

KEEPING SECRETS: SURVEILLANCE POST PRIVILEGE

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Location or surveillance post privilege is designed to protect surveillance operations where knowledge of the locations, techniques and equipment used would educate criminals about how to avoid future surveillance; educate third parties about how to conduct illegal surveillance; frustrate future similar surveillance activities; and pose risks to individuals conducting surveillance or those allowing the use of their facilities.¹

While the privilege is based on two centuries of jurisprudence regarding the protection of informants, it is a relatively new application of the rules regarding informants. The privilege is, however, qualified and not absolute. As a result trial courts have a great deal of discretion in determining the scope of the privilege – balancing the accused's right to full disclosure and to adequately cross-examine and confront witnesses with the public interest in maintaining secrecy and effective law enforcement.

While the ultimate focus is on Canadian law, the author starts with English precedent through New Zealand, Australia, and the United States before ending with Canada. As the rule is fairly consistent across the Commonwealth with Canadian courts adopting US precedent which in turn was built on earlier English precedent, the law in Canada can be seen as an evolution of the practices elsewhere.

Le privilège de non-divulgarion d'un poste de surveillance ou de son emplacement vise à protéger les opérations de surveillance lorsque la connaissance des emplacements, des techniques ou de l'équipement utilisé pour la surveillance instruirait les criminels sur la manière d'éviter des surveillances futures; informerait les tiers sur la façon d'effectuer une surveillance illégale; ferait échouer de futures opérations du même type; ou mettrait en danger les individus effectuant la surveillance ou qui permettent l'utilisation de leurs installations.

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¹ Zana E Holley, "Police Surveillance Privilege"(1999) 67 ALR (5th) 149 at 2(a). See also Shawn Spaulding, "Ripe for Resolution: A Critique of the Surveillance Post Privilege"(2002) 36 USF L Rev 1067

Alors que ce privilège est basé sur deux siècles de jurisprudence sur la protection des informateurs, il s'agit d'une application relativement nouvelle des principes liés aux informateurs. Ce privilège est, toutefois relatif et non absolu. En conséquence, les tribunaux de première instance disposent d'une grande marge de manœuvre pour en déterminer la portée — en conciliant, d'une part, le droit de l'accusé à l'entière communication de la preuve et à contre-interroger adéquatement et à confronter les témoins et, d'autre part, l'intérêt public à maintenir une application efficace et confidentielle du droit dans ce domaine.

Bien que l'analyse concerne principalement le droit canadien, l'auteur commence par résumer la jurisprudence du Royaume-Uni à travers les décisions rendues en Nouvelle-Zélande, en Australie et aux États-Unis, pour enfin conclure avec celles du Canada. Comme la règle est assez constante dans l'ensemble du Commonwealth et que les tribunaux canadiens s'appuient sur la jurisprudence américaine qui, à son tour, s'appuie sur une jurisprudence anglaise antérieure, le droit canadien en la matière peut être perçu comme une évolution de certaines pratiques étrangères.

The State's interest in protecting the confidentiality of its investigative methods and police informers remains compelling. The reality of modern law enforcement is that police authorities must frequently act under the cloak of secrecy to effectively counteract the activities of sophisticated criminal enterprises.

*Michaud v Quebec (Attorney General)*²

1. Introduction: Informant Privilege

Location or surveillance post privilege is designed to prevent the disclosure of the location, techniques and types of equipment used during police surveillance operations. This privilege, while relatively new, is derived from two centuries of jurisprudence regarding the protection of informants and the risks posed to individuals who help the police.

Dating back more than 200 years, to the *Trial of Thomas Hardy*, the English courts first recognized that information received from confidential informants should not unnecessarily be disclosed. As stated by Lord Chief Justice Eyre at the time:

² [1996] 3 SCR 3 at para 51.

[T]here is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed.³

Hardy was subsequently applied in *A-G v Briant*, where Pollock J affirmed that the rule was clearly established in criminal prosecutions that a witness could not be asked any questions that would disclose the identity of an informant, or that the witness was himself an informant. As hard as this rule may seem in a particular case “*private mischief must give way to public convenience.*”⁴

Both *Hardy* and *Briant* were subsequently applied in the civil case *Marks v Beyfus*. In that case the plaintiff claimed damages against the Crown for malicious prosecution. The plaintiff called as a witness the Director of Public Prosecutions, who refused to identify the name of the person who had given him the information on which he had acted against the plaintiff. The Court upheld the non-disclosure as a well-established rule of law:

I do not say it is a rule which can never be departed from; 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 shew the prisoner’s innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail. But except in that case, this rule of public policy is not a matter of discretion; it is a rule of law, and as such should be applied by the judge at the trial, who should not treat it as a matter of discretion... [The rule applied] ... not only to the trial of the prisoner, but also to a subsequent civil action between the parties on the ground that the criminal prosecution was maliciously instituted or brought about.⁵

Marks was subsequently cited with approval by the United States Supreme Court;⁶ the Supreme Court of Canada;⁷ the High Court of Australia;⁸ the

³ *R v Hardy*, (1794) 24 State Tr 199 [*Hardy*].

⁴ *A-G v Briant*, (1846) 15 M & W 169 at 185, 153 ER 808 at 815 [emphasis added][*Briant*]

⁵ *Marks v Beyfus* (1890), 25 QBD 494 at 498 [emphasis added] [*Marks*].

⁶ *Roviano v United States*, 353 US 53 (1957) [*Roviano*].

⁷ *Solicitor General of Canada v Royal Commission of Inquiry (Ontario Health Records)*, [1981] 2 SCR 494 [*Health Records Inquiry*]; *Bisaillon v Keable*, [1983] 2 SCR 60; *R v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*]; *R v Durette* (sub nom *R v Farinacci*), [1994] 1 SCR 469 [*Durette*]; *R v Leipert*, [1997] 1 SCR 281 [*Leipert*]; and *R v Mills*, [1999] 3 SCR 668.

⁸ *Sankey v Whitlam* (1978) 142 CLR 1 [*Sankey*].

House of Lords;⁹ the Supreme Court of Ireland;¹⁰ the Supreme Court of India;¹¹ the Supreme Court of South Africa;¹² the Hong Kong Court of Appeal;¹³ the New Zealand Court of Appeal;¹⁴ the Royal Court of Jersey;¹⁵ and the International Criminal Tribunal (Yugoslavia)¹⁶ among others.

In *D v NSPCC*, Lord Diplock, for the House of Lords, re-affirmed the rule, stating that the rationale for it was plain:

If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal.¹⁷

Although these cases dealt primarily with informant confidentiality, the principle has been used to uphold other types of privileges, such as the protection of law enforcement techniques, police intelligence files, surveillance post locations and the use of new technologies. In fact, most common law countries have codified the principles regarding the limited

⁹ *Rogers v Home Secretary*, [1973] AC 388 (aka *R v Lewes Justices, ex parte Home Secretary*) [Rogers]; *D v National Society for Prevention of Cruelty to Children*, [1977] UKHL 1 [*D v NSPCC*]; and *Ashworth Security Hospital v MGN Limited*, [2002] UKHL 29.

¹⁰ *Howlin v Hon Mr Justice Morris*, [2005] IESC 85.

¹¹ *State of Punjab v Sodhi Sukhdev Singh*, 1961 AIR 493, 1961 SCR (2) 371; see also *State of UP v Raj Narain*, 1975 AIR 865, 1975 SCR (3) 333.

¹² *S v Sefatsa and Others* (242/1986), [1987] ZASCA 150; [1988] 4 All SA 239 (AD).

¹³ *Piu Wing Chu v the Attorney General*, [1984] HKCA 235; and *R v Kwok-Hung Lam*, [1989] 2 HKLR 182, petition for special leave to Privy Council refused (August 11, 1990). Until 1997 the Court of Appeal was the highest court of appeal for Hong Kong, although the Judicial Committee of the Privy Council located in London was the court of last resort.

¹⁴ *Tipene v Apperley* [1978] 1 NZLR 761; and *R v Strawbridge*, [2002] NZCA 332. Until the Supreme Court was established on January 1, 2004, the Court of Appeal was the highest court of appeal in New Zealand, although the Judicial Committee of the Privy Council located in London was the court of last resort.

¹⁵ *Att Gen v Lagadec*, 1995 JLR 328.

¹⁶ *Prosecutor v Simic, et al* (1999), separate concurring opinion of Judge Hunt in *Ruling Concerning the Testimony of a Witness*. Case # IT-95-9-PT, notes 25 & 27.

¹⁷ *Supra*, note 9 at 3. This paragraph was recently cited with approval by the Supreme Court of Canada in *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at para 50, [2010] 2 SCR 592, regarding a claim for journalistic privilege.

immunity available to public bodies (including the police) in protecting confidential information that is not otherwise covered by informant privilege.

2. Surveillance Post Privilege

A) United Kingdom

1) Observation Post Privilege

Up until April 1, 1997 the English common law had recognized that information received from confidential informants should not unnecessarily be disclosed for more than 200 years, as mentioned earlier in this paper. In *R v Rankine*,¹⁸ however, the Court of Appeal applied this privilege to observation posts in upholding an objection to disclosing the location from which police conducted surveillance.

As noted by Mann J, such cases are analogous to informant privilege and that the same basic rules must apply. Similar views were expressed by the Court of Appeal in *R v Johnson*,¹⁹ *R v Hewitt*,²⁰ and *R v Grimes*.²¹ For example, in *Hewitt* the Court stated:

[We] see no essential difference between informers and the providers of observation posts for both in different ways provide the police with indispensable assistance in the detection of crime.²²

While these cases are useful in providing historical context, on April 1, 1997, the *Criminal Procedure and Investigations Act (CPIA)*²³ came into force, codifying most of the common law principles on privilege into one set of rules, or *Code of Practice*.

2) Criminal Procedure and Investigations Act

The *Code of Practice* requires that the police disclose all relevant material to the prosecutor with a separate schedule containing the information to which privilege is claimed and the reason therefor. Section 6.12 of the *Code of Practice* then provides a list of examples of material which may attract privilege from disclosure, including (among others):

¹⁸ (1986), 83 Cr App R 18 (CA) [*Rankine*].

¹⁹ (1989), 88 Cr App R 131 (CA) [*Johnson*].

²⁰ (1992), 95 Cr App R 81 (CA) [*Hewitt*].

²¹ *R v Grimes*, [1994] Crim LR 213 (CA)

²² *Supra* note 20 at 87.

²³ *Criminal Procedure and Investigations Act 1996* (UK), c 25.

- Material relating to national security
- Material received from the intelligence and security agencies;
- Material relating to intelligence from foreign sources which reveals sensitive intelligence gathering methods;
- Material given in confidence;
- Material relating to the identity or activities of informants, or undercover police officers, or witnesses, or other persons supplying information to the police who may be in danger if their identities are revealed;
- *Material revealing the location of any premises or other place used for police surveillance, or the identity of any person allowing a police officer to use them for surveillance;*
- *Material revealing, either directly or indirectly, techniques and methods relied upon by a police officer in the course of a criminal investigation, for example covert surveillance techniques, or other methods of detecting crime; and*
- *Material whose disclosure might facilitate the commission of other offences or hinder the prevention and detection of crime.*²⁴

Thus the decision of the police and Crown Prosecution Service to withhold information from the defence because of its sensitivity – for example surveillance locations – would fall squarely into section 6.12 of the *Code of Practice*. While this discretion is reviewable by the courts, a strong argument could be made against disclosure based on the nature of the damage which may be caused to the public interest. In fact, section 21(2) of the *CPIA* preserved the common law rules regarding the withholding of disclosure in the public interest.

To assist lawyers in determining the degree of sensitivity, consideration should be given to the fact that the public interest may be prejudiced either directly or indirectly through incremental or cumulative harm.

²⁴ *Criminal Procedure and Investigations Act 1996*, s 23(1) [*Code of Practice*] online: <http://police.homeoffice.gov.uk> [emphasis added].

Examples of direct harm provided in the Code include:

- exposure of secret information to enemies of the state
- death of or injury to an intelligence source through reprisals
- revelation of a surveillance post and consequent damage to property or harm to the occupier
- exposure of a secret investigative technique.

Examples of incremental or cumulative harm include:

- exposure of an intelligence source that does not lead to a risk of death or injury, or any reprisal, to that intelligence source, but which discourages others from giving information in the future because they lose faith in the system
- revelation of a surveillance post leading to a reluctance amongst others to allow their premises to be used
- exposure of an investigative technique that makes the criminal community more aware and therefore better able to avoid detection
- exposure of material given in confidence, or for intelligence purposes, that may make the source of the material, or others, reluctant to cooperate in the future, such as CrimeStoppers material
- an active denial that a source was used in the instant case, leading to the inability to deny it in future cases where one was used, thereby impliedly exposing the use of a source. The Crown should neither confirm nor deny the use of a source.

In recent years, since the enactment of the *CPIA*, a novel procedure has been introduced designed to protect the interests of a party against whom privilege is claimed and who cannot, for security reasons, be fully informed of all the material relied on against him. The procedure is to appoint a person, usually called a “special advocate,” to represent that party’s interests but to whom he cannot disclose the secret material.

While this procedure was originally created for immigration appeals, in *R v H & C*²⁵ the House of Lords reviewed the law on disclosure,

²⁵ [2004] UKHL 3, [2004] 2 AC 134, aff’ing [2003] EWCA Crim 2847 [*H & C*]. See *Roberts v Parole Board*, [2005] UKHL 45, in which the House of Lords held by a majority of 3:2 that the Parole Board also has the power to withhold material relevant to

including the use of special counsel to provide an adversarial element where privilege is claimed in criminal matters.

In *H & C* the accused faced charges of conspiring to supply Class A drugs. The prosecution based its case on police observations and surveillance evidence. Counsel for the accused made far-reaching requests for disclosure, including details of the covert police operations – suggesting the police had falsified their observations. It was counsel’s contention that access to the records would assist in the preparation of their defence and establish the legality of the operation.

At a preliminary hearing the trial judge, without looking at any of the material, held that it was necessary to appoint special counsel to review the material so as to avoid a perception of unfairness in accordance with the European Court of Human Rights decision in *Edwards and Lewis v United Kingdom*.²⁶

The prosecution appealed on the basis that it was premature to appoint special counsel, arguing that the judge should first have looked at the material and assessed its relevance in relation to the issues in the case. This argument succeeded in the Court of Appeal and the House of Lords affirmed the decision, ruling that the prosecution had a duty to disclose material it had in its possession that weakened its own case or strengthened the case of the defence. Where material could not be disclosed without risk of serious prejudice to an important public interest, some derogation for the normal rule could be justified provided it was kept to the minimum:

Circumstances may arise in which material held by the prosecution and tending to undermine the prosecution or assist the defence cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest. The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and under-cover agents, *or the use of scientific or operational techniques (such as surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations*. In such circumstances some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial.²⁷

a parole review from the Appellant and his legal representatives, and is able to appoint a “Specially Appointed Advocate.”

²⁶ [2004] ECHR 560.

²⁷ *Supra* note 25 at para 18 [emphasis added].

Since the judge had not addressed the question of the nature of the material sought to be withheld, he had acted prematurely in appointing special counsel. However the House of Lords felt that the occasions on which it would be appropriate to appoint special counsel would be rare.²⁸

B) New Zealand

1) Protection of Police Tools

In New Zealand, which had a somewhat similar legislative scheme to that of England,²⁹ the New Zealand Court of Appeal held that

there can be no presumption in favour of disclosure and the competing interests must be carefully weighed and a judicial judgment exercised. Where other competing interests are also guaranteed by the Bill of Rights, as here, the exercise of the discretion will weigh those rights of the non-party along with other public interest considerations, including, of course, the [accused's] fair trial rights.³⁰

Proposals for reform of this area of the law had previously been made by the New Zealand Law Commission, to enable a judge to order that the information not be disclosed in a proceeding if satisfied that the public interest in the communication or information being disclosed is outweighed by the public interest in preventing harm to a person or in preventing harm to the particular relationship in the course of which the information was obtained or relationships of a similar kind or maintaining activities which contribute to or rely upon the free flow of information.³¹

It was felt these proposals would more accurately reflect the common law and previous decisions of the courts in that country. For example, in *R v McFarlane*³² the trial judge accepted the need to afford protection to

²⁸ However see *R v Davis*, [2006] EWCA Crim 1155, rev'd on other grounds [2008] UKHL 36, for a more recent example of where the Court of Appeal appointed a Special Advocate in a criminal trial.

²⁹ See the *Criminal Disclosure Act 2008* (NZ) 2008/38, ss 16 and 17; see also the *Evidence Amendment Act (No 2) 1980* (NZ) 1980/27, s 35 (repealed by the *Evidence Act 2006* (NZ) 2006/69).

³⁰ *Attorney-General (on behalf of the New Zealand Police) v The District Court at Otahuhu*, [2001] NZCA 187, [2001] 3 NZLR 740; *R v H*, [2000] 2 NZLR 257 (CA); and *R v Moore*, [2001] NZCA 140, [2001] 1 NZLR 761.

³¹ New Zealand Law Reform Commission, *Evidence: Reform of the Law* (NZLC R55 – vol 1, 1999) and *Evidence: Evidence Code and Commentary* (NZLC R55 – vol 2, 1999). See the ruling in the case of *Dr C*, [2006] NZSC 48 where the Supreme Court was asked to rule on the privilege afforded to medical records under s 35 of the *Evidence Amendment Act*, *supra* note 29.

³² [1992] 1 NZLR 495 (HC) [*McFarlane*].

police tools, other than informants. In this case, the police declined to disclose the precise location of listening devices used in a wiretap investigation on the basis that disclosure of the location would impede other investigations.

The Court held that the categories of public interest privilege are not closed and that police methods of operation and the identity of police sources of information should not be publicly revealed unnecessarily. Relying on the earlier English cases of *Rankine* and *Johnson*, the Court stated:

Whilst the cases have largely been concerned with informers, or the location of observation posts, broadly stated it is the public interest in the detection of crime. In *R. v Johnson* the appellant was seen to be selling drugs by police officers watching from private premises. The appellant's counsel endeavoured to cross-examine the police officers on the exact location of the observation point, which would have revealed the identity of the owners and occupiers of the premises, who would be put at risk. The Judge refused to allow the question to be put and on appeal the extension of the public interest privilege given to informers applied to the premises from which observations were made if it would reveal the identity of such persons co-operating with the police.

...

It may well be that there could be a case where the exact location of the listening device is critical, or that the Crown is required to give more information than is being given here. Those factors can be catered for when any Judge comes to weigh the respective public interest referred to. The police officer Senior Sergeant Ward is not required to answer the questions as to the precise location of the devices.³³

The decision in *McFarlane* was subsequently affirmed by the New Zealand Court of Appeal in *R v Beri*. In that case the Crown refused to disclose three video surveillance tapes taken by the police in relation to the accused's premises. The Crown claimed public interest immunity on the grounds that the disclosure of the tapes could lead to the identification of police investigative techniques and/or the locations from which the video surveillance was conducted. The trial judge agreed and excluded the tapes (although he permitted the police to give evidence about their contents).³⁴

³³ *Ibid* at 497-98. See also *R v Chou*, CRI-2007-004-8340 (HC Auckland), May 28, 2008, in which the location of a police tracking device was refused.

³⁴ *R v Beri*, [2003] NZCA 78; as previously noted the Court of Appeal was the highest court in New Zealand until 2004.

2) Evidence Act 2006

On August 1, 2007, following on the advice of the Law Reform Commission, a new *Evidence Act* came into force in New Zealand.³⁵ While the Act replaced the common law with a statutory regime, section 10 provides that the common law can still be used as an aid regarding interpretation, so long as it is consistent with the provisions of the Act and the promotion of its purpose and principles.

With regards to public interest privilege and surveillance post location, section 69(2) of the Act states that a judge may prohibit disclosure of information where the public interest outweighs disclosure having regards to:

- (a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
- (b) preventing harm to (i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or (ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or
- (c) maintaining activities that contribute to or rely on the free flow of information.

When considering such an order, the court may give regard to any matters it considers relevant, including:

- the likely extent of harm that may result from the disclosure of the information;
- the nature of the information and its likely importance in the proceeding;
- the nature of the proceeding;
- the availability or possible availability of other means of obtaining the information;
- the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given;

³⁵ *The Evidence Act 2006*, *supra* note 29.

- the sensitivity of the evidence, having regard to the time that has elapsed since the information was compiled or prepared; and the extent to which the information has already been disclosed to other persons; and
- society's interest in protecting the privacy of victims of offences.

Section 52(2) of the Act permits a judge to give an order under section 69 on his/her own initiative or on the application of an "interested person." This is an expansion of the previous law which only allowed an application to be made by a party to the proceeding or by a witness. While the Act does not define who an interested person is and the concept is foreign to New Zealand law, it is not difficult to imagine when it may apply.³⁶

After the passage of the *Evidence Act 2006*, the first appellate case heard under section 69 was *R v Robertson*, a case where the police videotaped the accused's property from an undisclosed location over a 72-day period. The accused was subsequently charged with the sale of a controlled drug and possession of a controlled drug for the purpose of sale. During a pre-trial motion Thomas J excluded the actual videotapes from disclosure, but held the detective could give evidence as to his observations of the video recordings and the log that was kept as to time and circumstances of individual entries. Relying on section 69 the judge ruled that because viewing the actual videotaped images would lead to identification of the camera location, and thereby inhibit the confidentiality of its placement, its disclosure could not be directed.³⁷

3) *Privacy Act 1993*

Besides legislative and common law privileges, lawyers should also be aware of state privacy laws that protect law enforcement techniques from disclosure. For example under section 27(1)(c) of the New Zealand

³⁶ *C.f. Leipert*, *supra* note 7, where the Greater Vancouver Crime Stoppers Association, a third party public service organization, was an intervener in the application to withhold disclosure of one of their tip sheets. See also *In re David W*, 62 Cal App 3d 840, 133 Cal Rptr 342 (2d DCA 1976), where a special agent for the National Automobile Theft Bureau, a non-profit service organization, verified the findings of the police without disclosing the secret location of the vehicle identification number in question.

³⁷ *R v Robertson*, CRI 2007-035-777, June 12, 2008. Application for leave to appeal pre-trial order denied [2008] NZCA 274. Ruling upheld on further appeal post-conviction, [2009] NZCA 154. See also *R v Hertnon*, [2009] NZHC 976, in which the identity of a private pilot and his/her plane were withheld from disclosure on the grounds such disclosure could potentially result in retaliation against the pilot and/or their aircraft. In part the judge relied on the balancing exercise employed by Heron J in *McFarlane*, *supra* note 32.

Privacy Act 1993,³⁸ the police may refuse to provide information if the disclosure of the information would be likely to *prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial*.

In addition, the police may also rely upon section 29(1)(a) of the *Privacy Act 1993*, which states that an agency may refuse to disclose any information where the *disclosure of the information would involve the unwarranted disclosure of the affairs of another individual*.

Both these sections of the *Privacy Act 1993* were employed by the Commissioner of the New Zealand Police to prevent disclosure of informant information during a human rights hearing in *Stoves v Commissioner of Police*. The Human Rights Tribunal affirmed the Commissioner's decision, which was in turn upheld by French J of the New Zealand High Court:

[I]n my view, the Tribunal's decision was undoubtedly correct and supported by long-standing authority, including the decision of *Nicholl v Chief Executive of the Department of Work & Income* [2003] 3 NZLR 426. As explained in that case at [16],

There is ... a substantial body of decisions dating from 1982 which have recognised that in a proper case, s. 27(1)(c) [of the *Privacy Act 1993*] may be relied on to deny access to the name of an informant. The decisions are firmly grounded in the words of the statute and in the pragmatic concerns which, since *R v Hardy* (1794) 24 St Tr 199, have conferred public interest immunity on police informants. For more than two centuries it has been accepted that the public interest favours preserving the anonymity of police informers by keeping open avenues of information which will assist in the detection and investigation of crime.³⁹

C) Australia

1) Evidence Act 1995

Like England and New Zealand, public interest immunity matters have also been legislated under Australia's federal *Evidence Act 1995*⁴⁰ as well as under various evidence laws of the States and Territories. In essence, under these statutes public interest immunity operates as a similar balancing test. Courts limit the disclosure of information or documents on

³⁸ *Privacy Act 1993* (NZ) 1993/28.

³⁹ *Stoves v Commissioner of Police*, [2009] NZHC 443 at para 46, aff'ing [2008] NZHRT 30.

⁴⁰ *Evidence Act 1995* (Cth). In most respects each state's Evidence Act is drafted in identical terms except so far as minor drafting variations are required because one Act is a state Act and one Act is a Commonwealth Act. *C.f. Evidence Act 1995* (NSW).

the basis that the public interest against disclosure outweighs the need for disclosure to ensure justice in a particular case.⁴¹

For example, section 130(1) of the *Evidence Act 1995* provides that if the public interest in admitting into evidence information that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information, the court may direct that the information or document not be adduced as evidence.

To create predictability while allowing the exercise of discretion where required, the *Evidence Act 1995* includes guidelines aimed to promote consistency of application. Section 130(4) provides that information may be considered to relate to matters of state if adducing it as evidence would:

- (a) Prejudice the security, defence or international relations of Australia;
- (b) Damage relations between the Commonwealth and a State or between 2 or more States; or
- (c) *Prejudice the prevention, investigation or prosecution of an offence*; or
- (d) Prejudice the prevention or investigation of, or the conduct of proceedings for the recovery of civil penalties brought with respect to other contraventions of the law; or
- (e) *Disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State*; or
- (f) Prejudice the proper functioning of the government of the Commonwealth or a State.

These factors are consistent with those developed under the prior common law in Australia as laid down by the High Court in *Sankey v Whitlam* where Gibbs ACJ, after citing a number of English court decisions, stated:

The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to

⁴¹ The following information was adopted from *ALRC Report 98 Keeping Secrets: The Protection of Classified and Security Sensitive Information*, c 8, “Restricting Access to Courts and Tribunals” (Canberra: Australian Law Reform Commission, 2004).

disclose it. However the public interest has two aspects, which may conflict. These were described by Lord Reid in *Conway v Rimmer* as follows:

There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of public interest against the other, and decide where the balance lies. In other cases, however, as Lord Reid said in *Conway v Rimmer*, “the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it.” In such cases once the court has decided that “to order production of the document in evidence would put the interest of the state in jeopardy,” it must decline to order production.⁴²

Thus the same balancing approach to claiming privilege over the location of surveillance posts was generally the same in Australia as it was in New Zealand. For example, in *Young v Quin*, the Australian Federal Court of Appeal held that a police officer could be exempt from cross-examination on certain evidence, including the location of surveillance cameras used in relation to a drug importation investigation. Relying on *Sankey*, the Court found that, in the circumstances of the case, the information was privileged:

[I]n my view, the matters sought to be opened up in the cross-examination of Inspector Wheatley fall squarely within a traditional head of the public interest, viz., that police methods of operation and the identity of police sources of information should not be publicly disclosed. Unless, therefore, the accused can demonstrate that the proof of these matters is necessary or desirable in order to maintain their innocence the appellant’s objection to cross-examination in such areas should be upheld.

In my opinion, where, as here, a *prima facie* case has been made out for excluding cross-examination on public interest grounds, something more than the mere assertion of a right to conduct a “fishing” expedition is required in order to displace the *prima facie* claim to immunity. The position may well be different if, as in *Sankey v Whitlam*,

⁴² *Sankey*, *supra* note 8 at 38-39. See also *Alister v The Queen* (1984), 51 ALR 480 and (1984) 50 ALR 41 (HC). In addition see s 47 of the *Surveillance Devices Act 2004* (Cth), which allows a person to object to the disclosure of information that could reveal details of surveillance device technology or methods of installation, use or retrieval of devices, unless the interests of justice otherwise require.

immunity is claimed in respect of evidence lying at the very heart of the prosecution. But the cross-examination proposed here is directed at matters which are essentially collateral to the charges brought. In such a case, the claim to immunity should be displaced only if the cross-examiner can demonstrate a real likelihood that his cross-examination will materially assist his defence⁴³

In *Wolf v The Magistrates' Court at Melbourne*, O'Bryan J followed the reasoning expressed by the Court of Appeal in *Young* as well as the English decisions in *Rankine* and *Johnson* and applied a balancing test in overturning a magistrate's order to disclose the name and address of the owner of a premises used as an observation post by the police:

In my opinion, the ruling below was wrong and the learned Magistrate should protect the anonymity of the occupier of the premises by not requiring any witness to disclose the name or address of the occupier of the premises in which the camera was located.

...

I shall make a declaration that the informant or any other police witness is not required to answer a question if the consequence of doing so will disclose the name or address of the occupier of the premises in which the surveillance cameras and/or listening devices were located for the purposes of investigating the offences with which the respondent was charged.⁴⁴

With the passage of the *Evidence Act 1995* the Federal Court of Appeal held that there was no relevant difference between the common law as determined in *Sankey* and the provisions of section 130.⁴⁵ Similarly, the Court in *Chapman v Luminis Pty Ltd (No 2)*⁴⁶ held that the common law principles considered in *Aboriginal Sacred Sites Protection Authority v Maurice*⁴⁷ continued to apply under section 130.

Thus, like the New Zealand *Evidence Act 2006*, section 130(1) of the Australian *Evidence Act 1995* indicates that the onus is on the party seeking to preserve the secrecy of matters of state to show that the need for secrecy outweighs the public interest in admitting the information or document into evidence. This reflects the common law in that it does not

⁴³ *Young v Quin*, [1985] FCA 22, (1985), 59 ALR 225at 237 [*Young*]. See also *Marinovich v Director Public Prosecutions* (1987), 14 ALD 315, in which Forster J upheld a magistrate's order for non-disclosure in relation to an affidavit and in relation to questions regarding secret police methods and technology and police informants.

⁴⁴ *Wolf v The Magistrates' Court at Melbourne*, (April 30, 1992) BC9200699 (QL) Victoria (Aust) Supreme Court.

⁴⁵ *State of New South Wales v Ryan* (1998), 101 LGERA 246, var'ing *Ryan v Great Lakes Council* (1998), NG 183 of 1997 (unreported). Also see *R v Smith* (1996), 86 A Crim R 308 (Fed CA) at 311-12.

⁴⁶ (2000), 100 FCR 229.

⁴⁷ (1986), 10 FCR 104.

confer absolute immunity on information relating to matters of state or an absolute right to protect the information, and appears to apply to both oral and documentary evidence.

2) *Freedom of Information Act*

While the Act is in most respects a restatement of the common law, it only applies to the admission of evidence at a trial or a hearing. Therefore the common law would still apply in pre-trial contexts such as discovery, interrogatories and notices to produce whereas the Act applies to interlocutory proceedings, final hearings and on appeal. In addition section 37 of the Australian *Freedom of Information Act* would also apply to any information, the disclosure of which would, or could reasonably be expected to, affect the enforcement of a law and/or the protection of public safety in any of the following ways:

- prejudice the conduct of investigations of a breach or possible breach of the law (section 37(1)(a));
- reveal the existence or identity of a confidential informant (section 37(1)(b));
- endanger the life or physical safety of any person (section 37(1)(c));
- prejudice the fair trial of a person or the impartial adjudication of the particular case (section 37(2)(a));
- disclose lawful methods or procedures for investigating, preventing, detecting or dealing with breaches of the law where disclosure of those methods would, or would be reasonably likely to, reduce their effectiveness (section 37(2)(b)); or
- prejudice the maintenance or enforcement of lawful methods for the protection of public safety (section 37(2)(c)).⁴⁸

D) *United States*

1) *Police Surveillance Privilege*

In 1934, the US Congress delegated procedural rulemaking authority to the federal judiciary. For the next forty years the Supreme Court created and publicized court rules without any legislative intervention and the *Federal*

⁴⁸ *Freedom of Information Act 1982* (Cth), as amended .

Rules of Civil Procedure and the *Federal Rules of Criminal Procedure* were issued in that manner. In 1975 Congress enacted the *Federal Rules of Evidence*, which codified the following rule on Privilege:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof *shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience*. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.⁴⁹

In this context, the federal courts have developed and expanded on the common law rules of privilege as they apply to the protection of informants and the public interest, in light of their “reason and experience.” One of the early privileges affirmed by the Supreme Court was the “informer’s privilege” and the non-disclosure of their identity in *Roviaro*. Burton J, speaking for the majority of the Court, underlined the rationale of the rule:

What is usually referred to as the informer’s privilege is in reality the Government’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law ... *The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.*⁵⁰

Many courts in the United States now recognize a qualified privilege protecting sensitive investigative techniques from disclosure (such as the non-disclosure of surveillance posts) based on the ruling in *Roviaro*. Courts have analogized this protection to the privilege afforded to confidential informants as laid out by the Supreme Court. For example, in *State v Garcia*, Clifford J of the New Jersey Supreme Court stated:

Trial courts must consider possible disclosure of surveillance locations on a case-by-case basis. The balancing test outlined in *Roviaro* [*v. United States*], *supra*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639, and adopted by this state in *Milligan*, *supra*, 71 N.J. at 383, 365 A.2d 914, to determine the applicability of the informer’s privilege should

⁴⁹ *Federal Rules of Evidence*, Pub L No 93-595, § 1, 88 Stat 1926 (1975) [emphasis added].

⁵⁰ *Supra* note 6 at 59 [emphasis added].

apply in this context as well. If the State meets its preliminary burden for application of the privilege, the court should permit disclosure if the information sought is relevant and helpful to the defense or essential to a fair determination of the case ... Absent some showing of need by a defendant for the exact surveillance location, the trial court should deny its disclosure.⁵¹

In *US v Green* the District of Columbia Circuit Court of Appeals further found that policy justifications analogous to those underlying informer's privilege supported a qualified privilege protecting police surveillance locations from disclosure. Like confidential informants, hidden observation posts may often prove to be useful law enforcement tools, as long as they remain secret. Like many other US decisions upholding the validity of the privilege, it was based on policy considerations such that disclosure of the location of, manner of, and equipment used in surveillance would educate criminals about how to avoid future surveillance, would educate third parties about how to conduct illegal surveillance, would frustrate future similar surveillance activities and would pose a risk to individuals conducting surveillance or allowing it to occur on their premises.⁵²

The decision in *Green* has been cited in more than a hundred US judgments; including the Kentucky Court of Appeals in *Jett v Commonwealth*.⁵³ The decision in *Jett* was, however, overruled four years later by the Kentucky Supreme Court in *Weaver v Commonwealth*.⁵⁴

In *Weaver* the court struck down the "police surveillance privilege" because it was not among those privileges recognized in Article V of the *Kentucky Rules of Evidence*.⁵⁵ While the police investigation in *Jett* occurred in 1991, in 1992 new rules of evidence were enacted that did not include a general public immunity privilege. Informant privilege was one of

⁵¹ 618 A 2d 326 (NJ Sup Ct 1993) at 333 [*Garcia*].

⁵² *US v Green*, 670 F 2d 1148 (DC Cir 1981) [*Green*]. See also *US v Cintolo*, 818 F 2d 980 (1st Cir Ct 1987); and *US v Van Horn*, 789 F 3d 1492 (11th Cir Ct 1986), cert denied, 107 S Ct 190, where the Court stated at 1507:

We hold that the [informant] privilege applies equally to the nature and location of electronic surveillance equipment. Disclosing the precise locations where surveillance devices are hidden or their price specifications will educate criminals regarding how to protect themselves against police surveillance. Electronic surveillance is an important tool of law enforcement, and its effectiveness should not be unnecessarily compromised. Disclosure of such information will also educate persons on how to employ such techniques themselves [...]

⁵³ 862 S.W.2d 908 (Ky App Ct 1993) [*Jett*]. The Court of Appeal also applied *US v Harley*, 682 F 2d 1018 (DC Cir Ct 1982) as well as *Roviaro*, *supra* note 6.

⁵⁴ 955 SW 2d 722 (Ky Sup Ct 1997) [*Weaver*].

⁵⁵ *Kentucky Rules of Evidence*, KRS c 422A, Article V (Privileges) (1992).

the seven identified privileges (Rule 508), but it only covered information provided to the police – not assistance to the police. Furthermore the Court held that Article V was a complete codification of the rules of privilege and that Rules 1102 and 1103 prohibited amendments or additions to the rules created unilaterally by either the General Assembly or the Supreme Court.

Kentucky is the exception to the general pattern, however, and all other states have enacted comprehensive legislative schemes where the common-law rules of privilege either still remain in force and/or the rules of evidence are drafted broadly enough so as to provide an additional process for the protection of sensitive information in the public interest such as surveillance posts. For example section 509(b) of the *Massachusetts Guide to Evidence* states:

Surveillance Location. The exact location, such as the location of a police observation post, used for surveillance is privileged, except there is no privilege under this subsection when a defendant shows that revealing the exact surveillance location would provide evidence needed to fairly present the defendant's case to the jury.⁵⁶

By comparison, section 1040 of the *California Evidence Code* more broadly defines disclosure as against the public interest where it is necessary to preserve confidentiality of the information over disclosure in the interest of justice. The language of this section leaves the court with some discretion in determining whether to order disclosure of a surveillance post location. The judge must balance the public interest in maintaining secrecy against a defendant's need for disclosure in an *in camera* hearing without the presence of defense counsel. Even if the judge finds the privilege applicable, section 1042 of the California Code requires the judge to rule against the prosecution only if the surveillance location is material to the defendant's guilt or innocence.⁵⁷

Since 1988 there have been seven reported appellate cases in California where the privilege was invoked, the surveillance locations were not disclosed, and the accused was convicted of selling narcotics.⁵⁸

⁵⁶ Supreme Judicial Court Advisory Committee on Massachusetts Evidence Law, *Massachusetts Guide to Evidence* (2012) at 112, online: <http://www.mass.gov/courts/sjc/guide-to-evidence/massguidetoEvidence.pdf>.

⁵⁷ *California Evidence Code*, §1040(b)(2).

⁵⁸ *People v Haider*, 40 Cal App 2d 369 (App Ct 1995), petition for habeas corpus denied, 992 F Supp 1192 (CD Cal 1998) [*Haider*], affirming that qualified surveillance post privilege did not contravene the accused's constitutional rights; *People v Garza*, 38 Cal App 2d 11 (App Ct 1995) [*Garza*]; *In re Sergio M*, 16 Cal App 2d 701 (App Ct 1993), review denied, 1993 Cal LEXIS 2245; *People v Walker*, 282 Cal App 12 (App Ct 1991) [*Walker*]; *Hines v Superior Court*, 251 Cal App 28 (App Ct 1988) [*Hines*]; *People v*

In the most recent decision Ruvolo J, for a unanimous court, summarized jurisprudence in the area as follows:

[O]ur analysis of the published cases reveals that a standard of materiality emerges that is both consistent with the results of virtually all of the published cases ... and with the wording of the applicable statutes. That standard is as follows: the location from which the surveillance was performed is not material, for the purpose of section 1042's adverse finding requirement, if the accuracy of the testifying officer's testimony about the surveillance observations is unquestioned, or at least is sufficiently corroborated by independent evidence such that there is no realistic possibility that disclosing the surveillance location would create a reasonable doubt in the minds of a reasonable jury about the officer's veracity.⁵⁹

2) Confidential VIN Locations

Similar to surveillance posts, the courts in the United States have also recognized a qualified privilege in protecting the secret location of confidential or secondary vehicle identification numbers (VINs). For example, in *Gurleski v United States* the Federal Court of Appeal for the Fifth Circuit stated:

[The] location of the secret identifying numbers appears to be wholly irrelevant to any defense asserted by Smith. *Just as the prosecution need not generally divulge the name of an informer unless some materiality is shown, they need not reveal the location of these marks, which are a highly valuable tool to law enforcement officers in discovering and solving car thefts.*⁶⁰

Similar rulings were made in the next few years by the Seventh, Eighth and Ninth Circuit Court of Appeals, upholding the non-disclosure of confidential VINs as an important tool for law enforcement. The Seventh Circuit Court of Appeals, for example, commented:

Requiring an answer [regarding the location of secondary VINs] would have destroyed the effectiveness of a device which is useful in the public interest, and the

Montgomery, 252 Cal App 779 (App Ct 1988) [*Montgomery*]; and *People v Lewis*, 92 Cal App 3d 191 (App Ct 2009), review denied 2009 Cal LEXIS 7721 (July 22, 2009) [*Lewis*].

⁵⁹ *Lewis*, *ibid* at 200.

⁶⁰ *Gurleski v United States*, 405 F 2d 253 (5th Cir 1968), cert. denied, 395 U.S. 977 (1969) at 265-66 [*Gurleski*]. However this was not the first decision by the Fifth Circuit upholding this privilege. In 1959 it was also applied in *United States v Williamson*, 272 F 2d 252 (5th Cir 1959), cert denied, 395 US 981 (1960), which in turn relied on *United States v Wheeler*, 219 F 2d 773 (7th Cir. 1955), cert denied 1955.

value of an answer was speculative. In our view, the district judge did not abuse his discretion.⁶¹

Several state courts have also drawn an analogy between the informant privilege in *Roviaro* and confidential vehicle identifiers, such as the Michigan Court of Appeal, which stated:

Secret VIN's are important to effective law enforcement. Disclosure of their locations would greatly harm the strong public policy mandating confidentiality. The policy considerations in "confidential informer" cases are applicable here.

*We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense.*⁶²

In 1976 the California Court of Appeal upheld a ruling under section 1040 of the *Evidence Code* that allowed a police officer, who was an auto theft expert, to invoke privilege refuse to testify upon cross-examination as to the location of the confidential VIN on a stolen vehicle.⁶³ The Court did, however, authorize the *ex parte* appointment of an independent expert witness, under section 730 of the *Evidence Code*, to identify and examine the vehicle identification number of the impounded car and testify in court as to his verification of the VIN.

The appointed expert, Robert E Barrie, was a special agent for the National Automobile Theft Bureau, a non-profit service organization which had knowledge of the secret location of the VIN. Agent Barrie testified as to the accuracy of the police officers findings, but also asserted the privilege of official information in refusing to reveal its location on the vehicle. At a rehearing the court denied the appellant's motion to strike Barrie's testimony, stating:

(1) We agree with the trial court that the privilege, claimed by the petitioner and the police officer, was properly invoked. To allow public knowledge of the location of the secret identification number would destroy its very purpose and would remove a valuable investigatory device that may lead to the discovery of vehicle thefts.

⁶¹ *US v Nasse et al.*, 432 F 2d 1293 (7th Cir 1970) at 1305-1306 [Nasse]. See also *US v Briddle*, 430 F 2d 1335 (8th Cir 1970) at 1340-41; and *US v Simmons*, 457 F 2d 763 (9th Cir 1972), at 763-64.

⁶² *Michigan v Brown*, 336 NW 2d 908 (App Ct 1983), citing *Roviaro* [emphasis added]; see also *Pennsylvania v Lowry*, 560 AR 2d 781 (Sup Ct 1989).

⁶³ *In re David W*, *supra* note 36 at 846-48; see also *State v Marghzar*, 192 Cal App 3d 1129 (1987), in which the California Court of Appeal also upheld the confidentiality of the formula that produces the VIN check digit.

(2) It is immaterial whether the appointment of Barrie and the proceedings in which the trial court received this testimony amounted to an *in camera* hearing ... Here the trial court, by the use of its own expert, conducted the very kind of examination that the minor's counsel sought to make, and satisfied itself that no further examination would, or could, produce anything material to the defense.⁶⁴

Since this ruling there have also been a number of cases that have discussed the application of section 1040 of the *California Evidence Code* to covert surveillance posts used by police officers to observe narcotics transactions, drawing an analogy to the privilege afforded confidential VINs in *In re David W.* As noted by the Court in *People v Montgomery*:

Like confidential [VINs], hidden observation posts may often prove to be useful law enforcement tools, so long as they remain secret. Just as the disclosure of an informer's identity may destroy his ... future usefulness in criminal investigation; the identification of a hidden observation post will likely destroy the future value of that location for police surveillance.⁶⁵

This information, however, may be so critical that the accused's Sixth Amendment right to confrontation would outweigh the government's need for the privilege. For example (1) the exact location might show whether the officer's view was obstructed; (2) the angle of the view might make observation impossible; or (3) the distance from the transaction might raise doubts as to the level of detail observed.⁶⁶ In such cases the accused's fundamental right to a fair trial would prevail. The government would then have the option of disclosing the information, maintaining its secrecy by not using the evidence derived from it, or staying the charges.

In trying to balance the accused's right to discovery with the public policy demanding confidentiality of secondary vehicle identification numbers, the Florida Court of Appeals in *State v Moore* also relied on the decision *In re David W.*:

The state contended that the location of the secondary vehicle identification number was privileged and that disclosure of its location was not required unless materiality was shown. The court agreed that disclosure of its location should be privileged for public policy reasons. However, the court held that the trial court order could be modified in such a way to balance appellee defendant's right to discovery with the

⁶⁴ *Ibid* [emphasis added].

⁶⁵ *Montgomery*, *supra* note 58 at 1019; *Walker*, *supra* note 58; *Hines*, *supra* note 58; *In re Sergio M*, *supra* note 58; *Garza*, *supra* note 58; and *Haider*, *supra* note 58. See also Holley, *supra* note 1, for an extensive list of all cases upholding this privilege in the United States.

⁶⁶ *Green*, *supra* note 52 at 1156.

public policy demanding confidentiality of secondary vehicle identification numbers. Specifically, the court recommended a procedure whereby appellant state disclosed the location to an official court reporter, the reporter verified the location and number in a sealed transcript, and the reporter was enjoined from disclosing the location to anyone but the trial judge.

...

It is not enough to allege that this evidence “might seriously have weakened the prosecution’s case” as the defendant alleges. This generalization is true of all evidence, including that relating to confidential information. We do not believe a blanket rule of exclusion is warranted, but we also do not believe the defendant’s right to cross-examine witnesses requires a blanket rule of admissibility. A defendant must show actual materiality; a *pro forma* allegation of possible usefulness is inadequate to compel disclosure of the secret location of vehicle identification numbers, considering their use in solving car thefts ... the best procedure is to conduct an *in camera* hearing to determine whether disclosure is required.⁶⁷

In addition to the common law, several states have also enacted evidence codes like that of California, which provide an additional process for the protection of sensitive information in the public interest.⁶⁸ However, unlike the case-by-case flexibility of the federal courts to develop rules of privilege pursuant to Rule 501 of the *Federal Rules of Evidence*,⁶⁹ not all states have enacted such broad legislation and lawyers should be aware of the evidence codes in their jurisdiction and how and when it applies.

In addition, lawyers should be aware of the *Classified Information Procedures Act (CIPA)*, which can be used to protect against unauthorized disclosure of confidential information for reasons of national security.⁷⁰ While it has not been used to determine the location of confidential VINs, in 2001 the FBI received a *CIPA* Protective Order to prohibit the disclosure of their “key logger system” – an investigative technique designed by the agency to deal with encrypted data on a suspect’s computer.⁷¹

⁶⁷ *State v Moore*, 356 So 2d 838 (Fla CA 1978) at 839-40. The Court also relied on the federal decisions in *Gurleski*, *supra* note 60, and *Nasse*, *supra* note 61. Although sections 90.5015 to 90.506 of the *Florida Evidence Code* (Title VII, Chapter 90) do not recognize informant or law enforcement privilege, such common-law exceptions remain in force in so far as they are not altered by or inconsistent with any other Act of the State.

⁶⁸ *C.f.* New York’s *Criminal Procedure Law*.

⁶⁹ *Supra* note 49.

⁷⁰ *Classified Information Procedures Act*, Title 18, United States Code, Appendix III (96th Congress, Act of 15 October 1980 - 94 Stat 2025, as amended by Pub L 100-690, Title VII, s 7020(G), Nov 18, 1988, 102 Stat 4396).

⁷¹ *United States v Nicodemo S Scarfo*, 180 F Supp 2d. 572 (DNJ 2001); see Murch Affidavit filed with the Court outlining actual claim for privilege.

3) Freedom of Information Act

In non-criminal or non-civil matters, lawyers should also be aware of the laws that protect the disclosure of law enforcement techniques pursuant to applications made by the public for information under the various state or federal access to information statutes. For example, Exemption 7(E) of the Federal *Freedom of Information Act (FOIA)* affords protection to all law enforcement information that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.”⁷²

Notwithstanding the broad scope of Exemption 7(E)’s protection, in order for the exemption to apply, the technique or procedure at issue must not ordinarily be well known to the public. In some cases, however, even commonly known procedures have been protected from disclosure when “the circumstances of their usefulness ... may not be widely known,” or “their use in concert with other elements of an investigation and in their totality directed toward a specific investigative goal constitute a ‘technique’ which merits protection.”⁷³

An application is currently under way in Arizona by the Electronic Privacy Information Centre (EPIC) to gain access to FBI information under *FOIA* regarding the use of a technique and device (cell-site stimulator) used to track the location of a cell phone by acting as a cell tower in *US v Rigmaiden*. Although the trial judge in the criminal case ruled against disclosure on the grounds of public interest privilege, EPIC is seeking disclosure on the grounds that the device and the technique are well known.⁷⁴

⁷² *Freedom of Information Act*, 5 USC § 552(b)(7)(E) (2006), amended by *OPEN Government Act*, Pub L No 110-175, 121 Stat 2524 (2007). This should be contrasted with the more narrowly construed *Open Records Act* of Kentucky which *only* exempts law enforcement records from disclosure that would reveal the identity of an informant or prematurely release information to be used in a prospective law enforcement action or administrative adjudication; see KRS § 61.878(1)(h).

⁷³ See Department of Justice, *Freedom of Information Act Guide*, 2009, Exemption 7(E) for further details, online: http://www.justice.gov/oip/foia_guide09/exemption7e.pdf.

⁷⁴ See *EPIC v FBI Stingray / Cell Site Stimulator*, online: <http://epic.org/foia/fbi/stingray/default.html>. A similar application was filed by the American Civil Liberties Union (ACLU) on July 31, 2012, online: https://www.aclunc.org/docs/government_surveillance/rigmaiden/motion_to_unseal.pdf. The related criminal decision is *US v Rigmaiden*, 2012 WL 27600 (D Ariz Jan 5, 2012).

Nevertheless, just because the accused knows or believes he knows the identity of an informant does not mean the police or prosecution can or should acknowledge it – far from it. As noted by the California Court of Appeals in *People v Otte* “the public policy [of nondisclosure] applies even if the informant is known to the defendant and even if the informant is dead.”⁷⁵ By analogy, just because the accused knows or believes he knows the location of an observation post or how a specific device or police technique works, public policy would also dictate this should not be confirmed or disclosed.

E) Canada

1) Confidentiality of Investigative Techniques

In 1991 the Supreme Court of Canada held that there is a general duty on the part of the Crown to disclose *all* material it proposes to use at trial and especially all evidence that may assist the accused, even if the Crown does not propose to adduce it, but added that the requirement to fully disclose is moderated by an exception if the evidence is beyond the control of the prosecution, clearly irrelevant or privileged.⁷⁶

In *Durette*, however, the Supreme Court modified this rule with respect to editing wiretap affidavits, holding that as a general rule all relevant information in the possession of the state should be disclosed to an accused, subject to certain important exceptions. To justify non-disclosure, the Crown must show that disclosure will prejudice the interests of informants, innocent persons or *law enforcement authorities* and that such prejudice overbears the interests of the accused. As noted by the Court:

[I]n order to protect the public interest in law enforcement, and in particular the interest in protecting the identity of informers *and the confidentiality of investigative techniques*, a judge may edit a wiretap affidavit before providing it to the accused. The interests of law enforcement are adequately served if the judge considers the [following] factors:

⁷⁵ *People v Otte*, 214 Cal App 3d 1522 at 1534, n7 (1989), citing *People v McShann*, 50 Cal 2d 802 at 807 (1958) [*Otte*]. See also *Jones v FBI*, 41 F 3d 238 (6th Cir 1994); *Radowich v US Dist Attorney*, 658 F 2d 957 (4th Cir 1981); *Bullock v FBI*, 577 F Supp 2d 75 (DDC 2008); *Wickline v FBI*, 1994 WL 549756, at *4 n.8 (DDC Sept 30, 1994).

⁷⁶ *Stinchcombe*, *supra* note 7 at 339. See also *R v Chaplin*, [1995] 1 SCR 727 and *R v Egger*, [1993] 2 SCR 451.

- (a) Whether the identities of confidential police informants, and consequently their lives and safety, may be compromised, bearing in mind that such disclosure may occur as much by reference to the nature of the information supplied by the confidential source as by the publication of his or her name;
- (b) Whether the nature and extent of ongoing law enforcement investigations would thereby be compromised;
- (c) *Whether disclosure would reveal particular intelligence gathering techniques thereby endangering those engaged therein and prejudicing future investigation of similar offences and the public interest in law enforcement and crime detection; and*
- (d) Whether disclosure would prejudice the interests of innocent persons.⁷⁷

Three years after the decision in *Durette*, the Supreme Court handed down its decision in *Leipert*. While the Court affirmed that an accused's right to make full answer and defence as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*⁷⁸ is engaged during a criminal trial, that right alone does not trigger an exception to the informer privilege.⁷⁹ However, like the accused's Sixth Amendment right in the United States to confront any "witness against him," the right to disclosure of a surveillance location may outweigh the government's need for the privilege where the accused's fundamental right to a fair trial is at stake. The privilege is not absolute, but must be balanced with the public interest in effective law enforcement.

This was highlighted by L'Heureux-Dubé J in *Durette*; she dissented but not on this point. She stated that the unsubstantiated pretext of the right to full and fair defence should not be allowed to put in jeopardy such an important tool in the fight against crime as the identity of informers *and police investigation techniques*:

The same concerns guided the developments in the *common law world*, including, for example, the American case law. [She then cited the passage quoted earlier from *Roviaro*, *supra* note 50].

....

In *State v Garcia*, the Supreme Court of New Jersey held that, under a disposition creating an "official information privilege", the State of New Jersey could not disclose to an accused the location from which police conducted surveillance of criminal

⁷⁷ *Durette*, *supra* note 7 at para 39 [emphasis added]; see also *R v Garofoli*, [1990] 2 SCR 1421 [*Garofoli*].

⁷⁸ Part I of *The Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11

⁷⁹ *Leipert*, *supra* note 7 at paras 23-25.

activity. The court was concerned with the safety of ongoing police operations. Clifford J., for the court, made the following observations (at p. 330), which are apposite in the context of wiretapping where the safety of ongoing criminal investigations and police investigation techniques are equally at stake:

Failure to protect the confidential locations from which police have witnessed criminal activity would harm several important public interests. First, non-disclosure avoids compromising ongoing surveillances.

...

Second, the privilege, protects police officers and private citizens from reprisal.

...

Third, and related to the second reason, the privilege encourages citizens to cooperate with police.⁸⁰

The observations by the Supreme Court in both *Durette* and *Garofoli* confirm that the existing privilege for informers extends to the protection of police investigative and intelligence gathering techniques. Indeed, in respect of both informer privilege and police investigative privilege, the aim is the same – the furtherance of the effective investigation and prosecution of criminal activity. Both forms of privilege are predicated on the need to enhance effective law enforcement.⁸¹

3) Observation Post Privilege

In *R v Thomas*,⁸² Molloy J of the Ontario Court of Justice looked at the nature of informant privilege as it applied to individuals who assist the police in ways other than providing information, and in particular whether it applies to people who provide police officers with a location from which to conduct surveillance. While the judge was aware of cases in which the police used private property from which to conduct surveillance he was not aware of any case in which informer privilege had been specifically raised in such a situation. As such Molloy J canvassed much of the existing jurisprudence from England and the United States, including *Rankine*, *Hewitt*, *Green*, *Garcia* and the comments of Justice L'Heureux-Dube in *Durette*,⁸³ before concluding:

⁸⁰ *Durette*, *supra* note 7 at paras 142 and 147 [emphasis added by l'Heureux-Dubé J]. A majority of the Supreme Court also cited *Roviaro* in *R v Scott*, [1990] 3 SCR 979 and *Garofoli*, *supra* note 77. Also see s 8(3) of the *Criminal Code of Canada*, RSC 1985, c C-46, which provides that every rule and principle of the common-law remains in force in so far as it has been not altered by or inconsistent with any other Act of Parliament.

⁸¹ Robert W Hubbard, Peter J DeFreitas and Peter M Brauti, "Informer and Police Investigatory Privilege and the Preliminary Inquiry" (1998-1999) 41 Crim LQ 68.

⁸² *R v Thomas* (1998), 124 CCC (3d) 178 (Ont Ct J). See also *R v Richards* (1997), 34 OR (3d) 244 (CA); and *R v Blair*, [2000] OJ No 3079 (CA) (QL).

⁸³ *Durette*, *supra* note 7.

[I]n my opinion, persons who assist the police by providing them with a location from which to conduct surveillance of suspected criminal activity are entitled to the same protections as persons who assist police by providing information. I can see no rational basis for distinguishing one from the other. Under existing law, if a person makes observations of criminal activity through his kitchen window and gives this information to the police, his identity would be protected from disclosure by informer privilege. Why should he be in a different position if he allows the police to have access to his kitchen and the police observe criminal activity from there? All of the policy reasons which gave rise to the informer privilege are equally true for persons who assist the police by permitting surveillance to be conducted from their homes or businesses.⁸⁴

More than twenty years *before* the decision in *Thomas* was handed down, however, Cohan J of the Manitoba Provincial Court refused defence counsel permission to ask questions of a police officer in the course of a preliminary inquiry that would disclose the exact location of a concealed transmitter on the grounds that it would become a matter of public information contrary to public interest.⁸⁵

Only a few years later Cohan J's ruling was also relied upon by Greenberg J of the Quebec Superior Court in upholding an officer's refusal to disclose the exact location of a concealed transmitter:

And where Crown counsel and the witness have informed me that obliging the latter to go beyond that and disclose the exact location would ipso facto divulge the exact nature of what is, at this point in time, a secret device developed by the R.C.M.P. for such purposes, I hold that to do so would be contrary to the public interest. That public interest, in this case, must prevail over the right of the accused to a full and complete defence.⁸⁶

In *R v Lam*, the British Columbia Court of Appeal reviewed both the English and US authorities regarding surveillance post privilege. With respect to the US cases, Esson JA stated:

The approach taken in most of the U.S. jurisdictions in cases where the prosecution leads evidence from the observer has been to allow the defence to cross-examine only on specific matters. The purpose of the limitation is of course to protect the identity of the person who made the post available. The subjects upon which cross-examination is permitted have generally been held to be the distance between the post

⁸⁴ *Thomas*, *supra* note 82 at para 22.

⁸⁵ *R v Knockaert* (9 May 1977) unreported (Man Prov Ct)..

⁸⁶ *R v Bradley* (1980), 19 CR (3d) 326 (Que Sup Ct) at para 25. The decision in *Knockaert* was also relied upon by the New Zealand High Court in *McFarlane*, *supra* note 32.

and the conduct observed, whether visual aids were used, whether the position was elevated and the angle of sight between the two points.⁸⁷

Esson JA then cited the English cases mentioned earlier in this paper⁸⁸ before quoting from *Garcia*,⁸⁹ concluding that the American authorities are similar to the English decisions and while the observer need not disclose his precise location, if his observations are to be given in proof of the charge, the prosecution must provide as much information about the location as can be given without revealing its exact location.

In 2010 the BC Court of Appeal revisited *Lam* and the law regarding surveillance post privilege in *R v Hernandez*. The Court affirmed the decision of the trial judge who had restricted a defence application to cross-examine a police officer on the location from which she observed a drug transaction.

After reviewing the case law Hinkson JA, for a unanimous Court, outlined the following framework that a trial judge should apply when considering cases of observation post privilege asserted by the Crown:

- a) The judge must decide whether the Crown has shown that disclosure of the information sought would adversely affect the public interest.
- b) If the public interest would be adversely affected by disclosure of the information sought, then the judge must determine, having regard to both the public interest and the accused's right to a fair trial, whether upholding the privilege would prevent the accused from making full answer and defence.
- c) If the judge determines that upholding the privilege claim would not prevent the accused from making full answer and defence, then the claim will be upheld. However, if the judge determines that upholding the privilege claim would prevent the accused from making full answer and defence, then the judge must consider whether partial disclosure of the information sought can be made without adversely affecting the public interest and without preventing the accused from making full answer and defence. However, if upholding the claim even in part would prevent the accused from making full answer and defence, then the claim will not be upheld and disclosure of the information sought will be required.

⁸⁷ *R v Lam* (2000), 148 CCC (3d) 379 (BCCA) [*Lam*]. Also see *R v Barry*, 2000 BCSC 725, [2000] BCJ No 932 (SC) (QL); *R v Guilbride*, 2003 BCPC 176 [2003] BCJ No 1245 (Prov Ct), aff'd on other grounds 2006 BCCA 392, (2006), 270 BCAC 128 (CA) [*Guilbride*]; and *R v Cameron*, [2001] MJ No 347 (Prov Ct) (QL) for similar Canadian rulings.

⁸⁸ *Supra* notes 18-21.

⁸⁹ *Supra* note 51.

d) If the privilege claim is not upheld, then the Crown will have to decide whether it wishes to continue with the prosecution.

e) If the privilege claim is upheld, then, at the conclusion of the trial, the trier of fact, in assessing the reliability of, and weight to be given to the observer's testimony, is entitled to take into account the limitations placed on the accused's ability to cross-examine that witness.⁹⁰

3) *Canada Evidence Act*

In addition to the common law, the trial judge in *Hernandez* also considered section 37 of the *Canada Evidence Act*.⁹¹ This section is available to "any official" (defined as a person appointed to discharge a public duty) wishing to prevent the disclosure of information in court. Sections 37(1) (5) and (6) state:

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

...

5) If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made ... would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

6) If the court does not authorize disclosure ... [it] shall, by order, prohibit disclosure of the information.

In discussing section 37 the BC Court of Appeal in *Canada (Attorney General) v Sander* indicated:

An order for disclosure in a criminal trial invokes the common law and concentrates on the requirement that there be a fair trial. The right to make full answer and defence is at the heart of the inquiry.

⁹⁰ *R v Hernandez*, 2010 BCCA 514, (2010), 222 CRR (2d) 107 at para 23 (CA), aff'ing *R v Hernandez*, (June 30, 2009) Vancouver 24736 (BCSC) on this point. See also *R v Carvey*, 2011 NSSC 283, (2011), 305 NSR (2d) 77 (SC).

⁹¹ RSC 1985, c C-5.

An application under s. 37 concerns two questions. First, it involves a consideration of the public interest in the proper functioning of government. Secondly, it involves a consideration of the public interest in disclosure, and whether it outweighs a specific interest bearing upon the proper functioning of government.⁹²

There is no exhaustive definition of public interest privilege. In *Sander*, however, the Court stated that “no particular communications are excluded – what particular interest deserves protection is left for decision on a case-by-case basis [as established by Wigmore’s four criteria].”⁹³

These four fundamental conditions necessary to the establishment of a privilege against the disclosure of communications are:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one that in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.⁹⁴

These conditions were expanded on in *Pereira E Hijos SA v Canada (Attorney General)*,⁹⁵ where the Federal Court of Appeal stated that in assessing a claim under sections 37 and 38 of the *Canada Evidence Act*, there are actually two stages. In the first stage the court must weigh the competing public interests to determine if an apparent case for disclosure has been met. It is only after this stage that the court moves to the second stage to determine which public interest is paramount in the circumstances.

In assessing whether an apparent case for disclosure has been made out, the following factors were adopted by the Court from *R v Khan*⁹⁶:

⁹² (1994), 44 BCAC 200 (CA) at paras 85-86.

⁹³ *Ibid* at paras 76 and 97.

⁹⁴ *Wigmore on Evidence*, 3rd ed, (Boston: Little Brown, 1961-1988) vol 8 (revised by John T McNaughton, 1961) at para 2285, as cited by the Supreme Court of Canada in *Slavutych v Baker*, [1976] 1 SCR 254. See also *D v NSPCC*, *supra* note 9 at para 19.

⁹⁵ 2002 FCA 470, (2002), 299 NR 154 at para 16, aff’ing 2001 FCT 1434, [2001] FCJ No 1950 (QL) [*Pereira E Hijos*].

⁹⁶ [1996] 2 FC 316 (TD); the cases cited at para 26 in connection with each factor were as follows:

- (a) The nature of the public interest sought to be protected by confidentiality;
- (b) Whether the evidence in question will “probably establish a fact crucial to the defence”;
- (c) The seriousness of the charge or issues involved;
- (d) The admissibility of the documentation and the usefulness of it;
- (e) Whether the applicants have established that there are no other reasonable ways of obtaining the information;
- (f) Whether the disclosures sought amount to general discovery or a fishing expedition.

Objections under section 37 are usually made by a senior public official who has some responsibility in relation to the specified public interest. For example, the official may be a senior police officer concerned about the possible disclosure of police techniques and methods of investigation (such as the location of observation posts, tracking devices, or confidential VINs). It could, however, be any public official such as the Director of the Gaming Commission as in *Rogers*,⁹⁷ the Director of the Children’s Aid Society as in *D v NSPCC*,⁹⁸ the Director of Public Prosecutions as in *Marks*,⁹⁹ or the Department Head of Customs and Excise.¹⁰⁰

Nevertheless where Crown counsel expects that an issue of this nature may arise, it is important to confer with investigators and interested departments or agencies before the proceedings begin. This also holds true for civil cases where disclosure can be withheld on similar grounds. For example, in *Stetson Motors Corp v Peel (Regional Municipality) Police*

(a) The nature of the public interest sought to be protected by confidentiality: *Kevork v The Queen*, [1984] 2 F.C. 753 (T.D.), at pages 762 to 764; *Goguen v Gibson*, [1983] 1 F.C. 872 (T.D.), at page 884; *Goguen v Gibson*, [1983] 2 F.C. 463 (C.A.) at page 479.

(b) Whether the evidence in question will “probably establish a fact crucial to the defence”; *Kevork v The Queen*, *supra*, at pages 764 and 765; *Goguen v Gibson*, *supra*, (T.D.), at page 906.

(c) The seriousness of the charge or issues involved; *Kevork v The Queen*, *supra*, at pages 765 and 766; *Henrie v Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229 (T.D.), at page 238.

(d) The admissibility of the documentation and the usefulness of it; *Kevork v The Queen*, *supra*, at pages 766 to 768; *Goguen v Gibson*, *supra*, (T.D.), at page 906; *Gold v R.*, [1986] 2 F.C. 129 (C.A.).

(e) Whether the applicants have established that there are no other reasonable ways of obtaining the information; *Kevork v The Queen*, *supra*, at page 767.

(f) Whether the disclosures sought amount to general discovery or a fishing expedition; *Kevork v The Queen*, *supra*, at page 767; *Gold v R.*, *supra*, pages 139 to 140.

⁹⁷ *Supra* note 9.

⁹⁸ *Supra* note 9.

⁹⁹ *Supra*, note 5.

¹⁰⁰ See *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No 2)*, (1972) AC 405 (HL).

Services Board, the Court ruled that the police were not obligated to disclose any “information as to the location or format of the secret VINs” or “the confidential methods of identifying true vehicle VINs” at a civil trial.¹⁰¹

4) Confidential VIN Locations

The decision in *Stetson Motors* was subsequently followed in *R v Boomer*¹⁰² where the Court prohibited disclosure of “the investigative techniques, makeup and location of secondary VIN numbers” at a criminal trial. *Boomer* also relied on the decision in *Thomas*,¹⁰³ drawing the analogy that people who assist the police by providing the location of confidential VINs are entitled to the same protection as those who provide a location from which to conduct surveillance.¹⁰⁴

The judge concluded that the court should only refuse to compel disclosure if the specified public interest in maintaining the confidentiality of the secondary VIN number program outweighed the legitimate interest of the accused in disclosure of such. In balancing the accused’s entitlement to disclosure of all relevant information with protecting the specific public interest in the program, the judge subsequently granted a non-disclosure order protecting the confidentiality and integrity of the secondary VIN system.

More recently, in *R c Bégin*,¹⁰⁵ the accused objected to a refusal by the trial judge to require the Crown to disclose the secondary VIN locations, thus depriving them of their right of access to this evidence and their right to a full defence and a fair trial. The trial judge concluded that the confidentiality of the location of serial numbers on automobiles was a matter of public interest:

Concerning this point of confidentiality, if the locations are not kept privileged and secret, this investigative technique will be in danger of becoming completely ineffective.

In short, the confidential location of automobile serial numbers is important to successful police investigations related to the plague of auto theft and subsequent

¹⁰¹ [1996] OJ No 4632 (Gen Div) (QL) [*Stetson Motors*].

¹⁰² (2000), 182 NSR (2d) 49 (SC) [*Boomer*]. See also *R v Michaud*, (December 10, 1990) WL 1056789 (NBQB); *R v Blomme*, (March 24, 1976) unreported (Alta QB); and *R v Smith*, 2009 ABPC 88, (2009), 7 Alta LR (5th) 372 (Prov Ct).

¹⁰³ *Supra* note 82.

¹⁰⁴ *Boomer*, *supra* note 102 at para 34.

¹⁰⁵ 2005 QCCA 213, [2005] JQ no 797 (Qc CA) (QL) [*Bégin*].

recovery of stolen vehicles. It is in the public interest that these locations remain confidential.¹⁰⁶

The Court of Appeal, relying on the decision in *Boomer*, saw no error in this conclusion, holding that the trial judge had to balance the rights of appellants to have access to the evidence in the interest of a fair trial and the public interest in maintaining the confidentiality required to facilitate police investigation of stolen vehicles. A decision permitting access to these confidential secondary locations in which the manufacturers affixed their serial numbers would have seriously compromised police investigations of this kind of crime.

Furthermore, the Court made reference to its own earlier decision in *Hernandez et Létourneau c R* in which Rochon JA, speaking for the Court, took notice that auto manufacturers, during fabrication, place secondary serial numbers in one or more place to aid in the identification of recovered stolen vehicles. The location of these numbers is revealed only to authorized police and insurance industry experts. Due to the magnitude of auto theft in Quebec (\$229 million in 2002), the public interest in withholding the exact location of these secret numbers outweighed the accused's right to make full answer and defence:

The Courts are constantly reminded that the existence of these secondary serial numbers lead to solving a considerable number of vehicle thefts. They also lead to the curbing of organized car theft networks, which are becoming increasingly sophisticated. *One can easily imagine the consequences of revealing the location of the numbers in open court.*¹⁰⁷

The Court concluded that in maintaining the confidentiality of the secondary VIN locations as a matter of public interest, the trial judge was very conscious of his duty to balance this against the right of the accused to a fair trial in the circumstances of this case. Far from totally excluding all access to the evidence of the secondary locations, the trial judge specifically provided for the possibility of an expert on behalf of the defence to establish the identity of the vehicles concerned even though the secondary locations of the serial numbers was to remain confidential for reasons of public interest. This was similar to the ruling *In re David W.*¹⁰⁸

¹⁰⁶ *Ibid* at para 15 quoting Bouchard J [original decision in French, my translation].

¹⁰⁷ *Hernandez et Létourneau c R*, [2004] JQ no 11285 at para 74(Qc CA) (QL), leave to appeal to SCC refused April 21, 2005 (2005 WL 879670) [original decision in French, my translation, emphasis added].

¹⁰⁸ *Supra* note 36.

This would not, of course, have provided the accused with unrestricted personal access to the secondary locations, since the judge concluded these were to remain confidential in the public interest. But, at the very least, it does indicate the sensitivity of the judge to the rights of the accused in the matter and it did offer to the defence a mechanism for verifying the secondary locations and for verifying the crown's evidence as to the identity of the vehicles. In this regard the trial judge in *Bégin* stated:

In addition, in this particular matter, the interests of the accused, I speak here of the judicial interests of the accused – and their right to a full defense – militate – in favour of a procedure that will permit them to obtain what they seek, that is to say proper expert opinion concerning the identification of the automobiles by the hidden secondary serial numbers or whatever other name they are referred to.

Consequently this court, in reviewing the exercise of the discretion of the Crown in refusing to divulge the location of the confidential numbers, concludes that the non-disclosure is in the public interest.

Taking into account the circumstances of this matter, like the judicial interest of the accuseds to call experts, the involved vehicles must be provided to the defense experts, if requested. They can, in the time they will be given, in a manner they will be subject to, formulate a defense of the elements concerning the identification of the involved vehicles implied by the secondary serial numbers and say they are hidden, but not make evident the location of the numbers.¹⁰⁹

Considering 170,000 vehicles are stolen every year in Canada¹¹⁰ with another 3.5 million vehicles stolen from around the world,¹¹¹ preserving the confidentiality of the location of secondary VINs may also be important to international relations. In this regard the procedure for objections under section 37 of the *Canada Evidence Act*¹¹² regarding information which would be harmful to international relations or national defence or security if disclosed are set out in section 38; they would be similar to an order under the American *Classified Information Procedures*

¹⁰⁹ *Bégin*, *supra* note 105 at para 18 [original decision in French, my translation].

¹¹⁰ See the Prime Minister of Canada's April 14, 2008, news release on Bill C-53 to combat organized auto theft, which states approximately 170,000 vehicles are stolen in Canada each year with an estimated 20 per cent of stolen cars being linked to organized crime activity, online: <http://pm.gc.ca/eng/media.asp?id=2065>.

¹¹¹ Gordon Barclay and Cynthia Tavares, *International Comparisons of Criminal Justice Statistics 2000* (London: RDS Communications & Development Unit, Home Office, 2000). Similar results were also found in the 2003 study, however there were six less reporting countries. See also the *European Sourcebook of Crime and Criminal Justice Statistics* published by the Council of Europe which tracks police statistics in 39 European countries, available on-line through the Dutch Ministry of Justice: www.wodc.nl/eng/.

¹¹² *Supra* note 91.

Act.¹¹³ Objections under this section are determined, on application, by the Federal Court.

In *R v Khawaja*, the Federal Court of Appeal upheld the constitutional validity of section 38.11(2) of *Canada Evidence Act*, which permits the Attorney General to make *ex parte* representations in support of non-disclosure of information to an accused in the interest of national security. The Court found that the provisions did not engage the right to life, liberty and security of person and that Khawaja's right to a fair trial was not violated, as sufficient safeguards were in place to ensure he was able to make full answer and defence to the charges without disclosure of secret information.¹¹⁴

One of the procedural safeguards suggested by the Court was a judicial discretion to appoint an *amicus curiae* "to read, hear, challenge and respond to the *ex parte* representations made on behalf of the government." Such a procedure would be similar to that suggested by the House of Lords in *H & C*.¹¹⁵

While an *amicus curiae* is a "friend of the court," there is little authority for the appointment of a special advocate or special counsel to represent the interests of an actual defendant in an ordinary criminal trial in public interest matters. Nonetheless, on February 14, 2008, a special advocate system was created by Parliament to protect the interests of a person in immigration and refugee matters where confidential information has been withheld.¹¹⁶

¹¹³ *Supra* note 70.

¹¹⁴ *R v Khawaja*, 2007 FCA 388, (2007) 228 CCC (3d) 17 (CA), leave to appeal to SCC refused [2007] SCCA No 610, April 4, 2008. See also *R v Ahmad*, 2011 SCC 6, [2011] 1 SCR 110, in which the Supreme Court upheld ss 38 through 38.16 of the *Canada Evidence Act* as constitutional.

¹¹⁵ In *H & C*, *supra* note 25, the House of Lords upheld the use of special advocates in criminal trials but cautioned it would be rare. As such it is possible that, by analogy, a special advocate could also be appointed to assist the accused in criminal trials where information has been withheld on public interest grounds. See also *Named Person v Vancouver Sun*, 2007 SCC 43, [2007] 3 SCR 253 at para 48 [*Vancouver Sun*], in which the Supreme Court of Canada also opined that an *amicus curiae* may be necessary or appropriate, particularly where the interests of the informant and the Crown are aligned.

¹¹⁶ *An Act to Amend the Immigration and Refugee Protection Act*, SC 2008, c 3. The Act creating the special advocate system was drafted in Canada in response to the Supreme Court's decision in *R v Charkaoui*, 2007 SCC 9, [2007] 1 SCR 350.

Notably, in *R v Mentuck*¹¹⁷ the Supreme Court of Canada declined to uphold a permanent publication ban on a particular homicide technique employed by the RCMP. However any argument that this case stands for the proposition that there is no privilege in relation to investigative techniques, is misplaced. As noted by Binder J in *R v Trang*:

[It] must be noted that the issue in *Mentuck* was whether information *already disclosed* in court and therefore part of the public record should be kept from the general public by way of publication ban. If it was possible for the Crown to claim privilege with respect to the information in that case, the privilege was waived. The lesson to be taken from *Mentuck* is that where the Crown pursues trial of charges where sensitive information will be revealed because it is relevant, the public interest in the transparency of the justice system will weigh heavily in the balance in terms of dissemination of the information through the media. *Mentuck* does not stand for the proposition that the Crown could never succeed in justifying a claim of privilege with respect to the types of information mentioned in that case.¹¹⁸

Thus the Crown must be vigilant with respect to disclosures made in the course of preparing their notes and reports, applications for warrants, and when providing evidence to “any court, person or body with jurisdiction to compel the production of information,”¹¹⁹ and should be prepared, prior to providing such evidence, with the factual basis for any claims of privilege to ensure that investigative techniques (or other types of privileged information) are not disclosed in any public forum.

Although this will presumably be discussed with Crown counsel prior to trial, police or other witnesses should not rely upon counsel to intervene during problematic cross-examination and, should the situation arise, they should request an adjournment themselves for the purpose of consulting with counsel, or having the benefit of representation with respect to opposing the problematic inquiry. This is especially so if the trial or hearing is not one involving the Crown, as in the case of a civil discovery, public inquiry, disciplinary hearing, administrative tribunal, provincial review board, or licensing or regulatory commissions.¹²⁰

¹¹⁷ 2001 SCC 76, [2001] 3 SCR 442; see also *R v ONE*, 2001 SCC 77, [2001] 3 SCR 478.

¹¹⁸ *R. v Trang*, 2002 ABQB 19, (2002), 1 Alta LR (4th) 247 (QB) at para 51 [emphasis in original].

¹¹⁹ To use the words of s 37 of the *Canada Evidence Act*, *supra* note 91.

¹²⁰ See e.g. *Canada (Royal Canadian Mounted Police Public Complaints Commission) v Canada (Attorney General)*, 2005 FCA 213, [2006] 1 FCR 53 (CA), where the Federal Court of Appeal upheld the RCMP Commissioner’s refusal to disclose information to the RCMP Public Complaints Commission on the basis of informer privilege. See also *Health Records Inquiry*, *supra* note 7.

5) Freedom of Information Act

As discussed earlier for Australia, New Zealand and the United States, lawyers and police officers should also be aware of the various provisions under provincial Freedom of Information and Access to Information Acts that protect the disclosure of law enforcement techniques on application from the public. See for example section 14(1) of the Ontario *Freedom of Information and Protection of Privacy Act* (FIPPA)¹²¹ and section 8(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA),¹²² both of which protect against the disclosure of “investigative techniques and procedures currently in use or likely to be used in law enforcement” and “the identity of a confidential source of information in respect of a law enforcement matter, or information furnished only by the confidential source.”¹²³

Where access to police investigative techniques or informant information is requested by an accused using an alternate forum such as access to information legislation, government officials must be vigilant there is no attempt being made to relitigate or collaterally attack the decision of another court or administrative body. As noted by Abella J in *Workers' Compensation Board (BC) v Human Rights Tribunal (BC)*:

A litigant ... is only entitled to one bite at the cherry. ... Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided ... [T]he doctrine of abuse of process can be triggered where allowing the litigation to proceed would violate principles such as “judicial economy, consistency, finality and the integrity of the administration of justice”.¹²⁴

Where confidentiality has been promised, the failure to protect a source from disclosure may bring the administration or integrity of the justice system into disrepute.¹²⁴ In addition the police may be held liable for failing to keep confidential information secure¹²⁵ and others may be

¹²¹ RSO 1990, c F.31.

¹²² RSO 1990, c M.56.

¹²³ See also the Government of Ontario *Freedom of Information (FOI) and Privacy Manual* on Sections 14(1) and 8(1) of FIPPA/MFIPPA, online: <http://www.accessandprivacy.gov.on.ca/english/manual/SECT14.htm#technique>.

¹²⁴ *Workers' Compensation Board (BC) v Human Rights Tribunal (BC) et al*, 2011 SCC 52 at paras 27 and 33, [2011] 3 SCR 422, citing Binnie J in *Danyluk v Ainsworth Technologies Inc*, 2011 SCC 44, [2011] 2 SCR 460, at para 18 and Arbour J in *Toronto (City) v CUPE, Local 79*, 2033 SCC 63, [2003] 3 SCR 77, at para 37.

¹²⁵ See *Monfils (Estate of) v Taylor*, 165 F 3d 511 (7th Cir 1998), where the estate of a murdered informant was awarded \$2 million against a Green Bay police officer for negligently releasing a taped message to the accused that identified the informant. See also *Swinney v The Chief Constable of Northumbria Police* [1996] 3 All ER 449 (CA), where

held criminally liable for exposing or trying to expose an informant.¹²⁶ However inadvertent or mistaken, disclosure by the Crown or police does not amount to a waiver of the privilege. Waiver of the privilege must be specific. To conclude otherwise would be to undermine the public policy purposes of the privilege.¹²⁷

Although the accused may try and learn the identity of an informant (or the location of an observation post, police technique or device) public policy would likewise dictate this should not be confirmed or disclosed where the accused knows or believes they know where or who or what it is.¹²⁸

3. *Practical Considerations and Conclusion*

In jurisdictions where the privilege has been recognized, a number of practical issues should be taken into consideration. Because the privilege is qualified and not absolute, the trial court has a great deal of discretion in determining the scope of the privilege. In reviewing the decision of the trial court as to the extent of the privilege, appellate courts will examine whether the defense had adequate opportunity to cross-examine and confront witnesses on the particular issue in question.

A trial court making the determination of whether the privilege applies may hold some form of *in camera* hearing regarding the defense's need for the information or an *ex parte* hearing on the government's need to protect the information. An *ex parte in camera* review may even include a viewing of the sensitive investigative technique in question by the court.

After considering the applicability of the privilege, the trial court may reach a number of possible conclusions, including that the sensitive investigative technique must be fully disclosed, that some information regarding the technique must be disclosed and the defense can ask certain

an informant's name and phone number and the details of her tip had been left on a piece of paper that was stolen from a locked police car. The action was eventually dismissed in *Swinney v The Chief Constable of Northumbria Police* (No 2) (1999) The Times May 25th (QBD).

¹²⁶ *R v Barros*, 2011 SCC 51, [2011] 3 SCR 368, rev'ing in part 2010 ABCA 116, (2010), 477 AR 127 (CA) [*Barros*]. Barros was a private investigator and former police officer who tried to learn the identity of an informant for a lawyer representing a drug dealer whose home was searched based on the informant's information.

¹²⁷ *R v Nicholson*, 2001 BCSC 752, [2001] BCTC 752 (SC); see also *R v Lucas*, [2009] OJ No 2251 (Ont Sup Ct) (QL).

¹²⁸ *C.f. Vancouver Sun*, *supra* note 115; and *Barros*, *supra* note 126. See also *Otte* and other US cases on point, *supra* note 75.

cross-examination questions regarding the technique, or that no information need be disclosed.

If the court orders disclosure, the prosecutor should argue that the disclosure be made under a protective order limiting the persons with whom the defense may share the information and directing that all materials the prosecution provides to the defense during the case be returned at the end of the trial.

Such a ruling was made in *R v Guess*¹²⁹ where the BC Court of Appeal ordered that the defence have access to certain material, but only on the basis that *they disclose nothing to the accused* without the consent of the Crown or further order of the Court.

A majority of the Court upheld the approach taken by the trial judge, giving counsel access to the material but not the accused. In *Guilbride*, the Court made a similar disclosure order on similar terms to the trial judge in *Guess* regarding a tracking device installed on a ship.¹³⁰

In both these cases disclosure was made to allow the defence to prepare their case, however the lawyers were under court order not to discuss the contents with their clients. As such full disclosure was affected, minimizing the risk to third party interests.

A similar argument was made in *R v Basi*.¹³¹ In that case the trial judge granted an order permitting defence counsel to attend an *in camera* hearing sought by the Crown to establish its claim of informant privilege. Although the judge sought to restrict the disclosure of privileged information to defence counsel by prohibiting them from sharing it with anyone else (including their client), the Supreme Court reversed, holding that the order amounted to disclosure and that defence counsel was not within the “circle of privilege”:

The inevitable result of the trial judge’s decision was to require the Crown to reveal to defence counsel information over which the informant privilege had been claimed. As defence counsel are outside the “circle of privilege”, permitting them access to this information – even subject to court orders and undertakings – constitutes *inevitable disclosure of the information*. And while the trial judge sought to restrict this disclosure

¹²⁹ *R v Guess*, 2000 BCCA 547, (2000), 143 BCAC 51 (CA) [*Guess*]; see also *Guilbride*, *supra* note 87.

¹³⁰ *Guess*, *ibid*; *Guilbride*, *ibid*.

¹³¹ 2009 SCC 52, [2009] 3 SCR 389; rev’ing 2008 BCCA 297, (2008), 257 BCAC 253 (CA); aff’ing 2007 BCSC 1898, (2007), 170 CRR (2d) 275 (SC).

of privileged information to defence counsel, who were prohibited from sharing it with anyone else, her decision constituted an order of disclosure nonetheless.¹³²

As noted earlier, however, because the surveillance post privilege is qualified and not absolute, the trial court may have a great deal more discretion in determining the scope and extent of the privilege. For example, in *AM v Ryan*,¹³³ a majority of the Supreme Court affirmed a decision of the BC Court of Appeal regarding the disclosure of a psychologist's file to the defendant in a civil suit. To protect the interests of the plaintiff, the BC Court of Appeal had ordered the disclosure of the doctors reporting letters and notes under the following conditions:

1. That inspection be confined to the defendant's solicitors and expert witnesses only, *and that the defendant could not see them*;
2. That any person who saw the documents could not disclose their contents to anyone not entitled to inspect them;
3. That the documents could be used only for the purposes of the litigation; and
4. That only one copy of the notes was to be made by the defendant's solicitors, to be passed on as necessary to any expert witnesses.¹³⁴

In the event that disclosure is ordered, the prosecutor may even consider the possibility of withdrawing the case based upon the nature of the offense, the nature of the technique, and the harm that would result should the technique be disclosed.

Police, their legal advisors and prosecutors should ensure that they are familiar with the law in their jurisdictions and consider the following prior to using a sensitive investigative technique:¹³⁵

1. Any department policies, inter-agency agreements or practices that exist regarding the use of sensitive investigative techniques;
2. Any policies or positions of the prosecutor's office regarding the use of sensitive investigative techniques. The use of a sensitive

¹³² *Ibid* at para 30 [emphasis in original].

¹³³ *AM v Ryan*, [1997] 1 SCR 157.

¹³⁴ *AM v Ryan* (1994), 98 BCLR (2d) 1 at para 50 (CA).

¹³⁵ This part was adopted from Jayme S Walker, "Legal Digest: Qualified Privilege" (May 2000) FBI Law Enforcement Bulletin at 26-32.

investigative technique in a case should be coordinated in advance with the prosecutor;

3. The likelihood that the sensitive investigative technique will be disclosed;
4. Informing citizens that may be affected by disclosure;
5. If the sole or substantial evidence to be used in the prosecution comes from the use of a sensitive investigative technique, it is likely that the technique will have to be disclosed;
6. If a sensitive investigative technique is used and the prosecutor decides to argue that it is privileged, officers should work closely with the prosecutor to more effectively articulate why the technique is sensitive;
7. If the court allows limited cross examination regarding a sensitive investigative technique, officers should work closely with the prosecutor to understand the parameters of the court's orders;
8. If the court orders that a sensitive investigative technique be disclosed, officers should work closely with the prosecutor, who may file a motion for a protective order or have to decide whether to proceed with the case.

Some courts have never addressed the issue of whether a privilege exists to protect sensitive investigative techniques such as the surveillance posts from disclosure. Of the courts that have addressed the issue, the vast majority have determined that a qualified privilege exists to protect such information.¹³⁶

¹³⁶ However see *supra* notes 53-55, where the Kentucky Supreme Court has refused to recognize "police surveillance privilege" because under Kentucky law, recognition of such a privilege would require an amendment to the State's *Rules of Evidence*. The Kentucky *Rules*, Article V, Rules 501-511, currently list only 7 types of privilege including lawyer-client; husband-wife; religious; counselor-client; psychotherapist-patient; and informant.

