdirected herself in this case on the *legal* character of the “threats, accusations, menaces or violence” as well as other elements of the offence necessary to support a conviction.

[53]                          Extortion requires the Crown to establish beyond a reasonable doubt (i)  that the accused has induced or attempted to induce someone to do something or to cause something to be done; (ii) that the accused has used threats, accusations, menaces or violence; (iii) that he or she has done so with the intention of obtaining something by the use of threats; and (iv) that either the use of the threats or the making of the demand for the thing sought to be obtained was without reasonable justification or excuse: see *R. v. Natarelli*, [1967 CanLII 11 (SCC)](https://www.canlii.org/en/ca/scc/doc/1967/1967canlii11/1967canlii11.html), [1967] S.C.R. 539; D. Watt, *Watt’s Manual of Criminal Jury Instructions* (2005).

[54]                          Of particular pertinence in *Natarelli* is the instruction by Cartwright J. (later Chief Justice), speaking for the Court, that “one item in the accused’s course of conduct” is not to be isolated, but taken in the context of the “course of conduct considered in its entirety” (p. 546).  Although Cartwright J. was speaking in relation to whether the conduct was “justifiable or excusable”, his observation applies with equal force to all of the elements of the charge of extortion.

[55]                          The need to view the conduct of the accused in its entirety and in context was further addressed by the Ontario Court of Appeal in *R. v. Alexander* (2005), [2005 CanLII 32566 (ON CA)](https://www.canlii.org/en/on/onca/doc/2005/2005canlii32566/2005canlii32566.html), 206 C.C.C. (3d) 233, leave to appeal refused, [2006] 1 S.C.R. v.  It was argued in that case that extortion was not made out because the “threats”, however distasteful, were not themselves unlawful.  Doherty J.A. commented:

When an accused charged with extortion has used threats in an attempt to collect a legitimate debt, the trier of fact must consider all of the circumstances, including the nature of the threat and the nature of the demand, to determine whether the Crown has proved beyond a reasonable doubt that there was no reasonable justification or excuse for the threat.  [para. 84]

                    (See also *R. v. Royz* (2008), [2008 ONCA 584 (CanLII)](https://www.canlii.org/en/on/onca/doc/2008/2008onca584/2008onca584.html), 248 O.A.C. 361.)

The Crown’s position is that the trial judge failed to consider the relevant events in context and misapplied the proper legal test.  In the result, it argues, her analysis was flawed by a series of *legal* errors.

[56]                          Count 2 of the indictment alleges that the appellant

                    did, without reasonable justification or excuse and with intent to obtain an end to criminal proceedings against Irfan Qureshi, by threats, accusations, menaces or violence induce or attempt to induce Detective Kevin Brezinski to take steps to cease criminal proceedings against Irfan Qureshi . . . .

[57]                          The trial judge concluded that Mr. Barros had not engaged in conduct prohibited by s. 346 and thus “since in my view there were no threats, of course the third element [*mens rea*] also is not proved” (A.R., at p. 12).  Her conclusion regarding the intent of Mr. Barros was therefore linked to her view of what constitutes a “threat” in law.

[58]                          In my respectful view, the trial judge made two errors of law that vitiate her verdict of acquittal on this count:

(i)         she failed to consider elements of the conduct of Mr. Barros in the context of his entire course of behaviour, contrary to *Natarelli*;

(ii)         she adopted an erroneously narrow view of what conduct is in law *capable* of constituting a threat or menace.  In what can be taken as a summary of her approach to this branch of the case she stated that “it is not every pressure that qualifies as the threat that is meant in the Parliament’s definition of ‘extortion’” (A.R., at p. 12 (emphasis added)).

(i)         The Appellant’s Conduct

[59]                          The first task is to identify the “something” sought by Mr. Barros by alleged threats or menaces and the person from whom this was sought.  The indictment identifies the “something” as obtaining “an end to criminal proceedings against Irfan Qureshi” and accuses the appellant of seeking to obtain this by inducing or attempting “to induce Detective Kevin Brezinski to take steps” to withdraw the charges against Qureshi.  This is alleged to have happened during the golf course meeting of May 6.  Because this is closely related to the alleged use of threats by Mr. Barros, I will now turn to that point.

(ii)        The Appellant’s Use of Threats

[60]                          It is true that Mr. Barros did not come right out and say that if the police did not drop the charges against Qureshi the “source” would suffer bad consequences.  On the other hand, the law does not require the person accused of extortion to act clumsily and without subtlety.  What is required is that the message be sent in words definite enough to convey to a person of ordinary intelligence *in the position of Sgt. Brezinski*, taking into account his shared police background with Mr. Barros, a threat of harm to his “secret source” if the prosecution was not ended.  The trial judge was not prepared to view the alleged threat of Mr. Barros in this broader context.  She stated:

                           With respect to dropping the charges, in particular, there was no request made, not even Brezinski said so, that Barros asked for the charges to be dropped.  The dropping of the charges was an interpretation that Brezinski made of Barros’ intention in raising the issue of the informant with Brezinski. [A.R., at p. 10]

[61]                          The key element, as the Court recognized in *R. v.* *Davis*, [1999 CanLII 638 (SCC)](https://www.canlii.org/en/ca/scc/doc/1999/1999canlii638/1999canlii638.html), [1999] 3 S.C.R. 759, is the relationship between the alleged threats, etc. and the complainant’s freedom of choice:

                    Extortion criminalizes intimidation and interference with freedom of choice.  It punishes those who, through threats, accusations, menaces, or violence induce or attempt to induce their victims into doing anything or causing anything to be done. . . . [T]he victim may be coerced into doing something he or she would otherwise have chosen not to do.  [References omitted; para. 45.]

Accordingly, a veiled reference may constitute a threat if it is sufficient, in light of all the circumstances, to convey to the complainant the consequences which he or she fears or would prefer to avoid:  *R. v. McClure*(1957), 22 W.W.R. 167 (Man. C.A.), at p. 172.  The courts have elsewhere adopted a similar contextual interpretation: *R. v. Hodson*, [2001 ABCA 111 (CanLII)](https://www.canlii.org/en/ab/abca/doc/2001/2001abca111/2001abca111.html), 92 Alta. L.R. (3d) 262, at paras. 11-13; *R. v. Pelletier*(1992), 71 C.C.C. (3d) 438 (Que. C.A.).

[62]                          The trial judge emphasized at several points the absence of an explicit demand but Mr. Barros conveyed his threat more subtly for example by referring to what had happened in other cases where an informer was identified, i.e. the charges were dropped.  Mr. Barros himself readily acknowledged in his statement to the police that “[t]he Policeman’s responsibility [is] to protect the source.  I’ve gone through that, I’ve lost major cases [because] of having to protect my source” (R.R., vol. IV, at p. 35).

[63]                          The trial judge took a functional approach to the existence of a threat, i.e. “whatever is communicated must be definite enough that a person of ordinary intelligence would understand it as a threat of injury” (A.R., at p. 11).  What is “definite enough” will depend on the context.  Having stated the test, however, the trial judge demonstrably failed to apply it.  She talked the talk but demonstrably failed to walk the walk.  Nowhere in the section of her reasons rejecting the existence of “threats” does she refer to *any* of the factual context at all.  Instead, the trial judge looked at dictionary definitions of the words “threat” and “menace” which described them as “a determination or disposition to inflict an evil or injury on another person”, or a “declaration of hostile determination or of loss, pain, punishment or damage to be inflicted in retribution for or conditionally upon some course”.  There was, it is true, no such “hostile declaration”.  Nor, as a matter of law, was one required.

[64]                          The question was, as a matter of law, what would a reasonable person in the position of Sgt. Brezinski understand?  The recipient of the message, Sgt. Brezinski, testified that he understood well enough the agenda being pursued by Mr. Barros — “not specific words, but the situation”  (R.R., vol. I, at p. 95).  The message had been received and, to Sgt. Brezinski, its meaning was said to be unmistakable.  A refusal to drop the charges would put at risk disclosure of his source, and at least the potential of retaliation.

[65]                          In my respectful view, the trial judge erred in law in concluding that the indirect suggestions and veiled references put forward by Mr. Barros did not in the circumstances here “qualify”, as a matter of law, as “threats” for the purpose of the extortion offence.  Elsewhere in her reasons, the trial judge found as facts that Mr. Barros told Sgt. Brezinski that he knew “for sure who the source was” (A.R., at p. 16), and noted Sgt. Brezinski’s testimony that “he felt that his back was against the wall” (p. 15).  She observed “there is no doubt that Barros knew from his background what kinds of things would probably be going through Brezinski’s mind as the topic of an informant came up” (p. 15).  Moreover, she emphasized the statement of Mr. Barros, heavy with portent, that “[w]e don’t want to get anyone hurt here” (p. 17).  “[T]he evidence establishes”, she wrote, “that Barros knew as well as anyone, much better than the Court, for example, how dangerous it would be in these circumstances for the identity of an informant to be revealed” (p. 16).

[66]                          It was said that an acquittal on this count may well appear surprising in light of the uncontested evidence before the trial judge, but, in my view, “the surprise” is readily explained by the trial judge’s misapprehension as to what in law is required to establish “threats” for the purpose of the extortion offence, and in particular her failure to weigh what was (and was not) said in the context of the whole relationship between the individuals concerned.

(iii)      The Appellant’s Intent

[67]                          As stated, it was the trial judge’s view that because she had concluded that there were no threats, accusations, menaces or violence within the scope of s. 346 then “of course the third element [a culpable intent] also is not proved” (A.R., at p. 12).  As I conclude that she erred in her *legal* analysis of the conduct of Mr. Barros, her consequential and dependent finding of his lack of the requisite intent cannot stand.  I recognize, of course, that the trial judge’s reasons were given orally, and should not be parsed word for word with a nit-picking attitude.  Nevertheless, her treatment of the intent of  Mr. Barros in approaching the police officers at the meeting at the golf course does not survive scrutiny.  She stated that it had

                    either something to do with bail, clearly something to do with warning the police that information was available in the community and to Mr. Qureshi potentially about who the informant was so that the police could take that into account.  [Emphasis added; A.R., at p. 10.]

In short, whatever else he intended, the trial judge found that Mr. Barros *intended* his declaration of knowledge of the identity of the confidential informer to influence police decision making.

[68]                          The trial judge’s reference to “something to do with bail” is mystifying. She had earlier (as noted by Slatter J.A., at para. 82) intervened during the proceedings to say that there was

                    no factual foundation for raising a question with respect to asking the witness about bail.  Bail is not relevant.

                    . . . there is the evidence from the witness [Sgt. Brezinski] that this had nothing -- my recollection of the evidence, again you’ll correct me where I’m wrong -- the witness said this golf course conversation had nothing to do with bail.

[69]                          More pertinent is her finding that the objective of Mr. Barros was “clearly” to tell the police that information about the informer’s identity was “available in the community” and that the police “[sh]ould take that into account” (A.R., at p. 10).  She then discussed potential police responses.  “[T]he police were perhaps going to drop the charges” or “they would have done other things, as indeed turned out to be the case”, or “nothing” (A.R., at p. 10).  It is important not to conflate the intent of Mr. Barros which is the legally relevant element, with the possible police responses, which were beyond the control of Mr. Barros and were not legally relevant to *his*intent.  As there is to be a new trial on this count, I say no more about this element of the case.

(iv)         Reasonable Justification or Excuse

[70]                          As to the absence of any reasonable justification or excuse, the trial judge accepted at face value the explanation of Mr. Barros that he was trying to be helpful to the police rather than menacing:

                           The evidence establishes that while Barros said that he knew, he knew for sure who the source was, there was no threat on Barros’ part to reveal the identity of the informant to anyone.  Indeed, the evidence establishes that Barros knew as well as anyone, much better than the Court, for example, how dangerous it would be in these circumstances for the identity of an informant to be revealed.

                           . . . Barros said, We don’t want to get anyone hurt here.  And that appears to me to be the case, that Barros was doing what he was doing in an effort to try and make sure that no one would get hurt there. [A.R., at pp. 16-17]

[71]                          It is true that Mr. Barros said in his statement to the police that he and defence counsel “[did not] want anybody to get hurt”.  He told the police that “I went to Brezinski to prevent that [hurt] from happening or to prevent the possibility of that happening”.  However, here again the trial judge, with respect, ignored the *legal*requirement to view the individual pieces of evidence in the context of the case “in its entirety” (*Natarelli*, at p. 546) and to take into consideration “all of the circumstances” (*Alexander*, at para. 84), leading up to and including the crucial meeting at the golf club.

[72]                          It is evident that I read the trial judge’s reasons on this extortion count very differently than my colleague Fish J.  I cannot agree with my colleague’s interpretation even giving the trial judge’s reasons the most favourable interpretation.  For example, my colleague argues that in relation to this fourth element (“reasonable justification or excuse”), the trial judge did instruct herself “to consider the accused’s entire course of conduct” (para. 90).  However, my colleague’s citations are on context drawn entirely from the trial judge’s discussion of that fourth element, and the problem, in my view, is that she failed to apply the same contextual approach in dealing with the *other* elements of the extortion offence.  In particular, she ignored the context in assessing whether what passed between Mr. Barros and Sgt. Brezinski *could* qualify as “threats, accusations, menaces or violence” within the meaning of [s. 346](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec346_smooth) of the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html).

[73]                          If Mr. Barros had not dedicated himself to identifying the informer, thereby opening up the possibility of a deal with the police to drop the charges, the police “dilemma”, as Mr. Barros described it, would never have arisen.

[74]                          The legal test for extortion requires a court to delve below the surface of the exchanges between the accused and those whom he or she is accused of threatening, particularly where, as here, the protagonists spring from the same occupational background.  Much that is understood between them need not be stated explicitly.  In my respectful view, the trial judge erred in law in failing to consider the issue of the threats or menaces in the context of the conduct of Mr. Barros in its entirety and, in particular, of the longstanding relationship between the two men.

[75]                          In the result, I agree with Slatter J.A. that the trial judge committed errors of law in her analysis of the elements in the first extortion charge.  The Crown is therefore entitled to appeal under [s. 676(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec676subsec1_smooth) of the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html), and, in my opinion, the Crown is entitled to a new trial with respect to the golf club meeting with the police.

[76]                          No party to this appeal contends — or could contend — that the Crown can appeal what it may regard as an unreasonable acquittal.  On the other hand, the Crown has every right to an appeal on errors of law giving rise to the acquittal.  Where, as here, such errors of law are established on the record, the acquittal must be set aside, not because it is unreasonable but because the verdict is founded on legal error.

E.   *Extortion to Obtain Telephone Numbers*

[77]                          The Crown charged in Count 3 that Mr. Barros did

                    without reasonable justification or excuse and with intent to obtain information regarding the identity of a confidential police source, by threats, accusations, menaces or violence induce or attempt to induce Nagman Chak, Tim Shapka, Robin Tran, Mike Kim, Mirza Kassam and others unknown to provide personal information including cellular telephone numbers . . . .

Although the trial judge viewed the evidence under Count 3 through the same flawed legal lens as she applied to Count 2, there is an important difference.  Leaving aside the self-exculpatory statement given to the police by Mr. Barros, in which, of course, he denied any intent to extort, the only *inculpatory*evidence from a witness on the receiving end of the threats was Mirza Kassam, who was disbelieved.  The trial judge thus rejected the existence of any *factual* foundation to which her erroneous legal test *could* be applied.

[78]                          On this point, with respect, I disagree with my colleague Cromwell J. that a new trial should be ordered because “there was evidence, apart entirely from the evidence of Mr. Kassam, which could found a conviction, but which the trial judge, because of her legal error, failed to consider.  That being the case, the judge’s legal error may reasonably be thought to have had a material bearing on the acquittal” (para. 107).

[79]                          My colleague and I are agreed that the proper test for ordering a new trial on a charge on which an accused was acquitted was set out in *Graveline*, at para. 14:

                           It has been long established, however, that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law.  Something more must be shown.  It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal.  [Emphasis added.]

See also *Vézeau v. The Queen*, [1976 CanLII 7 (SCC)](https://www.canlii.org/en/ca/scc/doc/1976/1976canlii7/1976canlii7.html), [1977] 2 S.C.R. 277, at p. 292, which requires the Crown to satisfy the court that had the errors not occurred, there would not necessarily have been an acquittal, a proposition endorsed in *R. v. Sutton*, [2000 SCC 50 (CanLII)](https://www.canlii.org/en/ca/scc/doc/2000/2000scc50/2000scc50.html), [2000] 2 S.C.R. 595, at para. 2, which emphasized that “the onus is a heavy one  . . .  the Crown must satisfy the court with a reasonable degree of certainty”.  In the present case, I do believe the trial judge’s erroneous view of the law — while fatal to the acquittal in the first extortion count — had nothing to do with her acquittal of Mr. Barros on the second extortion count.

[80]                          In approaching the evidence, the trial judge (accurately) acknowledged that, despite the fact that the charge related to a number of named and unnamed persons, “one was all that the Crown needs” and “all the Crown needs is Kassam” in relation to the “threats” issue (A.R., at p. 19).  The trial judge then proceeded to find Kassam’s evidence to be wholly unreliable (A.R., at p. 19).  She observed that

he has a poor memory, as he acknowledges himself, by reason of the fact that he has abused drugs and by reason of the lapse of time . . . between the events with which we are concerned and the time when Kassam came to testify.  [A.R., at p. 19]

Accordingly,

when Kassam comes down to particulars, I’m of the view that his evidence cannot be relied upon.  So, for example, Kassam talks about other people being there, being at these meetings, and someone wanting their telephone records.  I am of the view that he is not reliable even with respect to that.  [A.R., at p. 19]

Moreover, even on a review of Kassam’s evidence at face value, she “could not see any admission or any evidence from Kassam that [Kassam] knew of the efforts that were going on within I’ll call it the Qureshi group of associates to try and determine about the identity of an informant” (A.R., at pp. 19-20).

[81]                          In contrast to the charge related to the golf club meeting, where the trial judge did not doubt the credibility of the two police officers in attendance, there was no satisfactory factual basis on which a conviction *could* properly be registered on Count 3.  Mr. Barros did not testify at trial.  His 62-page statement to the police (placed in evidence) contains fewer than half a dozen pages relating to the meeting with group members.  The gist of his statement (on which, of course, there was no cross-examination) was that his dealings with group members were in the nature of requests, not threats:

                    BARROS:      . . . When I left the first meeting, I said you guys talk (unintelligible).  If you guys want to leave your numbers, piece of paper, I will collect it later.  So I left (unintelligible), and they wanted to tell me to fuck off, we’re not doing this (unintelligible) . . .

. . .

                    BARROS:      But are they going to come and trust me when I tell them out front, I have respect for Brezinski and he’s a friend of mine.

                    RAY:              Mm hmm.

                    BARROS:      So who knows after I left that first meeting whether they’re going to tell me to fuck off.

                    RAY:              Mm hmm.

                    BARROS:      No, why would we fucking trust this guy?  Who’s to say the numbers that I was given are the real fucking numbers?

. . .

                    RAY:              Now were they ever asked if they wanted to take a polygraph?

                    BARROS:      Yes.

                    RAY:              Okay.  Was there, was there anything in that conversation that will lead them to believe that if they didn’t leave their number for you, that suspicion would be based upon them, and they would have to take a polygraph.

                    BARROS:      No, I said, and I was very specific.  If asked, would you voluntarily take a polygraph?  Kay, half of these guys, I’m not even sure if they wrote down the right numbers.  [R.R., vol. IV, at pp. 41, 77 and 42]

The prosecution was defeated not by the “legal lens” applied by the trial judge but the insufficiency of the evidence — on any view of the law — to support a conviction, let alone satisfying the “heavy onus” to satisfy the court “with a reasonable degree of certainty” that had the trial judge taken a correct view of the law, she would not have acquitted.

[82]                          It would be a serious matter to deprive an accused of the benefit of an acquittal where, as here, the prosecution is found to have led no credible evidence to support a conviction beyond a reasonable doubt.  The Crown presumably put forward the case it had on Count 3 at the original trial.  The Crown is not entitled to a retrial based on a trial judge’s flawed legal analysis that had no impact on the outcome of the case.  In the circumstances I agree with Berger J.A. that the verdict of the acquittal rendered by the trial judge on Count 3 should stand.

V.   Disposition

[83]                          The appeal is therefore allowed with respect to Count 3, the Order of the Court of Appeal for a new trial on Count 3 is set aside and the trial judge’s verdict of acquittal is restored.  In other respects, the appeal is dismissed, and the Order of the Court of Appeal for a new trial on the obstruction of justice charge (Count 1) and the extortion charge related to the golf club meeting with the police (Count 2) is affirmed.

                    The following are the reasons delivered by

                    FISH J. (dissenting in part) —

I

[84]                          Like Justice Binnie, and for the reasons he has set out, I would order a new trial on Count 1 and enter an acquittal on Count 3.  With respect, however, I am unable to agree that a new trial is required on Count 2.  In my view, the trial judge committed no error of law in acquitting the appellant on that count.  Accordingly, even if it found her decision unreasonable, the Court of Appeal lacked jurisdiction to set it aside.  So, too, do we.

II

[85]                          Count 2, which concerns us here, alleges that the appellant, Ross Barros, threatened to disclose a confidential informant’s identity in order “to induce Detective Kevin Brezinski to take steps to cease criminal proceedings against Irfan Qureshi, thereby committing extortion, contrary to [section 346(1.1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec346subsec1.1_smooth)(*b*) of the [Criminal Code](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html) of Canada” (R.R., vol. I, at p. 13).

[86]                          The trial judge entered an acquittal on this count because the evidence left her with a reasonable doubt regarding two essential elements: (1) that Mr. Barros’s purpose in meeting with Sgt. Brezinski was to induce Sgt. Brezinski to stop the proceedings against Mr. Qureshi; and (2) the presence of a “threat” within the meaning of s. 346(1.1)(*b*).

[87]                          In concluding that Mr. Barros’s acquittal on this count should be set aside, Justice Binnie imputes two errors of law to the trial judge: First, that she failed to consider Mr. Barros’s conduct “in the context of his entire course of behaviour”; second, that she misdirected herself as to whether Mr. Barros’s conduct was capable in law of constituting a threat (para. 58).

[88]                          In my respectful view, the trial judge’s reasons, read as a whole, disclose neither error.

[89]                          First, it seems to me apparent from the trial judge’s reasons that she did in fact consider Mr. Barros’s conduct *contextually*.  As the Crown had suggested, she related the evidence to the essential elements of extortion in accordance with the Ontario pattern jury instructions for that offence.

[90]                          She expressly directed herself in accordance with those instructions (A.R., at p. 9), noting that she was required, as a jury would be, “to consider the accused’s entire course of conduct” (p. 13).  In considering whether Mr. Barros had a reasonable justification or excuse for his conduct, the trial judge explicitly recognized the need to assess “the reasonableness of the conduct of the accused in the circumstances”, as required by the pattern instructions, and stated that she had indeed “reviewed all of the circumstances” (p. 15 (emphasis added)).

[91]                          More particularly, in her detailed review of the circumstances and in evaluating Mr. Barros’s conduct contextually, the trial judge specifically adverted to the evidence: (1) that Mr. Barros was a “former senior police officer with seven years active service in the drug investigation area”; (2) that he and his police interlocutor, Sgt. Brezinski, knew one another well; (3) that “there is no doubt that Barros knew from his background what kinds of things would probably be going through Brezinski’s mind as the topic of an informant came up”; (4) that Mr. Barros “invited Brezinski to bring along another police officer as a witness to [their] meeting”; (5) that “there was a good deal of openness as between Barros and Brezinski and Krewenchuk [the other officer]”; and (6) that Sgt. Brezinski “felt that his back was against the wall” (A.R., at pp. 8, 15 and 16).

[92]                          With the greatest of respect, I am unable in this light to agree with Justice Binnie that the trial judge failed to consider whether Mr. Barros’s actions would have conveyed a threat to “a person of ordinary intelligence *in the position of Sgt. Brezinski*, taking into account his shared police background” (para. 60 (emphasis in original)).  On the contrary, the trial judge *referred at least four times* to the shared police background of Sgt. Brezinski and Mr. Barros immediately before turning to consider Count 2 and again later while considering that count.  She could hardly have excluded from her reasoning what she took care to include in her reasons.

[93]                          In short, I see no basis for inferring that the trial judge, in dealing with Count 2, ignored any of the evidence to which she explicitly referred in deciding as she did.  Nor am I able to discern in my colleague’s reasons any significant fact or circumstance that the trial judge ignored in applying the law to the facts as she found them. 

III

[94]                          The second error in law attributed by Justice Binnie to the trial judge is that she misdirected herself as to whether Mr. Barros’s conduct was capable in law of constituting a threat.

[95]                          In this regard, my colleague finds that the trial judge adopted an “erroneously narrow view” of what constitutes a threat at law (para. 58).  He concludes that the trial judge erred in finding “that the indirect suggestions and veiled references put forward by Mr. Barros did not in the circumstances here ‘qualify’, as a matter of law, as ‘threats’ for the purpose of the extortion offence” (para. 65).

[96]                          With respect, I am not persuaded that the reasons of the trial judge disclose any error of this sort.  Nowhere did the trial judge indicate that, as a matter of law, explicit threats or demands were an essential element of extortion.  In fact, she explicitly directed herself to the contrary:

                           The second element of the offence as set out in the Ontario specimen charges is did Barros use threats or violence to induce Brezinski to do something or to get something done.  And this is the instruction that I would give to a jury and that I give to myself with respect to that element:

                           A threat is a statement of an intention to injure another person or another person’s family or property.  It may be spoken or written.  It does not have to be stated in any particular form of words.  Sometimes, a threat is in general or vague terms without saying exactly what kind of injury is being threatened or precisely who will suffer it.  A threat may also be made by suggestion.  To be a threat, however, whatever is communicated must be definite enough that a person of ordinary intelligence would understand it as a threat of injury. [Emphasis added; A.R., at pp. 10-11.]

[97]                          Moreover, in denying the motion for a directed verdict on this count, the trial judge concluded that there was some evidence on every element of the offence: *R. v. Barros*, [2007 ABQB 428 (CanLII)](https://www.canlii.org/en/ab/abqb/doc/2007/2007abqb428/2007abqb428.html), 80 Alta. L.R. (4th) 390, at paras. 29-30.  Had she thought, as my colleague suggests, that an explicit threat was required, she could hardly have denied the motion.

[98]                          I thus think it fair to conclude that the trial judge, applying the proper test for a directed verdict, *did* recognize that Mr. Barros’s conduct could constitute a threat *as a matter of law*.  At the conclusion of the trial, she was simply not satisfied *as a* *matter of fact*, that the evidence established beyond a reasonable doubt that Mr. Barros had threatened to reveal the identity of the informant.

[99]                          Finally, my colleague takes as a “summary” of the trial judge’s approach to this branch of the case her statement that “it is not every pressure that qualifies as the threat that is meant in the Parliament’s definition of ‘extortion’” (Binnie J.’s emphasis, at para. 58).

[100]                     With respect, I do not read this passage as a summary of the trial judge’s approach at all.  After citing a series of authorities and dictionary definitions, she simply noted that *Rousseau v. The Queen*, [1985 CanLII 42 (SCC)](https://www.canlii.org/en/ca/scc/doc/1985/1985canlii42/1985canlii42.html), [1985] 2 S.C.R. 38, “may” support the proposition that not every pressure qualifies as a threat ― a correct statement of the law ― and concluded that it was of limited relevance in the circumstances of this case.  Moreover, nowhere in her reasons did the trial judge “conclud[e] that the indirect suggestions and veiled references put forward by Mr. Barros did not in the circumstances here ‘qualify’, as a matter of law, as ‘threats’ for the purpose of the extortion offence” (Binnie J., at para. 65).

IV

[101]                     As the Court noted in *R. v. Walker*, [2008 SCC 34 (CanLII)](https://www.canlii.org/en/ca/scc/doc/2008/2008scc34/2008scc34.html), [2008] 2 S.C.R. 245, at para. 2:

                    Caution must be taken to avoid seizing on perceived deficiencies in a trial judge’s reasons for acquittal to create a ground of “unreasonable acquittal” which is not open to the court under the provisions of the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html). . . .

[102]                     Bearing that caution in mind and for the reasons given, I would allow the appeal and restore the acquittal entered by the trial judge on Count 2.

[103]                     And, as mentioned at the outset, I would dispose of the appeal on Count 1 as Justice Binnie suggests, and for the reasons he has given.  As to Count 3, assuming that the trial judge committed the errors attributed to her by my colleagues, I agree with Justice Binnie that the Crown has not met its “heavy onus” to establish, with the required degree of certainty, “that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal” (*R. v. Graveline*, [2006 SCC 16 (CanLII)](https://www.canlii.org/en/ca/scc/doc/2006/2006scc16/2006scc16.html), [2006] 1 S.C.R. 609, at para. 14).  In my respectful view, that burden is not discharged by establishing that the judge, applying the law correctly, “could have” decided otherwise (reasons of Justice Cromwell, at paras. 118, 120 and 124).

[104]                     Finally, in concluding as I have, I express no opinion as to the effect on Count 1 of an acquittal on the other counts: see *R. v. Mahalingan*, [2008 SCC 63 (CanLII)](https://www.canlii.org/en/ca/scc/doc/2008/2008scc63/2008scc63.html), [2008] 3 S.C.R. 316.

                    The following are the reasons delivered by

[105]                     CROMWELL J. (dissenting in part) — I have had the advantage of reading the reasons of my colleague, Binnie J.  I agree with his analysis of informer privilege, as well as with his reasons and disposition regarding the charge of obstruction of justice (Count 1) and the first charge of extortion (Count 2). With respect to the second extortion charge (Count 3), I also agree with Binnie J. that the trial judge erred in law in her approach to whether or not Mr. Barros had engaged in conduct which in law constituted a threat.  My only disagreement with my colleague is on what flows from this error.  In my view, we should allow the appeal and order a new trial on this count rather than reinstate the acquittal entered at trial as Binnie J. proposes.

[106]                     On an appeal from an acquittal, as in this case, it is not enough for the Crown to show that the trial judge committed an error of law.  In order for the appellate court to set aside the acquittal and order a new trial, the Crown must in addition satisfy the court that the trial judge’s error might reasonably be thought, in the concrete reality of the case, to have had a material bearing on the acquittal.  The Crown, however, is not required to demonstrate that the verdict would necessarily have been different:  *R. v. Graveline*, [2006 SCC 16 (CanLII)](https://www.canlii.org/en/ca/scc/doc/2006/2006scc16/2006scc16.html), [2006] 1 S.C.R. 609, at para. 14; *R. v. Sutton*, [2000 SCC 50 (CanLII)](https://www.canlii.org/en/ca/scc/doc/2000/2000scc50/2000scc50.html), [2000] 2 S.C.R. 595, at para. 2.

[107]                     Binnie J. would hold, in effect, that the Crown cannot meet this requirement.  He reasons that the trial judge’s findings regarding the reliability of Mr. Kassam’s testimony made an acquittal inevitable quite apart from the trial judge’s error of law.  It is this conclusion with which I respectfully disagree.  In my view, there was evidence, apart entirely from the evidence of Mr. Kassam, which could found a conviction, but which the trial judge, because of her legal error, failed to consider.  That being the case, the judge’s legal error may reasonably be thought to have had a material bearing on the acquittal.  The Crown has discharged its onus and a new trial of this count should be ordered.

[108]                     The second extortion count (third count of the indictment) alleged that Mr. Barros, with the intent to obtain information regarding the identity of a confidential police source, threatened five named persons and others unknown to induce them to provide personal information, including cellular telephone numbers. The charge squarely focused on the conduct of Mr. Barros at one or several meetings he had with associates of Mr. Qureshi (hereinafter the “Qureshi Associates”).  In a nutshell, the Crown contended that, at one of those meetings, with a view to identifying a confidential police source, he used threats in order to get the Qureshi Associates to provide him with their cellular telephone numbers.

[109]                     Mr. Barros admitted in his videotaped statement to the police that he met with the Qureshi Associates and asked if they would give him their phone numbers.  Mr. Barros also admitted that these requests were made in furtherance of his investigation into the identity of a confidential police source.  He denied, however, having said anything that could have led them to believe that, if they did not provide their phone numbers, they would be suspected and would have to take a polygraph test (R.R., vol. IV, at p. 105).  He contended that he clearly indicated to them that they were free to comply with his requests or not.  In other words, according to Mr. Barros, “There was no threat” (R.R., vol. III, at p. 182).

[110]                     The only point of disagreement between the Crown and the defence on Count 3 was therefore whether, at those meetings, Mr. Barros tried to obtain the phone numbers of the Qureshi Associates by the use of “threats”, as contemplated by [s. 346](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec346_smooth) of the [*Criminal Code*, R.S.C. 1985, c. C-46](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html).  The trial judge was of the view that the Crown had not proven beyond a reasonable doubt that he did.

[111]                     In reaching this decision, the trial judge considered that insofar as the Crown had failed to call certain named and unnamed alleged victims as witnesses at trial, it could not prove that they had been victims of extortion. The only evidence to consider, in her view, was therefore that given by Mr. Kassam (A.R., at p. 19). After having assessed his testimony, the trial judge found that the Crown had failed to prove that he had been a victim of extortion as well. She found that he had not been coerced by Mr. Barros into providing his phone number, given that Mr. Barros was no longer present at the meeting when he arrived (A.R., at p. 20). Furthermore, she found that Mr. Kassam did not know what was going to be done with his phone number when he provided it and that, in any event, there was no evidence that he even knew of the Qureshi Associates’ efforts to determine the identity of the informant (A.R., at pp. 19 and 20). Finally, she found that Mr. Kassam had not been threatened when he met with Mr. Barros on a one-on-one basis. It followed from these findings that Mr. Barros, in the trial judge’s opinion, had to be acquitted on Count 3.

[112]                     It is true that Mr. Kassam was the only one of the persons named in the count to testify at trial.  However, to succeed on this count, the Crown did not have to prove that Mr. Barros had threatened Mr. Kassam. Nor did it have to prove that Mr. Kassam felt threatened by Mr. Barros’s conduct.The trial judge herself recognized this when ruling on the defence motion for a directed verdict on this count:  [2007 ABQB 428 (CanLII)](https://www.canlii.org/en/ab/abqb/doc/2007/2007abqb428/2007abqb428.html), 80 Alta. L.R. (4th) 390, at paras. 32-39.  Having heard all of the Crown evidence, she found that “there is no evidence whatever that Mr. Barros threatened Mr. Kassam”: para. 37. Notwithstanding that conclusion, the trial judge found that there was some evidence which the trier of fact had to weigh in relation to this count (para. 38).

[113]                       The judge was correct in her directed verdict ruling that evidence of a threat to Mr. Kassam was not necessary in order for Count 3 to survive a motion for non-suit. Respectfully, however, the trial judge erred insofar as she suggested in her reasons at the end of the trial that Mr. Kassam’s testimony was the only evidence to consider on that count.  It was not essential to the Crown’s case that any of the alleged victims of the extortion testify. The Crown’s burden was to present evidence, whether from the alleged victims or not, which satisfied each element of [s. 346](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec346_smooth) of the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html).

[114]                     My view is that even without the evidence of Mr. Kassam, there was evidence which was capable in law of proving each element of the offence. Of course, whether the evidence did so is for a trier of fact, not an appellate court, to determine. However, the trial judge’s legal error, coupled with her failure to turn her mind to these elements, had a material bearing on her decision to acquit. That being the case, the correct disposition of the appeal is to direct a new trial, not reinstate the acquittal. I will now explain why, in my view, this is the case.

[115]                     In addition to Mr. Kassam’s evidence (which, I acknowledge, was found to be mostly unreliable by the trial judge), the record included the evidence of Sergeants Brezinski and Krewenchuk. Their evidence, in turn, included evidence of statements made to them by Mr. Barros.  In addition, Mr. Barros made a lengthy warned statement to the police that was admitted into evidence.

[116]                     In assessing this record, it is important to remember that threats do not need to be explicit. Obviously, threats, menaces and other similar conduct will not always be carried out overtly; quite the contrary.  For this reason, the evaluation of the actions and the intent of an individual charged with extortion calls for a careful analysis of the totality of the surrounding circumstances.  For example, veiled references to possibilities may constitute threats if, viewed objectively, they would “convey to the mind of the person to whom they are addressed consequences which he fears or which he would avoid”: see *R. v. McClure*(1957), 22 W.W.R. 167 (Man. C.A.), at p. 172.  Similarly, the wilful creation by an accused of an oppressive atmosphere which, viewed objectively, would have the effect of giving a targeted individual no choice but to comply with his demand, may also qualify as a “threat” under [s. 346](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec346_smooth) of the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html): see, e.g., *R. v. N.N.*, [2008 BCCA 300 (CanLII)](https://www.canlii.org/en/bc/bcca/doc/2008/2008bcca300/2008bcca300.html), 257 B.C.A.C. 304, at para. 75.

[117]                     The context in this matter, while key to interpreting Mr. Barros’s conduct *vis-à-vis* the Qureshi Associates, was not properly considered by the trial judge because of her legal error. Indeed,the meeting at which Mr. Barros asked the Qureshi Associates to provide their telephone numbers was not a cocktail party held in a relaxing environment.  Qureshi had recently been arrested on various drug and weapons charges and the disclosure revealed that the arrests were rendered possible by information given by a source who had knowledge of his illegal dealings. The Qureshi Associates were intent on discovering the identity of the source and this subject was discussed during the meeting.  As Mr. Barros put it in his video interview:

                    BARROS:      . . . If I wanted to, I can probably sell, like at this meeting, everybody wants to know who the fucking informant is. [Emphasis added; R.R., vol. IV, at p. 104.]

[118]                     Given this tense context, the trial judge could have concluded, had she applied the proper legal test, that the Qureshi Associates were not consumed by idle curiosity.  Rather, Mr. Barros himself described them as being on a “witch hunt” (R.R., vol. IV, at p. 124). The trial judge could also have concluded that the purpose of this witch hunt was, to put it plainly, to take out the rat.  As the trial judge put it in her reasons, “the role of informers in drug-related cases is particularly important and dangerous. . . . [I]n the context of drug trafficking, it’s not melodramatic to say that ‘dangerous’ can mean death or serious bodily harm” (A.R., at pp. 6-7). The trial judge could have concluded that everyone present at the meeting would have understood this perfectly. Certainly Mr. Barros’s statement to the police makes it clear that he did:

                    BARROS:      . . . There’s always a chance that this person is gonna get hurt, and I’m stopped, trying to stop the witch hunt so other innocent people don’t get hurt and particularly this person doesn’t get hurt. [R.R., vol. IV, at p. 129]

Mr. Barros added the following a few moments later:

                    BARROS:      I said, I stressed over and over and over again, I don’t want this source getting hurt, and you can imagine these people.  Well we’d rather fucking know who the source is.  That’s their mentality. [Emphasis added; R.R., vol. IV, at p. 131.]

[119]                     Mr. Barros told the police that he even contemplated the possibility that the Qureshi Associates would be ready to harm him in order to get him to reveal the source’s identity once he had discovered it:

                    BARROS:      . . . He [Sidney Tarrabain] doesn’t want, and I can understand why, he doesn’t want this knowledge that I possess either.  It’s shitty Don, it’s shitty.

                    RAY:             Mm hmm. Mm hmm.

                    BARROS:      ‘Cause who’s to say I’m not going to get fucking grabbed on the street and, and, and tortured to fucking find out who the source is.

                    RAY:              Yeah.

                    BARROS:      You don’t think that comes across my mind? [Emphasis added; R.R., vol. IV, at p. 134.]

[120]                     It is in the context of this “witch hunt” that Mr. Barros asked the Qureshi Associates to provide their phone numbers in order to assist him in discovering the identity of the informer.  The trial judge’s failure to interpret Mr. Barros’s conduct in light of this context brought her to simply accept Mr. Barros’s stated reasons for being at the meetings and asking for phone numbers at face value. While she was entitled to do so, her error of law narrowed the range of conclusions she could have drawn from Mr. Barros’s conduct. Had she not erred in law, she could have concluded that Mr. Barros was well aware that any failure to cooperate with his attempts to uncover the source would immediately place that person under suspicion of being the informer, with all the risks of harm that could entail. She could also have concluded that he acted knowing that the participants in the meeting would hesitate to refuse to provide their cell phone numbers, because refusing could well lead to a risk of serious bodily harm.

[121]                     But that is not all. The trial judge’s view that only Kassam’s evidence was relevant to Count 3 led her to ignore testimony which, if believed, would have led to the conclusion that Mr. Barros told the group that if they failed to provide the information he sought, they would be required to take a polygraph test.

[122]                     During the course of Mr. Barros’s trial, a *voir dire* was held to determine the admissibility of statements made by Mr. Barros to Sergeants Brezinski and Krewenchuk at the “golf course” encounter, which formed the basis for Counts 1 and 2.  Mr. Barros’s counsel did not contest the voluntariness of the statements made during this encounter.  The trial judge thus ruled the statements voluntary and admissible into evidence.  She then granted the Crown’s motion to enter the *voir dire* testimony into the trial record proper (R.R., vol. II, at pp. 52-53).

[123]                     As indicated by the Court of Appeal, Sgt. Brezinski testified to the effect that Mr. Barros told him that he informed the Qureshi Associates that he would polygraph those of them who did not provide their name and cellular phone numbers (para. 13).

[124]                     In the present context, I am of the view that, had the trial judge considered this evidence and analysed Mr. Barros’s words in context, as s. 346 requires, she could have concluded that the underlined portion of Sgt. Brezinski’s testimony constituted a threat made by Mr. Barros. As noted, the trial judge could have concluded that Mr. Barros requested the Qureshi Associates’ telephone information at the meeting because he knew that anyone who refused to do so ran the risk of being suspected of being the informer and could put his life in danger. She could also have concluded that Mr. Barros’s indication to the Qureshi Associates that he would polygraph those of them who did not want to provide a phone number was calculated to further pressure the Qureshi Associates into providing their telephone information, and give them virtually no choice but to do so. Indeed, while an alternative non-incriminating phone number could be given to shield oneself from suspicion, it was far harder to conceal the truth about one’s informer status in the course of a polygraph test.

[125]                     Of course, whether any of these conclusions should be drawn is for a trier of fact, not an appellate court, to decide.

[126]                     I would therefore dismiss the appeal and confirm the Order of the Court of Appeal for a new trial on all three counts of the indictment.

*Appeal allowed in part,*FISH*and*CROMWELL JJ. *dissenting in part.*

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