

INTERRELATED POLICE INVESTIGATIONS AND DISCLOSURE

Grace Hession David*

With the advent of technology assisting police in their work at both the investigative and production phases of an investigation, it is becoming common that simple investigations branch out into interrelated and contiguous investigations with one or more defendants. The consequences of this should concern the Crown and alert the defence bar. This paper focuses on a simple drug investigation in Canada that eventually led to the wire-tapping of government officials and the search of provincial legislative offices in British Columbia in 2003. The breach of trust, fraud and money laundering charges that followed dominated the media in the months subsequent and resulted in the litigation of noteworthy concepts in the legal areas of disclosure, privilege and the constitutional right to a fair trial. This paper is offered as a primer of the various issues that will most likely be encountered by both the Crown and the defence when the police present electronic disclosure in very large cases stemming from interrelated investigations.

Depuis l'avènement de la technologie qui aide la police à mener à bien son travail, tant à l'étape de l'enquête qu'à celle de la production d'éléments de preuve, il est de plus en plus courant que des enquêtes simples en chevauchent d'autres qui y sont étroitement liées et qui impliquent un ou plusieurs défendeurs. Les procureurs de la Couronne, et surtout les avocats de la défense, devraient s'inquiéter des conséquences qui découlent de ce phénomène. Cet article porte sur une simple enquête en matière de stupéfiants au Canada, qui a entraîné l'écoute clandestine de représentants du gouvernement et la fouille des bureaux de l'Assemblée législative de la province de la Colombie-Britannique en 2003. Les accusations d'abus de confiance, de fraude et de blanchiment d'argent qui en ont résulté ont fait les manchettes pendant des mois et ont engendré un procès mettant en cause des notions juridiques importantes en matière de divulgation, de privilège et de droit constitutionnel à un procès équitable. Cet article offre un aperçu des différentes questions qui seront fort probablement soulevées auprès des procureurs de la Couronne et de la défense lorsque la police présentera de la preuve électronique dans de grandes affaires découlant d'enquêtes apparentées.

* Barrister and Solicitor, Thornhill, Ontario.

1. Introduction

Most criminal defence lawyers want to know exactly what it takes to be able to argue that their client is entitled to a stay of proceedings because the Crown has failed in its disclosure obligations.¹ The fact of the matter is, the test for a stay for an abuse of process is incredibly demanding; in most situations, the remedy will likely be a judicial order for an adjournment and an order for disclosure.² A lawyer may then pray that he or she can later argue that a stay is warranted because of the delay and its impact on the client's right to a speedy trial.³ The law on what constitutes grounds for a stay for inadequate disclosure is beyond the scope of this paper, but it is important to be conscious of this area of the law and how it has advanced in the past few years. Crown prosecutors tend to take their disclosure obligations very seriously; they are aware that not to do so may jeopardize the cases they are prosecuting, but also place them in a difficult situation with their governing body. The right to full disclosure is enshrined in the Canadian *Charter of Rights and Freedoms*,⁴ but it has its limitations. There are certain situations where the right to full disclosure will give way to Crown arguments of privilege. It is important that both Crown and defence lawyers know the limits of their respective duties. The defence has an obligation to raise disclosure issues in a timely fashion. The Crown must provide full disclosure save for certain exceptions. A full knowledge of both limits will prevent or assist in stay arguments, and that is the purpose of this paper.

2. Morphing Investigations

In 2002 the RCMP Island District Drug Section (IDDS) began an investigation into various drug targets involved in the organized drug trade in and around Vancouver Island. The IDDS termed this investigation Project "Everywhichway" or Project EWW. The investigation of the drug matter also spread to other parts of Canada. Project EWW flourished through the use of eleven confidential informants. The informants were assigned police handlers and these handlers gave each informant a unique letter of the alphabet as an identifier to preserve that informant's anonymity. The handlers met frequently with the informants and prepared source debriefing notes which were later compiled into reports. These reports included detailed information on the informant as well as:

¹ *R v O'Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235.

² *R v Bjelland*, 2009 SCC 38, [2009] 2 SCR 615, 194 CRR (2d) 148.

³ *R v Godin*, 2009 SCC 26, [2009] 2 SCR 3, 192 CRR (2d) 184.

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11 [*Charter*].

- The name of the RCMP handler who prepared the report;
- The names, addresses and other personal information of persons named in the report;
- The information that was provided by the informant at the time of the report;
- Whether or not the information was direct evidence from the informant or hearsay;
- The handler's views on the reliability of the informant and the reliability of the information which formed the basis of the report.

Informants A, C and G supplied enough information for 448 reports and on twenty-one different occasions they mentioned Dave Basi (Basi) in connection with the target of the drug investigation, Jas Bains. As a result of the confidential informants to the RCMP, 145 warrants and four wiretap authorizations were issued during the IDDS investigation. Basi became a named and primary target in the last two of the wiretap authorizations. The RCMP had a dial number recorder attached to the cell phone of Jas Bains. Since a number of calls were made between Bains and Basi, the police began to suspect that Basi could be laundering money for Bains, and both the Vancouver and Victoria units of the Commercial Crime Section of the RCMP became involved. The Anti-Corruption Investigation Units of the RCMP were also interested, as well as the RCMP Integrated Proceeds of Crime group. As the result of what was heard on the wiretaps, a corruption investigation targeting Dave Basi emerged from the drug investigation targeting Jas Bains. On December 28, 2003, a search warrant was issued for the search of the British Columbia Legislative Building and a number of documents were seized from the offices and personal computers of Dave Basi and Bobby Virk. At the time, Dave Basi was the Ministerial Assistant for the British Columbia Minister of Finance, Gary Collins; Virk was the Ministerial Assistant to the British Columbia Minister of Transportation, Judith Reid. Aneal Basi was also targeted in the investigation and is a co-defendant; he was related to Dave Basi and was employed by the British Columbia Transportation ministry during the relevant time.

As the result of the information obtained from the search of the BC Legislature, the corruption investigation was turned into four separate

RCMP investigations with the drug investigation, Project EWW, being the mother investigation of them all. The four investigations that morphed from the original drug investigation into Jas Bains⁵ were:

- 1) An investigation into the sale of BC Rail (BC Rail file⁶);
- 2) An investigation into a fraud upon the BC Liberal Party;
- 3) An investigation into a violation of the *Agricultural Land Reserve Act* ⁷ (*ALR* file); and
- 4) An investigation by the Integrated Proceeds of Crime unit of the RCMP (IPOC file).

The four investigations were “inextricably linked and not severable,” to quote the pre-trial judge when she later began to rule on disclosure applications. A total of fourteen counts of fraud, breach of trust and money laundering were laid in connection with the sale of BC Rail in December of 2004. Dave Basi and Bobby Virk were charged with the corruption offences and Aneal Basi was charged with money laundering. The Crown alleged that Dave Basi and Bobby Virk accepted bribes from Pilothouse, a lobbyist firm and its agents, Erik Bornmann and Brian Kieran, in exchange for leaking confidential information about the bidding process in connection with the sale of BC Rail. Pilothouse was hired to represent US-based OmniTRAX, which was one of the three original bidders for BC Rail. The other two bidders were CP Rail and CN Rail. When CP Rail pulled out of the bidding process, OmniTRAX had a concern that “the fix was in” for CN Rail to win the bid. It was alleged that OmniTRAX voiced its concerns through Bornmann and Kieran to Basi. At the trial, the Crown hoped to lead evidence that Bornmann had a discussion with Basi to the effect that if OmniTRAX stayed in the bidding process it would receive a “consolation prize” from the government. As long as OmniTRAX stayed in the competition, the process looked legitimate and CN Rail would be encouraged to bid competitively. BC Rail was sold to CN Rail for \$1 billion in December, 2004. The trial commenced on May 18, 2010, and the Crown had only called evidence from two witnesses when the proceedings

⁵ On September 14, 2004, Jas Bains was charged jointly with three others under the drug investigation with conspiracy to traffic a controlled substance. The three others were charged with conspiracy to traffic a controlled substance under the umbrella of the drug investigation. Dave Basi was charged under the drug investigation with possession of a controlled substance for the purpose of trafficking and possession of a controlled substance. All the drug investigation charges against Dave Basi were stayed in June 2005.

⁶ Also known as the “Commercial Crime Investigation.”

⁷ RSBC 1996, c. 10 [*ALR*].

were curtailed by a surprise plea of guilt on the part of the two defendants, Basi and Virk, on Monday, October 18, 2010.

The Crown accepted pleas to two counts each of breach of trust and accepting benefits. The fraud charges against both accused were stayed and the money laundering charges against Basi's cousin, Aneal Basi, were stayed as well. No charges were laid with respect to the second investigation, the alleged fraud on the BC Liberal Party. Dave Basi also pled guilty to one count of accepting a benefit of \$50,000 from a development company in connection with the third RCMP investigation, the *ALR* file. Both Basi and Virk received a conditional sentence of two years less a day to be served under house arrest.

With the trial now over and the debate about the legal fees a fading issue, we are left to sift through the ashes of the pre-trial disclosure motions. The pre-trial motions were subject to a publication ban instituted by MacKenzie J of the British Columbia Supreme Court in March 4, 2010, until a verdict was reached in the case. The decisions are now once again available for public inspection, and they provide much from which we can learn.

3. Police Problems with Disclosure in Large Investigations

The information involving the BC Rail matter setting out charges against Dave Basi, Bobby Virk and Aneal Basi was laid by the police in December of 2004. Disclosure of the Crown's case commenced in January 2005 and a direct indictment was preferred on January 28, 2005. Even though a trial date was set for November 28, 2005, it became clear very quickly that the 11,000 documents that had been disclosed up to that point did not constitute complete disclosure and so the prospect of a November 2005 trial date became remote.

Among the problems encountered in those early days of disclosure was the fact that no index for the initial 11,000 documents had been produced. Moreover, the software provided by the Crown for the purposes of document management did not possess a search function, making it very difficult to find documents. Other problems included inadequate lists of withheld Crown documents; these lists were described as being "sparse" by Bennett J, the judge assigned to facilitate the pre-trial disclosure motions.

As the process continued, the Crown released disclosure in phases that were nothing more than "dumps" of material in batches of CD-ROMS. There were many problems with these information dumps. Defence counsel soon found that the materials in the CD-ROMS were disorganized.

Files had been scanned by the police into incorrect file folders and the index was so vague that, without an adequate search function, the material was irretrievable. As late as May 2006 the chief investigating officer was still requesting notes, reports and documents from officers involved in the investigation.

Defence counsel applied to Bennett J to be allowed to attend the RCMP IPOC project room to review the Crown documents because of the many problems discussed above. The Crown opposed a document review on the grounds that the documents housed in the project room were the originals and had not been vetted. The Crown argued that if defence counsel reviewed these documents, the identity of the various private informants would be placed at risk. The defence argued that they were concerned that the Crown had not been sufficiently involved in the disclosure process and that the bulk of the decisions with respect to disclosure had been made at the earliest stages by the police without input from the Crown. By June 2007 over 100,000 documents had been disclosed by the Crown in electronic format. Problems with police disclosure continued to plague the Crown. For instance, the chief Crown witness, Erik Bornmann, gave a statement to the RCMP in February 2005; this statement was not disclosed to the defence team until January 29, 2007.

In the first pre-trial disclosure decision, *R v Basi, Virk and Basi*,⁸ Bennett J reviewed the principles of electronic disclosure set out by Watt J in *R v Blencowe*⁹ and as summarized by LaForme J in *R v Hallstone Products Ltd.*¹⁰ Aside from principle one which has been refined by *R v Stinchcombe*,¹¹ *R v Egger*¹² and *R v Chaplin*,¹³ these principles still stand as fundamentals to this day for large investigations where the disclosure must be electronic because of its size:¹⁴

1. There is the duty of the Crown to disclose all relevant material, inculpatory and exculpatory, sufficient to allow an accused to make full answer and defence. Disclosure may be withheld or delayed in certain circumstances and initial disclosure should be made before an accused is asked to elect mode of trial or to plead. Non-disclosure is

⁸ 2006 BCSC 2086 (November 16, 2006) [*Basi*].

⁹ (1997) 35 OR (3d) 536 (Ont Div Ct), 118 CCC (3d) 529 [*Blencowe*].

¹⁰ (1999) 46 OR (3d) 382, 140 CCC (3d) 145.

¹¹ [1991] 3 SCR 326, 130 NR 277 [*Stinchcombe*].

¹² [1993] 2 SCR 451, 103 DLR (4th) 678.

¹³ [1995] 1 SCR 727, 178 NR 117 [*Chaplin*].

¹⁴ For a recent and useful discussion of the technical issues associated with massive electronic disclosure, see “Electronic Disclosure” in Glen Jennings and Andrew Burns, *Six Minute Criminal Defence Lawyer*, LSUC 2010 at Tab 16.

justified on the basis of: (i) no control by the Crown; (ii) clear irrelevance; and (iii) privilege.

2. The right of disclosure is not absolute nor does it demand production of original material. However, the defence has the right to inspect the original if it is in the control of the Crown. The defence is also entitled to a copy of any such material that the Crown intends to rely on at trial.

3. Disclosure, in cases where there are large numbers of documents such as business records, is complied with by providing defence with photostated copies or CD-ROM.

4. Where materials are the subject of a privacy or security interest, privacy for the defence in viewing them may be limited unless there is a sufficient undertaking given by defence counsel. This would apply in exceptional cases.

5. An accused ought not to bear the costs of “basic disclosure.” Such costs are to be the responsibility of the Attorney General. Basic disclosure is, generally speaking, the Crown brief and it will vary from case to case.

6. Trial judges have the responsibility of resolving disputes regarding such things as timing and adequacy of Crown disclosure.¹⁵

The defence successfully argued that because of all the disclosure problems they had encountered up to that point, they could not be confident that they had complete disclosure unless they engaged in a document-by-document check with the Crown and the RCMP. The defence indicated that unless this document review was conducted to ensure all disclosure was made, the alternative could be an application for a mistrial or even an abuse application further on in the proceedings. Bennett J agreed and she concluded, largely because of all the Crown problems with disclosure, that the defence had demonstrated they were not on a fishing expedition. She ordered a review on the part of the police and the Crown with defence counsel present. Bennett J ruled that defence counsel could accompany the Crown and the police to the BC Rail project room. In order to preserve informant privilege, defence counsel were not permitted to review any of the documents, but only to be sufficiently advised of the description of the document in order to determine if they had already received it, or if it was on a list of documents not disclosed but adequately described in an index.

¹⁵ *Basi*, *supra* note 8 at para 42.

4. Access to Disclosure from “Related Investigations”

Having attended and participated in a methodical review of the documents in the BC Rail project room, the defence and Crown discovered 78 new documents of which neither the Crown nor the police were aware.

On June 4, 2007, the defence brought a second motion for disclosure before Bennett J in the *Basi* matter.¹⁶ This motion involved an application to review the drug investigation file, Project EWW, which was the mother investigation that gave rise to the charges in the sale of BC Rail as well as the IPOC file. The Crown conceded at the outset of the motion that the defence was entitled to review the disclosure available in the IPOC file. Surprisingly, the Crown objected to the defence application to review the material from Project EWW because they submitted there had already had been adequate disclosure of the relevant material in that file. In 2005 the defence had been given 70,000 pages of the drug disclosure package. The drug disclosure package came in an electronic form which had a search function but again, this feature was slow and imprecise. The defence was able to convince Bennett J to allow them to review the drug investigation material by showing that the Crown had not played an active hand in the dissemination or determination of what items should be disclosed. Secondly, the defence convinced Bennett J that even though the Crown maintained that disclosure for the BC Rail matter was complete, certain “holes” in disclosure were indicative that other relevant material must be elsewhere within the RCMP investigative framework, namely the drug investigation:

A) Police Perspective on Disclosure:

After reviewing the seminal cases on disclosure and the relevant principles outlined in *Stinchcombe*,¹⁷ *R v Taillefer and Duguay*,¹⁸ and *Chaplin*,¹⁹ Bennett J summarized the purpose of disclosure in her second major decision:²⁰

Important principles are stated in these decisions, some of which are particularly applicable to this case. The right of disclosure is a constitutionally protected right. The Crown is obliged to disclose everything it has unless it is not relevant or is protected by privilege. Relevance is defined as the reasonable possibility that the information could

¹⁶ *R v Basi*, 2007 BCSC 788, [2007] 49 CR (6th) 148 (BCSC)[June 4, 2007 ruling].

¹⁷ *Supra* at note 11.

¹⁸ 2003 SCC 70, [2003] 3 SCR 307.

¹⁹ *Supra* at note 13.

²⁰ *Supra* note 16.

be used to meet the Crown's case, advance a defence or make a decision which could affect the conduct of the case.

Material in the possession of the police is deemed to be in the possession of the Crown for this purpose.

It is evident from these descriptions that the threshold test for relevance is low. It is also crystal-clear that the decision in terms of what is relevant is for the Crown and not for the police. Further, as the case unfolds, the relevance of certain documents may become obvious as the defence emerges. One of the purposes of the relevance test is to avoid "dump truck" disclosure on the defence. However, what may initially appear irrelevant may become relevant as the case unfolds, and then must be disclosed.

The Crown takes the position that much of what was requested does not exist, and therefore, according to *Chaplin*, cannot be produced. The defence under *Chaplin* needs to establish a basis upon which I can conclude that further potentially relevant material does exist. For the reasons that follow, I have concluded that the defence has met this test. There has been a substantial failure to respect the disclosure rights of the accused in this case.²¹

Crown counsel in charge of the BC Rail prosecution admitted that they had not reviewed the disclosure in Project EWW, and this turned out to be a devastating admission. Bennett J was convinced that the defence should be allowed to be present for another review, especially since the notes of many police officers were discovered at the behest of the defence in the first inventory of the BC Rail file which had occurred earlier. Perhaps the most convincing argument came when Inspector Callen's notes from the BC Rail Project room inventory were discovered in the review of December 22, 2006. Originally Inspector Callen indicated that he had submitted his notes to the drug investigation but because they were of an administrative nature, they were not disclosed. In his affidavit, he testified that perhaps he had never submitted his notes at all, raising some doubt as to the whereabouts of the notes until they were discovered in the course of the BC Rail file review. Bennett J noted at the beginning of her June 4, 2007 ruling that the defence had already put the Court on notice that they planned to challenge the search warrants and wiretaps in the drug investigation, making the material from the drug investigation materially relevant.

In cases where there is to be disclosure of very large amounts of material, the police are usually the first body to assemble the material and they make crucial decisions that are often the determining factors on what is disclosed. In investigations such as the *Basi* matter where several

²¹ *Ibid* at paras 25-28.

separate investigations morphed from an original investigation, the tendency on the part of the police is to disclose only the material that, from their point of view, is relevant to a single investigation. Allowing the police to make these initial decisions with respect to disclosure is risky because the police have no idea what the defence may be, nor can they be expected to have such foresight. It becomes essential that defence counsel be fair and open in the initial requests for disclosure by expressing the full reasons for the disclosure to the Crown. The defence in the *Basi* case correctly stated from the beginning that they would be challenging the validity of the wiretap applications and the validity of the search warrants from the drug file. Obviously, the likelihood of the relevance of the drug investigation material was high.

The Crown's objection to a review of the drug investigation was not that the material was irrelevant, but that there was the concern that wholesale disclosure of Project EWW in its entirety could put the identity of private informants at risk. Bennett J was of the opinion that the privilege granted to informants could be protected if Project EWW was moved to a neutral location where a page-by-page review of the contents of the seven filing cabinets could occur. Defence counsel were not permitted access to the documents themselves; the Crown and the police were to identify each document and ensure that the defence had it, or at least ensure that the document was sufficiently described on the list of documents to be withheld by the Crown. The Court allowed this second review to defence counsel, but it would later appear that the protection of police informants would require much greater scrutiny and caution from this point on in the case.

B) Holes in Disclosure

Another successful argument that persuaded Bennett J to grant the review of Project EWW was that the defence was able to show that there were many "holes" in the disclosure. For example, the defence was alive to an issue involving Minister of Finance Gary Collins, and the role he played in the matter. From the beginning, the three accused indicated during the course of their numerous disclosure applications that their defence was that they acted with the knowledge and approval of their superiors. From the disclosure in the BC Rail case, it was learned that Minister Collins was under surveillance on December 12, 2003; he was referenced three times in police briefing notes in December 2003. The defence made many requests for briefing notes to the highest level of the RCMP but no notes were ever forthcoming. There were many questions in connection to this issue, especially as to why the investigation on Minister Collins was closed after December 2003. Bennett J found this very strange, especially in spite

of the fact that police surveillance placed Minister Collins at a supper involving the two persons connected with OmniTRAX during the material time. This dearth of information with respect to Minister Collins was seen by Bennett J to be a “hole” in disclosure and a deficit that was directly relevant to the main defence.

Another hole in disclosure pointed out by defence was the fact that there was a paucity of information with respect to chief Crown witness Eric Bornmann – so much so that it would appear that the Crown policy may not have been followed in respect of the arrangements made for him to become a chief Crown witness. For example, the Crown immunity agreement had not been disclosed as of the June 4, 2007 ruling on disclosure. The Crown immunity agreement is the contract that the Crown enters into with a witness that spells out the nature of the agreement between the witness and the Ministry of the Attorney General. Such an agreement is to be expected when the chief Crown witness is an unindicted co-conspirator and certain arrangements have been made with the witness with respect to his anticipated testimony. Further, as of the June 4, 2007 disclosure ruling, no police notes had been disclosed that spoke to the issue of how Mr. Bornmann ceased to be a target of the investigation and became instead the chief Crown witness.

Until mid-December 2003 the BC Rail investigation was under the supervision of Staff Sergeant Buerk who was from the drug section of the RCMP and involved in Project EWW. The decisions with respect to Gary Collins would have been made around this time. Also for one week after December 12, 2003, there was a gap in police notes while the command of the BC Rail case was handed over to the commercial crime investigation section of the RCMP. The defence pointed to the fact that these missing notes were essential, especially when it was learned that there was some kind of a methodological disagreement between those involved in the drug investigation and the commercial crime investigation unit as to how to proceed. Bennett J concluded that it was likely that the information with respect to Gary Collins and the police notes for the missing week in December might be located in the Project EWW file, and for this reason, coupled with the others, she ordered the review.

5. Crown Claims of Privilege

In any case where there are interrelated investigations and multiple requests for disclosure, there will no doubt be numerous redactions of information and defence applications for production of the redacted material. The Crown must be in a position to justify these redactions in

order to not infringe the principles outlined in *Stinchcombe* and the cases that followed. The special prosecutor in the *Basi* case invoked the following types of privilege which led to the next level of pre-trial motions, refined disclosure motions to unveil redactions:

A) Informant Privilege

In February 26, 2007, the defence in *Basi* filed the third round in a lengthy application for disclosure. One of the many items the defence was seeking was an unredacted set of police notes. The Crown objected to the disclosure of the redacted material in the police notes on the grounds that to do so would breach informant privilege. Throughout the course of the arguments, the Crown offered on several occasions to give the Court a three-minute synopsis of the circumstances leading to the redactions of the notes in the absence of the accused and their counsel. Bennett J requested that the Crown file this synopsis along with the unredacted police notes in a sealed envelope for the Court's review. The Crown refused, indicating that a simple review of the unredacted documents by the Court alone without the *viva voce* evidence of a police officer would be insufficient to explain the nature of the privilege. The Crown maintained that the case law made clear that this evidence must be given *in camera* and *ex parte*. After reviewing the case law on informant privilege, Bennett J was of the opinion that in deciding whether or not the privilege applied, a pressing issue was whether the accused had a right to be present as per section 650 of the *Criminal Code*.²² Bennett J ruled that the hearing would be *in camera*, but she ruled that defence counsel would be allowed to attend without their clients and subject to a non-disclosure order.²³

The Crown felt strongly that this ruling on the privilege issue and the presence of the accused's counsel was incorrect. The next day it invoked section 37 of the *Canada Evidence Act*.²⁴ At this session the Crown argued *Named Person v Vancouver Sun*²⁵ as authority that a trial judge's discretion is removed when the Crown makes out a case of informant privilege. Bennett J struggled again with the issue of whether section 650 of the *Criminal Code* applied, allowing for the presence of the accused during the hearing of the pre-trial motion. Seeking a middle ground, Bennett J dismissed the Crown's section 37 application and ruled that

²² RSC 1985, c C-46.

²³ *R v Basi*, 2007 BCSC 1888, 170 CRR (2d) 260 (December 6, 2007).

²⁴ RSC 1985, c C-5.

²⁵ 2007 SCC 43, 3 SCR 252 [*Named Person*].

defence counsel could be present according to her reading of *R v Fisk*²⁶ and *R v Guess*.²⁷

The Crown appealed and was not assisted by the British Columbia Court of Appeal.²⁸ Finch CJBC did not view Bennett J's ruling as a "disclosure order" in the strict sense of the wording of section 37 which allows an immediate appeal to a court of higher authority.²⁹ He also saw Bennett J's proposed accommodation of defence counsel as being permissible. Donald JA agreed. Ryan JA disagreed and ruled that in permitting defence counsel to attend for the purposes of the hearing, Bennett J had in fact given a *de facto* disclosure order. He held that, in so doing, Bennett J had inadvertently breached the informant privilege that the Crown is bound to protect, and that this legitimately triggered the appeal provisions of section 37 of the *Canada Evidence Act*.³⁰

At the Supreme Court of Canada, Fish J delivered the decision for the Court.³¹ He noted that while there are to be no interlocutory appeals in criminal matters, the issue arose in a unique context. The motion was informed by section 37 of the *Canada Evidence Act* and was, in fact, a separate legal proceeding independent of the criminal trial.³² As far as the jurisdictional issue was concerned, Fish J agreed with Ryan JA³³ and held that, by failing to entertain a balancing of the rights of the accused to disclosure against the duty of the Crown to protect informant privilege as set out in section 37(5) of the *Canada Evidence Act*, Bennett J had unwittingly created a "disclosure order," albeit limited, with her ruling.³⁴

In her reasons dated December 6, 2007, Bennett J thoroughly analyzed the earlier Supreme Court ruling in *Named Person* for all principles relevant to the issue of a first stage hearing to decide whether or not informant privilege should apply. Bennett J noted that in *Named Person* the protection of informant privilege was invoked by an individual also sought by the Canadian immigration authorities, so section

²⁶ [1996] BCJ No. 1232, 108 CCC (3d) 63.

²⁷ 2000 BCCA 547, [2000] BCJ No. 2023. The written reasons of Bennett J with respect to this ruling may be found at *R v Basi*, 2007 BCSC 1898, 170 CRR (2d) 275 (December 7, 2007).

²⁸ *R v Basi*, 2008 BCCA 297, (2008) 235 CCC (3d) 383 (BCCA).

²⁹ *Ibid* at paras 59-68.

³⁰ *Ibid* at para 79.

³¹ 2009 SCC 52, 3 SCR 389 [*Basi SCC*].

³² *Ibid* at 403.

³³ *Ibid* at 394.

³⁴ *Ibid* at 398.

650 of the *Criminal Code* had no application.³⁵ In that case, the “Named Person” was subject to extradition proceedings; s/he was seeking to invoke informant privilege pursuant to the common law so that s/he could keep his/her status as an informant out of the hands of the media who were seeking access to the court record pursuant to the open court principle. In that sense, *Named Person* involved a third party and the debate centered around whether that third party should be excluded from the proceedings. In *Named Person*, the Court appointed an *amicus curiae* to assist with submissions on whether or not the privilege should apply since the party invoking the privilege was also the subject matter of the proceedings. It was in this context that Bennett J noted that only the media were excluded from the hearing and not the Named Person or his/her counsel; she noted that the Supreme Court was silent on the issue of what the proper procedure would be had the party seeking access to the hearing been the accused.³⁶ With this in mind, Bennett J mused that, in the circumstances before her, the mere invoking of informant privilege without a determination of whether or not it applies would not trump an accused’s right to his presence at his trial.³⁷

The Supreme Court of Canada was quick to address these issues and define the nature and scope of informant privilege. Fish J noted that informant privilege originates when 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.³⁸ Noting that this class of privilege, like solicitor-client privilege, is “nearly absolute,” Fish J stipulated that the privilege can only be waived by the informant him/herself, or by the Crown with the consent of the informant.³⁹ It is a jointly held privilege. This privilege can only be pierced where an opposing party demonstrates that the innocence of the accused is demonstrably at stake. Once the privilege has been demonstrated to exist, the trial judge has little discretion.⁴⁰ Fish J outlined the procedure to be followed in a first stage hearing and noted that it should always be held *in camera*. While the judge is deciding whether or not the privilege is to apply, the party raising the privilege is to be given the benefit of the doubt with respect to the care and caution that must be taken in the dissemination of the evidence during the hearing. Fish J noted the following:

³⁵ *Supra* note 23 at para 20.

³⁶ *Ibid* at para 29.

³⁷ *Ibid* at para 31.

³⁸ *Basi SCC, supra* note 31 at 400.

³⁹ *Ibid* at 401.

⁴⁰ *Ibid* at 400.

It thus remains as true in this case as it was in *Named Person* that “[w]hile the judge is determining whether the privilege applies, all caution must be taken on the assumption that it does apply” (para [47]). No one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does exist or that an exception applies. It follows that the trial judge erred in permitting defence counsel to hear the testimony of an officer tending to reveal the identity of the putative informant at the “first stage” hearing.⁴¹

The threshold for the party establishing the privilege is based on the “balance of probabilities” standard. It is the effect of the section 37 proceedings on a criminal trial, however, that has the greatest import on the rights of an accused. In an effort to fully explain the nature and scope of informant privilege, Fish J took great pains to underline the fact that the *Charter* right to full answer and defence, which includes the right to full disclosure of one’s case as guaranteed by section 7, does not trigger the breaching of informant privilege.⁴² It is still good law that the sole exception to this privilege is the “innocence at stake” test as outlined in *R v Leipert*.⁴³ As a result, the option fashioned by Bennett J in the *Basi* case of allowing defence counsel to attend the first stage hearing on informant privilege without their clients subject to non-disclosure undertakings would be ethically problematic for defence counsel.⁴⁴ In ruling for this form of attendance on the part of defence counsel, Bennett J was inadvertently preventing defence counsel from enjoying a full and frank relationship with their clients. This surely resulted in a serious fettering of the free flow of information. It is obvious that the duty of defence counsel to their clients and the duty to the court could pose a difficult conflict. The other major concern was the fact that consent with respect to disclosure, so freely given by the accused at the commencement of the hearing, could later become vitiated if new information, given in the course of the hearing, proved relevant to the defence but could not be shared with clients.⁴⁵ There is no question that defence counsel could not ethically or legally assume such a burden in relation to their clients and hence the hearing with respect to the existence of informant privilege had to be brought *ex parte*. Following from this, it is clear that a trial judge’s decision with respect to section 37 of the *Canada Evidence Act* can in no way involve section 650 of the *Criminal Code*. Fish J concluded:

In support of the trial judge’s order, the respondents cite s.650 of the *Criminal Code*, which codifies the accused’s right to be present at trial. Indeed, the trial judge’s first

⁴¹ *Ibid* at 402.

⁴² *Ibid*.

⁴³ *Ibid* citing *R v Leipert*, [1997] 1 SCR 281.

⁴⁴ *Basi SCC*, *ibid* at 402-03.

⁴⁵ *Ibid* at 403.

decision on the common law privilege claim rested, in part, on this provision: Section 650 was invoked by the judge in concluding that counsel should be permitted to attend subject to a court order and undertakings.

Section 650 reads:

650. (1) Subject to subsections (1.1) to (2) and section 650.01, an accused, other than an organization, shall be present in court *during the whole of his or her trial*.

Clearly, s.650 has no application to the trial judge's decision under s.37. By its very terms, it applies only to the presence of the accused at trial. An application under s.37 of the CEA is a discrete proceeding, separate from and only ancillary to the criminal trial. Accordingly, it is not caught by s. 650.⁴⁶

There are several helpful suggestions that Fish J offered in the closing paragraphs of the decision to enable defence counsel to offer meaningful representation to their clients. Noting the "serious procedural fairness concerns" involved with any process that involves *ex parte* applications within the context of a criminal proceeding, Fish J was alive to the difficulties connected to the decision that Bennett J had to make. He noted that the decision to exclude defence counsel and their clients from such hearings should be made in circumstances where the identity of the confidential informant cannot be protected in any other way. In an effort to get to the bottom of the privilege, courts are instructed to avoid unnecessary complexity and delay. Fish J urged trial judges to accommodate the accused in the most reasonable fashion possible:

In order to protect these interests of the accused, trial judges should adopt all reasonable measures to permit defence counsel to make meaningful submissions regarding what occurs in their absence. Trial judges have a broad discretion to craft appropriate procedures in this regard.⁴⁷

It is also suggested that defence counsel be given an opportunity to make submissions on the scope, nature and subject of informant privilege and what may or may not take place in their absence. Suggestions for questions that may be put by the trial judge to potential witnesses are to be sought from defence counsel. Finally, Fish J cautioned that in appropriate situations, the defence may have to be presented with a redacted version of the evidence from the record of the *ex parte* proceedings so that meaningful submissions may be made on the issue of the application of the privilege. For difficult cases, he recommended that an *amicus curiae* be

⁴⁶ *Ibid*, citing *R v Pilote* (2002) 156 OAC at paras 48-50 [emphasis in original].

⁴⁷ *Basi SCC*, *ibid* at 403.

appointed to assist in the submissions on the issue of the application of the privilege at its first stage.⁴⁸

B) Solicitor-Client Privilege

On December 8, 2008 and January 5, 2009, Bennett J released reasons on a claim of solicitor-client privilege on the part of the RCMP for with respect to numerous documents that were withheld from disclosure or heavily redacted.⁴⁹ She explained that each document had been reviewed in court and she had been assisted with the submissions of counsel with respect to each document on the itemized list. In her possession were the complete unvetted documents, as well as the vetted documents, some of which were in the possession of the defence. Bennett J noted in her reasons that she had previously ruled on June 4, 2007 that the prosecutor could no longer vet for relevance but he could still vet for privilege. Because of this ruling, Bennett J was also petitioned to rule when documents were clearly irrelevant. She was careful in addressing this request and in deciding that, she asked for submissions on relevance from both parties.⁵⁰

If a document were found to be relevant and protected by solicitor-client privilege, Bennett J noted that the next phase would likely be a series of submissions on whether or not the privilege had been waived and whether or not the “innocence at stake” exception would apply which would allow for the dissemination of the document.⁵¹ Clearly, disclosure applications in cases involving large amounts of disclosure can be very complicated for counsel and time-consuming for the courts.

Bennett J reviewed the principles that are relevant to a claim of this nature. She noted that solicitor-client privilege can be claimed for legal assistance sought by the RCMP from the Public Prosecution Service of Canada or by the lawyers at the Department of Justice as per *R v Campbell*.⁵² It is imperative that the information provided be legal advice sought in connection with the professional capacity of the government lawyer and given in a situation of confidence. The test for solicitor-client privilege was reviewed by Major J in *R v McClure*:

Not all communications between a lawyer and her client are privileged. In order for the communication to be privileged, it must arise from communication between a lawyer

⁴⁸ *Ibid* at 405-06.

⁴⁹ *R v Basi*, 2008 BCSC 1858, [2008] BCJ No 2725 (QL).

⁵⁰ *Ibid* at paras 17-21.

⁵¹ *Ibid* at para 21.

⁵² [1999] 1 SCR 565, 171 DLR (4th) 193.

and the client where the latter seeks lawful legal advice. Wigmore, *supra*, sets out a statement of the broad rule, at p. 554:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

As stated, only communications made for the legitimate purpose of obtaining lawful professional advice or assistance are privileged. The privilege may only be waived by the client...⁵³

Bennett J noted that advice that is non-legal in nature, such as business advice or policy advice is not afforded protection by this doctrine. Solicitor-client privilege, like informant privilege, is a class privilege which means that there is a *prima facie* presumption that the document is privileged once the party has invoked the privilege; the onus is clearly on the party searching to gain access to the document to show that the privilege does not apply.

As Bennett J commenced her review of each of the documents where solicitor-client privilege was claimed, she was careful to note whether or not there was a specific request for legal advice and if not, how it was that the advice came to be given. She also ruled on relevance and was careful to excise legal advice from the rest of the document if it did not taint the document and if the document was of use to the defence. Bennett J was exceptionally thorough in her review because she also referenced the Crown list that contained descriptions of the document and commented on whether or not the descriptions were accurate or helpful. In many instances she had to table documents for further discussion because of the fact that claims of solicitor-client privilege were combined with claims of litigation privilege, as is often be the case.

C) Litigation Privilege

As mentioned above, solicitor-client privilege is a recognized privilege placing the onus upon the party seeking disclosure to show how or why the privilege should be waived or breached. Litigation privilege is certainly not a class or “absolute” privilege in the same sense as informant privilege or solicitor-client privilege. It is also not a blanket privilege. Each document must be considered on a “case by case” basis where the onus of proof is on the party invoking the privilege. Defining the nature and scope of litigation privilege became an issue for Bennett J in the Basi case, and

⁵³ 2001 SCC 14, [2001] 1 SCR 445 at 460.

it will always be an issue for any case where there are large amounts of disclosure and when investigations have morphed from an original investigation. It is also not uncommon for documents to be possessed of an overlap between solicitor-client privilege and litigation privilege, all the more reason to be in a position to specify each privilege and its scope.

Litigation privilege is still a developing area of the law and the most recent case at the Supreme Court of Canada to discuss this area of privilege was *Blank v Canada (Minister of Justice)*.⁵⁴ This case outlines that while litigation privilege is clearly not an absolute privilege, it is distinguished from solicitor-client privilege on the basis of policy considerations. The following passage from *Blank* is helpful in trying to understand the legal consequences of litigation privilege and how it differs from solicitor-client privilege:

Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their client's case with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.⁵⁵

While solicitor-client privilege applies only to confidential communications between solicitor and client, litigation privilege can apply to non-confidential communications between a solicitor and third parties and to materials that are non-confidential if they are sought for, or prepared for approaching litigation. Secondly, solicitor-client privilege applies the moment there is a confidential communication between a solicitor and her client and remains forever encased by the privilege. As far as litigation

⁵⁴ 2006 SCC 39, 2 SCR 319 [*Blank*].

⁵⁵ *Ibid* at paras 26-27.

privilege is concerned, the lifespan of the privilege is defined by the litigation. Once the litigation ceases, so will the litigation privilege. This can become a tricky issue for interrelated police investigations, as we shall see below. Finally, the policy considerations behind solicitor-client privilege are based on the absolute requirement for full and fair disclosure of information that predicates access to legal advice in Canada. The policy consideration behind the need to protect litigation privilege, however, applies to the trial process. The material protected by litigation privilege encompasses the preparation for and the work product associated with litigation. Litigation privilege protects a process and solicitor-client privilege protects a relationship. These are the major conceptual differences between the two forms of privilege.

1) *Dominant Purpose Test*

Bennett J correctly noted in her December 8, 2008 decision in *R v Basi* that litigation privilege is more narrow than solicitor-client privilege in its scope.⁵⁶ Litigation privilege includes protecting only documents that were created for the “dominant purpose” of litigation, first adopted in *General Accident Assurance Co v Chrusz*.⁵⁷ In this case a videotape, float sheet and some time sheets that came into the solicitor’s brief from a third party, all of which pre-existed the threat of litigation, were excluded from coverage of litigation privilege by means of the “dominant purpose test.” While these items constituted evidence that supported the plaintiff’s case, they pre-existed the litigation because they had been kept in the ordinary course of business long before the litigation in question. Carthy JA ruled that these items were not covered by litigation privilege because they had been created before, and independently from, the litigation. Carthy JA referred approvingly to, and adopted, Craig JA’s dissent in *Lyell v Kennedy*:

Craig J.A., in dissenting reasons, put aside the older cases as not manifesting the modern approach to discovery and espoused a rigid circumscribing of litigation privilege. He bluntly concluded at p. 594:

I fail to comprehend how original documents which are not privileged (because they are not prepared with the dominant purpose of actual or anticipated litigation) can become privileged simply because counsel makes photostated copies of the documents and puts them in his “brief.” This is contrary to the intent of the rules and to the modern approach to this problem. If a document relates to a matter in question, it should be produced for inspection.

⁵⁶ *Supra* at note 49 at para 51.

⁵⁷ (1999) 45 OR (3d) 321, 180 DLR (4th) 241 (CA) [*Chrusz*].

I agree with the tenor of Craig J.A.'s reasons. The majority reasons reflect a traditional view of the entitlement to privacy in a lawyer's investigative pursuits. It is an instinctive reflex of any litigation counsel to collect evidence and to pounce at the most propitious moment. That's the fun in litigation! But the ground rules are changing in favour of early discovery. Litigation counsel must adjust to this new environment and I can see no reason to think that clients may suffer except by losing the surprise effect of the hidden mistake.

Returning to the specific topic, if original documents enjoy no privilege, then copying is only in a technical sense a creation. Moreover, if the copies were in the possession of the client prior to the prospect of litigation they would not be protected from production. Why should copies of relevant documents obtained after contemplation of litigation be treated differently? Suppose counsel for one litigant finds an incriminating filing by the opposite party in the Security Commissioner's files. Could there be any justification for its retention until cross-examination at trial? Further, such copies, if relevant in their content, must be revealed in oral discovery under rule 31.06(1) which provides that questions must be answered even though the information sought is evidence.

The production of such documents in the discovery process does little to impinge upon the lawyer's freedom to prepare in privacy and weighs heavily in the scales supporting fairness in the pursuit of truth.⁵⁸

Carthy JA saw the adoption of the dominant purpose test as keeping with the trend towards greater disclosure, a practice which has been enshrined within the *Charter* and in civil common law:

It can be seen from these excerpts, quoted without their underlying authorities, that there is nothing sacrosanct about this form of privilege [litigation privilege]. It is not rooted, as is solicitor-client privilege, in the necessity of confidentiality in a relationship. It is a practicable means of assuring counsel what Sharpe calls a "zone of privacy" and what is termed in the United States, protection of the solicitor's work product: see *Hickman v Taylor*, 329 U.S. 495 (1946).

The "zone of privacy" is an attractive description but does not define the outer reaches of protection or the legitimate intrusion of discovery to assure a trial on all of the relevant facts. The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. In effect, litigation privilege is the area of privacy left to a solicitor after the current demands of discoverability have been met. There is a tension between them to the extent that when discovery is widened, the reasonable requirements of counsel to conduct litigation must be recognized.⁵⁹

⁵⁸ *Ibid* at 333, citing *Lyell v Kennedy* (1884), 27 Ch D 1 (CA).

⁵⁹ *Ibid* at 331.

The “dominant purpose” test has been adopted and approved by the Supreme Court of Canada in *Blank*.⁶⁰ Therefore, while litigation privilege is clearly not a class privilege like solicitor/client privilege, it is also analyzed on a “case by case” basis such as the other areas of privilege in Canadian law that are not class privileges. The “dominant purpose test” is the test that must be applied to any document over which litigation privilege is being claimed and the onus will be on the party making the claim.

2) *Waiver*

Informant privilege can only be waived with the consent of the Crown and the informant him or herself. The Crown is duty bound to protect that privilege at all costs – hence the Crown’s immediate resort to section 37 of the *Canada Evidence Act* when Bennett J ordered the disclosure of certain information after the common law application for disclosure. With litigation privilege, both the Crown and the defence must be ever mindful of the fact that a reference at any stage of a proceeding to work-product or documents created for the dominant purpose of litigation will result in an inevitable waiver of that material. One of the most compelling examples of waiver can be found in *R v Toronto Star Newspapers Ltd*, where the Crown applied for a search warrant of the offices of Royal Group Technologies and the files of several named individuals.⁶¹ The Crown heavily redacted the Information to Obtain and the applicants objected to the level of redaction of that document. Many of the redactions were to protect the identity of several forensic studies prepared by Crown experts that contained the basis for the Crown theory of criminal liability. Ordering the forensic documents disclosed on the basis that they were the “fruits of the investigation,” Nordheimer J also noted that they were originally waived by the Crown in the first instance because they were filed with the Court and specifically mentioned in the Information to Obtain:

Finally, on this point, even if a proper claim of litigation or work product privilege could be made for the BDO Dunwoody reports, that privilege has been waived by referring to these reports and in filing those reports with the court for the purpose of obtaining the search warrants. It is fundamental to a claim of privilege that the party asserting the claim must maintain the confidentiality of the information at all times. Once a party asserting a claim of privilege reveals the information in a court proceeding, they have waived the privilege. Further they have waived the privilege not only for those portions that are revealed but for all portions that are relevant to a proper understanding of the report – see *R v Stone* (1999), 134 C.C.C. (3d) 353 (S.C.C.) at paras. [96] – [99].⁶²

⁶⁰ *Supra* at note 54 at paras 60-61.

⁶¹ [2005] No 5533, 204 CCC (3d) 397(Ont SC)[*Toronto Star Newspapers*].

⁶² *Ibid* at para 26.

3) Lifespan of Litigation Privilege

Communications protected by solicitor-client privilege are protected forever. The protection afforded by litigation privilege ends when the litigation ends. But for large police investigations involving interrelated sets of facts and separate sets of charges on separate informations, it can be difficult to determine when the “litigation” has come to an end. In the *Basi* case the documents over which the Crown claimed litigation privilege were documents that had originated from the initial drug investigation, and they covered a plethora of matters. The issue became whether the privilege had expired over these documents since the accused on the drug information pled guilty, save for Jas Bains who elected to have a trial at the provincial court level. Bains was convicted at trial, but by January 2009 when the issue of litigation privilege arose in the *Basi* matter, Bains’ appeal was still before the British Columbia Court of Appeal; this meant his case was still “in the system” and the work product associated with this matter was still covered by litigation privilege under the principles in *R v Thomas*.⁶³

In a January 14, 2009 ruling given in chambers on the issue of the lifespan of litigation privilege,⁶⁴ Bennett J noted that the defence had applied for access to redacted material from the drug investigation files and they were arguing that all of the matters, save the Bains matter, were final, and the litigation privilege covering those documents was now terminated.⁶⁵ Arguing the contrary, counsel for the RCMP submitted that there were three levels of litigation and all of them were “related.” Since at each level there was ongoing litigation, litigation privilege was alive and well – and not to be breached. The RCMP outlined the three levels in the following terms. The first level related to the four individuals charged together on the same information with conspiracy to traffic a controlled substance between September 19, 2003 and December 9, 2003 in Victoria BC: Jasmohan Singh Bains, Brahm Mikol, Blythe Vernon and John Scallon. The second level encompassed every individual charged in the drug investigation that started on Vancouver Island and ultimately spanned the breadth of the country. And finally, the third level of related proceedings, the RCMP submitted, involved the corruption and fraud charges in the *Basi* matter which had morphed from the *Everywhichway* drug investigation. The RCMP argued that as long as the corruption

⁶³ [1990] 1 SCR 713, 108 NR 147. Bains’ appeal was finally resolved on April 9, 2010 when the British Columbia Court of Appeal released reasons dismissing his appeal.

⁶⁴ *R v Basi*, 2009 BCSC 772, (2009), 244 CCC (3d) 537 (BCSC) (January 14, 2009).

⁶⁵ *Ibid* at para 6.

charges were alive and before the courts – then the litigation privilege from Everywhichway was active because all of these matters were related.⁶⁶

In order to resolve the issue of what constitutes a “related matter,” Bennett J reviewed the jurisprudence. She noted that in the *Blank* case⁶⁷ the first set of charges against Sheldon Blank were regulatory offences relating to environment and reporting requirements associated with his business. Those matters were quashed and the new charges laid some years later were ultimately stayed before trial. Blank then launched an action against the federal government alleging fraud and abuse of process for how he had been treated with respect to the regulatory matters. Blank brought applications under the *Access to Information Act*⁶⁸ for disclosure of all of the documents relating to his first set of charges. The Crown objected to having to disclose these documents to Blank on the grounds that the civil lawsuit was a related proceeding to the original regulatory charges, and that therefore a litigation privilege would apply to shield them from dissemination. The Supreme Court of Canada disagreed, as Bennett J noted in the following paragraph from her ruling:

Thus, in the facts of *Blank*, the records “were prepared for the dominant purpose of a criminal prosecution relating to environmental matters and reporting requirements. The respondent’s action ... seeks civil redress for the manner in which the government conducted the prosecution. It springs from a different juridical source and is...unrelated”: at para [43]. The dominant purpose of the privilege was to prepare a zone of privacy around the preparation of the criminal trial, not to prepare for a civil action arising from that conduct. The proceedings were therefore unrelated. Clearly, there were similarities between the litigation – the same parties were involved, and the issues may intertwine, however, the purpose was not sustained because the juridical sources differed, and that difference outweighed the similarities.⁶⁹

In the *Basi* January 14, 2009 ruling, Bennett J rejected the third link of the RCMP argument. She found that the Everywhichway drug investigation and the corruption charges in the *Basi* matter were not related proceedings; any documents that fell under the protection of litigation privilege in the drug matter could have no similar protection in the *Basi* case:

Considering all of the jurisprudence above, it seems that the bottom line is that the purpose is as stated by R.J. Sharpe (as he then was) and adopted by Fish J. in *Blank* that “litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate.” That protected area is

⁶⁶ *Ibid* at para 7.

⁶⁷ *Supra* at note 54.

⁶⁸ RSC 1985, c A-1.

⁶⁹ *R v Basi*, January 14, 2009 ruling, *supra* note 64 at para 19.

still needed when the parties and the issues are related. Thus, what is done to prepare for trial in one case will still be protected when the purpose of the preparation is still alive. In *Blank*, while parties were the same, the purpose of the trial preparation was completely different because the proceedings were completely different. Similarly, in [*R v. Bidzinski*, 2007 MBQB 138, (2007), 217 Man R (2d) 116] the litigation arose from the same event but the criminal proceedings vis-à-vis the civil proceedings were completely different.

The first step that is required, then, when assessing whether the matters before the Court are related is to examine the factors that would bring them under one umbrella. First I will address what the RCMP refer to as the third level of privilege in this case, and that is whether all of the proceedings, including the charges before the Court, are related proceedings. It is correct that the investigation is related, as the information obtained through the drug investigation led to the Commercial Crime investigation, and there is an overlap between the investigations. Not to be overlooked is the fact that there were also investigations involving proceeds of crime also pending at the same time and arising out of the initial drug investigation.⁷⁰

Bennett J then considered the connection between Dave Basi and the drug matter and she found his connection to be tenuous. Initially Dave Basi was charged in the drug matter because he owned a piece of property on Lake Shawnigan where the police uncovered a grow-op marijuana business. At the material time, however, this property was being rented to an independent third party. There was nothing else tying Mr. Basi to the Everywhichway investigation other than his familial relationship to Jas Bains. Bennett J then addressed the issue of the wiretap evidence. She found that the only evidential factor that linked Everywhichway to the commercial crime investigation was the evidence from the wiretapped discussions. It was the conversations monitored during the course of the Everywhichway wiretap that resulted in the commercial crime investigation and charges. Bennett J ruled that Crown work product with respect to the wiretaps would be covered by litigation privilege, from the outstanding Bains appeal as well as the commercial crime investigation.

D) Public Interest Privilege (Public Interest Immunity)

Like informant privilege, public interest privilege is informed by both the common law and, if the Crown requires, the procedure available in section 37 of the *Canada Evidence Act*. The kind of information that is protected from public dissemination by this form of privilege concerns matters that could seriously affect issues of national security, government relations and on-going criminal investigations. The ruling in *R v Basi* in December 2008

⁷⁰ *Ibid* at paras 30-31.

and January 2009 outlined the Crown argument that a subset of public interest privilege was “investigative technique privilege” which, they submitted, included information that needed to be kept privileged in order to protect techniques and individuals that assist in police investigations.⁷¹ The Crown argued that the publication of this information could cause serious risk to the integrity of police technique which directly affects ongoing investigations and the overall administration of justice. In her case-by-case review of the redacted documents, Bennett J addressed each document individually and weighed the factors for each. Two reviews, in particular, provide excellent examples where the privilege was upheld and a third shows where it was not:

Tab 589: The technique involves the installation of a tracking device. This document, although part of Everywhichway, is not related to the charges before the Court. The need to keep this type of investigative technique secret is well established. In these circumstances, weighing the value of the evidence to the accused’s right to make full answer and defence and the importance of the technique, I conclude that the public interest privilege will apply to the vetted part of this document.⁷²

Tabs 605 and 606: These are the same documents. The first vet relates to a phone number of the police officer and need not be disclosed. The second relates to the installation of a tracking device. However, it does not refer to any technique *per se*, simply the fact of the installation. While it does not appear to have much relevance to the charges before the Court, there is no public interest to protect that I can ascertain. Therefore, the documents will be unvetted to that extent.⁷³

Tab 973: The description of this document provided is vague. I have concluded that it is appropriate to disclose the nature of the technique sought to be protected and that is the installation of a listening device in the course of the drug investigation. The disclosure of the information would reveal the details of the technique, as well as the identity of civilians who aided the police in the investigation but would have nothing to offer as witnesses in the case. Counsel for the defence was concerned that the information may contain source information for the wiretap. Again, given this is not an absolute privilege, I consider it appropriate to indicate that there is no reference to source information. Otherwise, the contents of the last two paragraphs of this document are covered by privilege.⁷⁴

Courts recognize the need to protect police investigations. In situations where investigations are on-going it may be necessary to withhold from

⁷¹ *Supra* at note 49 at para 80.

⁷² *Supra* note 49 at 29-30.

⁷³ *Ibid* at 31.

⁷⁴ *Ibid* at 32.

disclosure the identities of certain police officers in order to protect them and other innocent parties assisting them. Another concern that affects the administration of justice is the fact that criminal offenders may learn and benefit from the mass publication of police technique. In each case, the balancing test must ultimately be a weighing of the harm done to the administration of justice from the disclosure of the police investigation technique as opposed to the benefits to the accused in terms of his ability to make full answer and defence from the disclosure. It should be remembered that this form of privilege is not a class privilege which means that there is a presumption of admissibility as long as it is also probative and relevant. Because of the fact that this is not a class privilege, the review of each document for which investigative privilege is claimed must be done individually and on a case-by-case basis.⁷⁵

In *Toronto Star Newspapers*, the Crown excessively edited an Information to Obtain a Search Warrant having claimed many privileges, chief among them investigative privilege.⁷⁶ Nordheimer J was faced with the question of whether the editing was justified in law. He urged great caution with investigative technique privilege and noted that a claim that is based on “generalized assertion of possible disadvantage” is not specific enough to meet the test. In this case, the Crown was unsuccessful in establishing the claim because the investigative techniques were nothing out of the ordinary.

The Crown also argued that revealing investigative “theories” would compromise the ongoing investigation because the theories had changed over time. The Crown claimed that the investigative theories were privileged under the broader subset of litigation privilege with respect to forensic analysis that had been completed on numerous forensic accounting reports completed by BDO Dunwoody at the request of the RCMP. BDO Dunwoody analyzed corporate documents and this analysis served as the basis for the obtaining of the search warrant. Once again, Nordheimer J dismissed this argument because of the fact that the investigation was continuing on the basis of a new and improved theory

⁷⁵ See eg *R v Richards* (1997) 115 CCC (3d) 377 (Ont CA); *R v Meuckon* (1990) 57 CCC (3d) 193 (BCCA); *R v Trang* (2002) 168 CCC (3d) 145 (Alta QB); *R v Toronto Star Newspapers Ltd*, *supra* note 61.

⁷⁶ *Toronto Star Newspapers*, *ibid*. In paragraph 11 of his reasons, Nordheimer J outlined the various bases upon which the Crown sought to justify the redactions in the Information to Obtain: (i) informant privilege; (ii) investigative technique privilege; (iii) litigation privilege including common interest privilege; (iv) information received from a third party on a confidential basis; (v) information that if released could compromise an ongoing investigation; (vi) information that if released could compromise the privacy rights of persons; and (vii) solicitor and client privilege.

and the worst possible scenario with respect to the revelation of the old theories would involve nothing more than possible embarrassment to the authorities:

The Crown also asserts that revealing its investigative theories will compromise the ongoing investigation because those investigative theories have changed over time. To quote from the Crown's submissions:

"The investigative theory should not be subject to premature exposure before the analysis is complete. Premature exposure may have a 'chilling effect' on the freedom with which RCMP investigators and the forensic accountants pursue investigative theories."

Putting aside that this once again appears to be a "generalized assertion of possible disadvantage," I fail to see how the revelation of past theories, that may now be discarded because subsequent information proved them to be flawed, can compromise an ongoing investigation that is now presumably based on some revised theory. I also fail to see why there would be a chilling effect on the pursuit of different investigative theories. I suppose that there may be some potential for embarrassment to the investigators regarding earlier failed theories, although I do not know necessarily why there would be. Any such possibility, however, cannot pose a serious risk to the administration of justice such as would justify keeping the information secret.⁷⁷

Each claim of privilege under this subset of public interest immunity will require great specificity and cogent illustration of the harm to be done to the success of the investigation, to the officers involved or to members of the public, should the material be disseminated. The party that alleges this claim, usually the Crown, will be required to satisfy the trier of fact of a very high threshold: that the integrity of the ongoing investigation will be compromised or lives will be at stake.

6. Conclusion

There are many lessons to be learned by both the defence bar and the Crown from the Basi litany of disclosure pre-trial motions. The first and most important lessons need to be learned by the Crown. If the police are going to use wiretaps and if they are going to be conducting massive investigations that branch out from wiretaps or informants, assistance is required from the Crown's office at the earliest opportunity. With the appointment of a "disclosure Crown" early on or at least from the minute charges are laid, and as long as that person can approach the case from the point of view of long-term disclosure management, there will be fewer pre-

⁷⁷ *Ibid* at paras 23-24.

trial motions and a minimalization of threats of mistrials and stays.⁷⁸ The Crown who is assigned to this task needs to commit to efficient file administration rather than devoting themselves to an evaluation of the merits of the case. The “disclosure Crown” should be concerned with his or her assigned investigation and how it relates to the various branch investigations and the primary source investigation. Disclosure should then be obvious in terms of all statements taken from common witnesses and all material involving common issues. One of the strongest arguments for the defence is that a statement from a chief Crown witness was disclosed years after the date it was taken and often years after the date that disclosure was first issued in the case. This kind of discovery is always very pleasurable for the defence because it can make the Crown look like it is hiding information when in reality it is often just a general lack of organization that is to blame. This kind of disclosure “discovery” will also usually win the defence an opportunity to attend and participate in a time-consuming and tedious document-by-document review of the Crown’s main case and, as we have seen in *Basi*, various related investigations. Another method of ensuring defence presence at time-consuming document reviews will be a concession on the part of the Crown in charge of the prosecution that no-one from the Crown’s office has reviewed the disclosure in the related investigations. All of this could be avoided with the appointment of a disclosure Crown early on in the process.

The disclosure Crown needs to be senior enough to be able to anticipate, at least in a general sense, the various defences that may be argued in the case. One argument in the *Basi* case that never got to be argued was that the matter cannot be a fraud because the people who are now alleged to be the victims were well aware of and condoned the situation when it was occurring. Such arguments will enable the defence to win access to disclosure of material that can give an insight into the thoughts and recordings of the complainants. Providing such material is already in the possession of the Crown and not protected by privilege, a prudent Crown would be certain to ensure the disclosure of such material under the rubric of relevance and to ensure adherence to all *Stinchcombe* obligations without embarrassing arguments late in the day contributing to an overall motion for delay.

Other technical issues the disclosure Crown needs to be concerned with are the provision to the defence of appropriate indices of all disclosure handed over in CD ROM as well as detailed indices of the documents to be withheld due to privilege and the nature or origin of the privilege in question. Needless to say, all scanning of documents must be done in an

⁷⁸ See “Effective Management of Mega-Trials: Air India Trial – Lessons Learned,” Michael Code, *Six Minute Criminal Defence Lawyer*, LSUC 2008 at Tab 13.

organized fashion and into the proper electronic file folders so that the indices match the actual organization on the CD ROM. Scanning is without a doubt, a very tedious and boring job, but if it is done incorrectly it furnishes the defence with another convincing argument that the Crown is slipshod in its approach to the case. The software that the Crown employs should facilitate search functions and should be able to perform such functions in a timely fashion. It is often the case that if the client has deep pockets, the defence will find and employ their own document management tool. This is part of the right to a fair trial but the Crown is doing the public a disservice if the engine used is inadequate.

Finally, those in charge of the prosecution of a mother investigation and related investigations must be aware of the difficulties involved with the assignment of different Crowns to the cases and with the assignment of different Crowns in different jurisdictions if the investigations span the country. In recent tobacco smuggling prosecution carried out in the jurisdiction of Ontario, there were numerous investigations pursued by the RCMP. Project Oiler was prosecuted in Toronto, Ontario. However, Project Oiler A and Project Oiler C arose in different cities and different jurisdictions, Oiler A in Ottawa and Oiler C in Montreal. There was a sense of continuity with disclosure in Project Oiler and Project Oiler A, since those in charge wisely assigned the same provincial Crown. Oiler C was prosecuted by Crowns from the federal Department of Justice which presented the opportunity for disclosure decisions that could be argued to have been at odds with those of the provincial Crown. In any large prosecution, there is a need for the continuity of the prosecution and for continuity in disclosure decisions.

The Basi case highlights the fact that defence counsel will have to clearly understand the nature of class privileges versus non-class privileges. The Basi rulings established the Crown's right to invoke an *ex parte* and *in camera* hearing in order to establish informant privilege. The defence will also have to study the decision from the Supreme Court in order to clearly understand that section 37 of the *Canada Evidence Act*, if invoked by the Crown in order to establish informant privilege, constitutes a separate legal proceeding that is not part of the criminal trial from which it may have originated. In the course of his decision, Fish J did include many suggestions for defence counsel who find themselves excluded from such hearings and this includes the right beforehand to make submissions on the nature and scope of the privilege as it applies to the facts before the court, and possible questions that may be put to witnesses during the course of the hearing. At the end of the day, the lessons from the pre-trial disclosure issues connected with this case will serve to underline in a new chapter in disclosure law in Canada.