

CANADA / JUDGMENT

R. v. Basi

2008 BCSC 1858

COURT

Supreme Court of British Columbia

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2008 BCSC 1858 R. v. Basi

N THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Basi,

2008 BCSC 1858

Date: 20081208

Docket: 23299

Registry: Vancouver

Regina

v.

Udhe Singh (Dave) Basi, Bobby Singh Virk

& Aneal Basi

Before: The Honourable Madam Justice Bennett

Oral Ruling on Solicitor-Client Privilege,

Litigation Privilege and

Public Interest Privilege

In Chambers

December 8, 2008 and

January 5, 2009

Counsel for the Crown:

J. Winteringham,

A.N. MacKay & B. Olthuis

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M. Bolton, Q.C.

& C. Hatcher

Counsel for the Accused, Bobby Virk

K.G. McCullough

Counsel for the Accused, Aneal Basi

J. Doyle

Counsel for the RCMP

W.P. Riley

Place of Hearing:

Vancouver, B.C.

- [1] THE COURT: In 2003, an investigation was underway by the RCMP Island District Drug Section ("IDDS"). As part of the investigation, they obtained Part VI wiretap authorizations permitting the electronic eavesdropping on a number of people. This investigation ultimately involved the RCMP Commercial Crime Section, and eventually resulted in the execution of a search warrant in the B.C. Legislature. Dave Basi, the then Executive Assistant to the Finance Minister and Bobby Virk, the then Executive Assistant to the Transportation Minister, were charged with corruption and fraud charges. Aneal Basi was charged with money-laundering.
- [2] The chronology, for the purpose of these Reasons, is as follows: On June 16, 2003, IDDS obtained a wiretap authorization P32, and Dave Basi was intercepted as a secondary target.
- [3] A second authorization was obtained on August 15, 2003, P53, and Dave Basi was again intercepted as a secondary target.
- [4] A Dial Number Recorder ("DNR") authorization was sought for Dave Basi around August 7 to 8, 2003, and was refused by a Provincial Court Judge. A second DNR authorization was sought for Dave Basi on September 16, 2003, which was also refused.
- [5] The idea of obtaining a DNR authorization was abandoned and a further wiretap authorization was sought, this time with Dave Basi as a primary target. This was granted on October 10, 2003 – P67.
- [6] The final wiretap authorization that was sought by IDDS was obtained on November 6, 2003, also with Mr. Basi as a primary target.

- [7] At some point, the information obtained on the wiretap led to the involvement of the Commercial Crime Section of the RCMP, both the Vancouver and the Victoria Sections. It appears that this had occurred by early September 2003, if not earlier. However, in spite of the involvement of Commercial Crime, IDDS was the section of the RCMP that was obtaining the wiretap authorizations.
- [8] The Anti-Corruption Investigation Unit ("ACU"), was also running a parallel investigation and was also obtaining wiretaps.
- [9] Search warrants were also obtained and executed on the Legislative Assembly in Dave Basi's office, as well as that of Bobby Virk. Other search warrants were executed at a number of other locations.
- [10] The investigation, which at some point also involved a Proceeds of Crime investigation ("IPOC"), was aptly named by the RCMP as "Everywhichway". It is clear, and I have found in an earlier decision, that the police documents relating to the drug investigation are documents that are subject to the disclosure requirements of *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C.(3d) 1, as it is obvious that these are fruits of the investigation and not third party records in an unrelated investigation.
- [11] The drug investigation and the Commercial Crime investigation were inextricably linked and not severable, as were all the investigations under the heading of Everywhichway. As a result, many documents from the drug investigation have been disclosed to the defence. However, there are approximately 300 documents over which the RCMP is claiming either public interest privilege, solicitor-client privilege, or litigation privilege. The Special Prosecutor is also asserting privilege over approximately 12 documents.
- [12] The Commercial Crime Section has decided not to assert solicitor-client privilege or litigation privilege over its documents and those have been disclosed to the defence. The remaining 12 documents are documents that are said to be from unrelated investigations.
- [13] I allowed counsel for the Public Prosecution Service of Canada ("PPSC"), to represent the RCMP in relation to the drug section documents. Counsel for PPSC says that these documents arose in the context of the relationship between the PPSC and the RCMP as part of the drug investigation.
- [14] The RCMP has opted not to file any affidavit material supporting their position that the documents engage privilege. It is their position that the documents speak for themselves. If it is clear from the document that the privilege does not apply, the RCMP does not wish a further opportunity to file affidavit evidence.

SOLICITOR-CLIENT PRIVILEGE

- [15] These Reasons engage the solicitor-client aspect of the claim. The documents were reviewed by me in court concurrent with submissions from counsel. I had the entire unvetted document, as well as a copy of the vetted document which is in the possession of defence counsel.
- [16] The only issue I have been asked to determine, at this point, is whether solicitor-client privilege applies to each document. If it does, I will hear further argument regarding whether the privilege has been waived, and possibly arguments in relation to innocence at stake.
- [17] As a preliminary matter, counsel for the RCMP submitted that I should assess first whether the document was clearly irrelevant. Stinchcombe states that one of the things the Crown is not obliged to disclose are matters which are clearly irrelevant. In my ruling of June 4, 2007, I held that the Special Prosecutor in this case could no longer vet for relevance. The reasons state the rationale why I came to that conclusion and I need not repeat them here.
- [18] However, that ruling, submits the RCMP, does not prevent me, the judge, from finding that the documents are clearly irrelevant. I agree that I have this ability. For example, where a document or part of a document has nothing to do with the Everywhichway investigation, then I am entitled, and have found in the past, that the document need not be produced.
- [19] I am asked to do this in relation to the 12 or so documents that the Special Prosecutors brought before me. However, this prosecution and the defence of this prosecution is complicated and elaborate. If the document relates to the investigation, I do not think it appropriate in the circumstances that I, although I have the ability, find the documents to be clearly irrelevant.
- [20] To clarify, if a document or part of a document has nothing to do with the investigation leading to the charges before the Court, then I am prepared to find that such a document is clearly irrelevant. I am not prepared to make that call otherwise.
- [21] However, as indicated, I expect it is likely that I will hear submissions on the issue of the innocence-at-stake exception to the solicitor-client privilege. Therefore, while I rule on the privilege issue I will also try to comment on my assessment of whether the document is relevant to the case before the Court in order to assist counsel.
- [22] I did receive submissions on relevance from counsel for the defence.
- [23] Counsel for the RCMP is not familiar with the case and not in a position to comment on relevance.
- [24] There was no quarrel regarding the law relating to solicitor-client privilege. It is a fundamental and substantive rule of law: see *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445 at para. 17.

[25] Solicitor-client privilege is defined in Robert W. Hubbard, Susan Magotiaux, & Suzanne M. Duncan, *The Law of Privilege in Canada*, looseleaf (Aurora, Ont.: Canada Law Book, 2008), at 11.30 as follows:

Solicitor-client privilege attaches to oral or written communications between a client and a lawyer in the following circumstances:

1. where a client seeks advice from a lawyer;
2. where a lawyer provides advice in his or her professional capacity;
3. where the communication between the client and the lawyer relates to legal advice;
4. where the communication between the client and the lawyer is made in confidence.

[26] That such a privilege exists between the Crown prosecutor, here the PPSC, and previously under the auspices of the DOJ, and the RCMP, is no longer in question: see *R. v. Campbell*, [1999] 1 S.C.R. 565, (sub nom. *R. v. Shirose*) 133 C.C.C. (3d) 257.

[27] However, as pointed out in *R. v. McClure*, at para. 36, not all communication between a lawyer and a client is protected by solicitor-client privilege. In order for the communication between the lawyer and the client to be privileged, it must relate to the client seeking lawful legal advice: see also *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 at 835-836, 50 C.C.C. (2d) 495.

[28] Advice that is non-legal in nature, such as business advice or policy advice, is not protected by this privilege.

[29] Some of the documents are overlapping in that both solicitor-client privilege and litigation privilege are being claimed.

[30] In *Blank v. Canada* (Department of Justice), 2006 SCC 39, [2006] 2 S.C.R. 319 at paras. 49 - 50, the Court said this regarding overlap between solicitor-client privilege and litigation privilege:

[49] Second, access will not be uncontrolled because many of the documents in the lawyer's brief will, in any event, remain exempt from disclosure by virtue of the legal advice privilege. In practice, a lawyer's brief normally includes materials covered by the solicitor-client privilege because of their evident connection to legal advice sought or given in the course of, or in relation to, the originating proceedings. The distinction between the solicitor-client privilege and the litigation privilege does not preclude their potential overlap in a litigation context.

[50] Commensurate with its importance, the solicitor-client privilege has over the years been broadly interpreted by this Court. In that light, anything in a litigation file that falls within the solicitor-client privilege will remain clearly and forever privileged.

- [31] I also accept the argument that, where the litigation-privileged information is so intricately woven in with the communication that is protected by solicitor-client privilege, the solicitor-client privilege must prevail and will encompass that over which litigation privilege is claimed.
- [32] Where the solicitor-client privilege can be extricated from the litigation privilege, then the information over which litigation privilege is claimed will be assessed on that basis only: see also *R. v. Ahmad* (2008), 59 C.R. (6th) 308 at paras. 91 - 92 (Ont. S.C.J.).
- [33] With that definition in mind, I turn to the documents in question.
- [34] Firstly, the RCMP indicated that there were 36 documents covered by either solicitor-client privilege or a combination of litigation privilege and solicitor-client privilege. In fact, by the time the document-by-document review was conducted, only 29 documents remained in issue in this category. As the documents have been marked as exhibits, I will refer to each document by tab number.

Tab 7: Solicitor-client privilege only is claimed. Page 11 – Solicitor-client privilege applies to this vet. Further, there does not appear to be anything of relevance in the vetted portion of the document.

Page 12 - there is no legal advice sought or given in either of the two vets on this page. This material will be released to the defence counsel.

Tab 23: Solicitor-client privilege is sought. Under IPOC-4, the vetted information does not relate to a communication with a lawyer seeking or giving legal advice. It will be unvetted.

5) the same comments apply above and this will be unvetted.

The next paragraph is an expression of an intention to seek advice on certain matters. However, it cannot be said that this falls within the definition of solicitor-client privilege. This also will be unvetted.

Tab 28: Both solicitor-client privilege and litigation privilege are being sought over these documents. The first vet, on page 2, involved the providing of legal advice, therefore, solicitor-client privilege applies. The second vet, on page 3, is partly privileged and partly not. The first part of the paragraph is not covered by any privilege and will be unvetted. The part from, "Hogg will review", and what follows is covered by solicitor-client privilege, as it addresses actions of Mr. Hogg, and will remain vetted. There is little, if any, relevance to this document.

Tab 184: I should say that for this tab both solicitor-client privilege and litigation privilege are raised. Page 105 – the vetted portion is not solicitor-client privilege as the communication is not in relation to obtaining or seeking legal advice. However, it may be litigation privilege and will be tabled for consideration under that section.

Page 106 - nothing on this page properly engages solicitor-client privilege. However, it also will be tabled for the discussion under litigation privilege. These documents have some relevance to the case.

Tab 373: Solicitor-client privilege is claimed. While this document refers to both the Special Prosecutor, (J. Wood), and a PPSC prosecutor, (Emily Reid), I do not see anything in this document that resembles the obtaining or giving of legal advice. While an affidavit might have made this clear, the document does not state which, if either, of the prosecutors is engaged in discussion, nor does it appear that legal advice as opposed to tactical advice, (if it is even that), is being provided. This document will be unvetted.

Tab 414: Solicitor-client privilege and litigation privilege are claimed. These notes involve the giving of legal advice by Mr. Hogg and solicitor-client privilege is established. All of the document is intricately connected, therefore, the litigation privilege claimed is also maintained under the umbrella of solicitor-client privilege. While the document is not clearly irrelevant, its relevance is marginal.

Tab 418: Both solicitor-client privilege and litigation privilege are claimed. There does not appear to be anything in the notes that would engage solicitor-client privilege. However, litigation privilege remains open for argument. This document will be tabled for the litigation privilege argument. This document has marginal relevance.

Tab 520: This document is a memorandum from Sergeant Harriman to Inspector Ryan. Part of it details advice received from Mr. Hogg at an earlier meeting. (Tab 414 is cross-referenced). This is the sharing of legal advice between clients and is therefore covered by solicitor-client privilege. Any litigation privilege asserted is sufficiently linked to the solicitor-client privilege that it is covered by the latter. The information contained therein is not clearly irrelevant. However, it is not more than marginally relevant to the matter before the Court.

Tab 564: Both solicitor-client privilege and litigation privilege are claimed. There are two vetted parts of this e-mail. The first paragraph does not contain any legal advice. However, it may be covered by litigation privilege and this part of the document is deferred to that motion. The second vetted paragraph does contain legal advice given to the RCMP by Mr. Prior of the PPSC. While there is overlap of litigation privilege and solicitor-client privilege in the second paragraph, here it is sufficiently connected to require that all of the information be covered by solicitor-client privilege. Again, while the information is not clearly irrelevant, it is marginally relevant to the charges before the Court.

Tab 574: Solicitor-client and litigation privilege are both claimed. This document was provided to me in its entirety. I reviewed it and concluded that a significant portion was clearly irrelevant, as it was not related in any way, shape or form to the Everywhichway investigation. Only the parts of the document that refer to Everywhichway have been marked as part of the exhibit. This document is clearly the RCMP seeking legal advice. While very little of this document may fall within litigation privilege, there is sufficient overlap to protect the entire document, on the basis of solicitor-client privilege. This document has some relevance to the defence.

Tab 588: Solicitor-client privilege is claimed. This relates to a meeting with Department of Justice counsel Emily Reid. The exchange falls within the parameters of solicitor-client privilege. The content relates to the investigation, but is not relevant to the charges before the Court.

Tab 596: Solicitor-client privilege is claimed. The vet contains legal advice from Department of Justice agent Brian Jones and is covered by solicitor-client privilege. The contents are relevant to the investigation, but not relevant to the charges before the Court.

Tab 598: Solicitor-client privilege is claimed. The entire document relates to the seeking and providing legal advice from Department of Justice agent Brian Jones. The information is relevant to the investigation, but not relevant to the charges before the Court.

Tab 602: Solicitor-client privilege is claimed. This document relates to legal advice provided by Department of Justice prosecutor Emily Reid. The entire document consists of seeking and obtaining legal advice. Counsel are aware of the general nature of the advice. Solicitor-client privilege applies to the document. The document is relevant to the charges before the Court.

Tab 627: Solicitor-client privilege and litigation privilege are both claimed. This relates to legal advice obtained from PPSC prosecutor Bill West. The entire vet is covered by solicitor-client privilege. The information is too vague to determine relevance.

Tab 661: Solicitor-client privilege and litigation privilege are both claimed. There was a small segment identified by the RCMP over which solicitor-client privilege is claimed. I have concluded that this does not meet the test for solicitor-client privilege, as legal advice is not being sought or given. The entire document will be tabled for the discussion of litigation privilege. This document is relevant to the case before the Court.

Tab 694: Solicitor-client privilege is claimed. I was advised that this refers to something other than Everywhichway. This is not clear from the content, other than the note made at 1050. Counsel were unable to find a firm date of the notes, other than possibly June 9, 2003. Also, the note does not appear to be the exchange of any legal advice between a client and the PPSC. The information appears to be received from another source as opposed to the PPSC. I have no evidence that the document does not relate to Everywhichway, and that cannot be inferred from the content of the note. Therefore, this note will be disclosed, except for the notation at 1050, which as I indicated is clearly related to some other matter.

Tab 708: Solicitor-client privilege and litigation privilege are both claimed for this document. Counsel for the RCMP selected a portion of the document over which he submits it is covered by solicitor-client privilege. With respect to this document, I think he has been too conservative with respect to his approach. Most of the document contains the providing of legal advice by Robert Prior from the PPSC. The fourth, fifth and sixth paragraph contain sufficient legal advice to be covered by the privilege. The first three paragraphs remain for the discussion of litigation privilege, as they are easily severed from the remainder of the document. This document has some relevance to the matter before the Court.

Tab 760: Solicitor-client privilege is claimed over this document. The description of this e-mail through to 762 (761 and 762 are the same document) is not very accurate. It is not entirely misleading, but it is not accurate. I cannot find a note regarding whether any of the people named in the e-mail chain are counsel; therefore at this juncture I cannot assess whether the documents are covered by privilege. The same analysis is applicable to 761 and 762, as they are part of the same document.

Tab 781: Only solicitor-client privilege is sought. This is a request for and the giving of legal advice. It is covered by solicitor-client privilege. Although the matters refer to Everywhichway, the information contained therein is marginally relevant to the matter before the Court.

Tab 869: Both solicitor-client privilege and litigation privilege are sought. There does not appear to be advice given or sought from a client. There is no solicitor-client privilege here to protect. The description on this document is not accurate. The only RCMP party to the communication is Penny Robinson. There is a document in the middle of these documents that is a communication between Officer Robinson and Ms. MacKay, the Special Prosecutor. That does not, on its face, appear to be related to the rest of the documents, which are in fact duplicated under the tab. This document will be tabled for discussion under litigation privilege. This document is relevant to the defence.

Tab 879: Solicitor-client privilege is being asserted. There is a request for legal advice and the advice is given. Solicitor-client privilege is applicable. There is, however, information contained in there, apart from the legal advice, that should be disclosed and likely has been already, pursuant to Stinchcombe. I do not have enough information regarding the content of this document to ascertain if it is relevant.

Tab 916: Both solicitor-client privilege and litigation privilege are claimed for this document. I do not see any request for or giving legal advice. Therefore this document will be tabled for the litigation privilege part of the application. The content relates to Everywhichway, but is marginally relevant.

Tab 920: Both solicitor-client privilege and litigation are raised. There is one sentence identified by the PPSC in this document that is legal advice. Legal advice was not sought, but was given during the discussion. The legal advice can be excised from the remainder of the vet in these circumstances. Therefore, the remainder of the vet will be dealt with during the discussion of litigation privilege. This document has marginal relevance to the matter before the Court.

Tab 973: Solicitor-client privilege is sought. Only a portion of the document is covered by solicitor-client privilege. That is the fourth paragraph in the document that commences, "Sergeant". Public interest privilege was not raised with respect to the remainder of the document and properly so. The document will be disclosed, other than the part dealing with the giving of legal advice. I add that the content of this document may be relevant.

Tab 978: Solicitor-client privilege is claimed over this document. This is an example of a client seeking legal advice, but no advice was given at that time. However, the seeking of the advice is covered by solicitor-client privilege. The information is marginally relevant to the defence.

Tab 979: Solicitor-client privilege is claimed. This relates to tab 978 and the seeking of legal advice. No advice was given at this time. However, the inquiry is covered by solicitor-client privilege and the document will not be disclosed. As above, the information is marginally relevant.

[35] I believe that concludes the application in relation to solicitor-client privilege.

LITIGATION PRIVILEGE

[36] I now turn to the next issue of the principles applicable to litigation privilege in the context of a criminal case. Once the principles are stated, I will then commence a document-by-document review of the documents over which the RCMP claim litigation privilege. These documents are in relation to the drug file referred to as IDDS only, as the Commercial Crime Section has waived privilege over the documents it generated. The assessment of the privilege is found in *R. v. Basi*, 2009 BCSC 772.

[37] I have reviewed the factual chronology above.

[38] There are two issues that require resolution. The first is whether or not litigation privilege is a class privilege or a case-by-case privilege. The second is the scope of litigation privilege in the context of a criminal trial, where the Crown has disclosure obligations as set out in *R. v. Stinchcombe*, and the accused have a constitutional right to make full answer and defence under s. 7 of the Charter of Rights and Freedoms.

[39] Much argument was directed at whether litigation privilege is a class privilege or a case-by-case privilege. There are conflicting decisions in this jurisdiction. It is first necessary to define what I mean, when I am discussing these categories of privilege. I take the definitions from *R. v. Gruenke*, [1991] 3 S.C.R. 263, 67 C.C.C. (3d) 289 [cited to S.C.R.].

[40] A class privilege is one that is defined in *R. v. Gruenke* as, at 286:

...recognized at common law and one for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (i.e., why they should be admitted into evidence as an exception to the general rule). Such communications are excluded not because the evidence is not relevant, but rather because, there are overriding policy reasons to exclude this relevant evidence.... The term "case-by-case" privilege is used to refer to communications for which there is a *prima facie* assumption that they are not privileged, (i.e., are admissible). The case-by-case analysis has generally involved an application of the "Wigmore test" ... which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in

each particular case.

[41] The Wigmore criteria, as set out below, from Wigmore, *Evidence in Trials at Common Law*, (McNaughton rev., 1961) Vol. 8 at ¶ 2285:

- (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 which in the opinion of the community ought to be sedulously fostered; and
- (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. [Emphasis in original]

[42] In this Court, in *R. v. Soomel*, 2003 BCSC 140, Bauman J., (as he then was), found that litigation privilege was a class privilege. However, he was performing his analysis under the binding authority of *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129, 55 D.L.R. (4th) 577 (C.A.), which held that litigation privilege and solicitor-client privilege were one and the same. Solicitor-client privilege is clearly a class privilege. This aspect of the decision in *Hodgkinson v. Simms* was overruled by *Blank*, more of which will be said shortly.

[43] In *R. v. Bidzinski*, 2007 MBQB 138, [2007] 11 W.W.R. 696, Oliphant A.C.J. held that litigation privilege was a class privilege. However, there does not appear to be analysis with respect to the decisions relating to the privilege.

[44] In *Wexler v. Bhuller*, 2006 BCSC 1466, a post-*Blank* decision, Ehrcke J. found that litigation privilege was not a class privilege. In so finding, he relied on the following passage of the *Law of Privilege in Canada* edited by Hubbard, Magotiaux, and Duncan (Canada Law Book 2006) at para. 12.10, and I add now updated 2008, and I will quote from the passage referred to Mr. Justice Ehrcke at paragraph 31:

The scope of litigation privilege is described in the *Law of Privilege in Canada*...

Litigation privilege, also called work product privilege, applies to communications between a lawyer and third parties or a client and third parties, or to communications generated by the lawyer or client for the dominant purpose of litigation when litigation is contemplated, anticipated or ongoing. Generally, it is information that counsel or persons under counsel's direction have prepared, gathered or annotated.

Litigation privilege is not a class or absolute privilege and, unlike solicitor-client privilege, has not evolved into a substantive rule of law.

Information sought to be protected by litigation privilege must have been created for the dominant purpose of use in actual, anticipated or contemplated litigation.

- [45] It appears what the learned authors are saying is that litigation privilege does not stand on the same footing as solicitor-client privilege and is not an absolute privilege. However, this does not necessarily mean that it is automatically a case-by-case privilege.
- [46] Blank makes it very clear that litigation privilege is not on the same footing as solicitor-client privilege. I will quote from paragraphs 1, 24 and 25.
- [1] This appeal requires the Court, for the first time, to distinguish between two related but conceptually distinct exemptions from compelled disclosure: the solicitor-client privilege and the litigation privilege. They often co-exist and one is sometimes mistakenly called by the other's name, but they are not coterminous in space, time or meaning.
- ...
- [24] Thus, the Court explained in *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860, and has since then reiterated, that the solicitor-client privilege has over the years evolved from a rule of evidence to a rule of substantive law. And the Court has consistently emphasized the breadth and primacy of the solicitor-client privilege: see, for example, *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61; and *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31. In an oft-quoted passage, Major J., speaking for the Court, stated in *McClure* that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance" (para. 35).
- [25] It is evident from the text and the context of these decisions, however, that they relate only to the legal advice privilege, or solicitor-client privilege properly so called, and not to the litigation privilege as well.
- [47] To contrast the two, one need only to look at paragraphs 26 and 27, where the Court said this:
- ...
- [26] The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

[27] Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship.

[48] Mr. Justice Fish then refers to the oft-quoted passage of R.J. Sharpe, now Sharpe J.A., at paragraph 28:

It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

[49] At paragraph 29 Fish J. goes on to say that:

[29] With the exception of *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129, a decision of the British Columbia Court of Appeal, the decisions of appellate courts in this country have consistently found that litigation privilege is based on a different rationale than solicitor-client privilege.

[50] He said at paragraph 33:

[33] In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

- [51] Litigation privilege is much more narrow than solicitor-client privilege and has a limited lifespan. It expires at the end of the litigation. It is designed to provide a zone of privacy for the litigator to work, in order to prepare his or her case. It protects communications made for the "dominant purpose of litigation" and nothing more.
- [52] Indeed, as Mr. Justice Fish said at para. 61:
- [61] While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process. In this context, it would be incongruous to reverse that trend and revert to a substantial purpose test.
- [53] However, the privilege is also not susceptible to the Wigmore analysis that one would normally apply in a case-by-case privilege.
- [54] As Fish J. said, at para. 32, the privilege applies to third parties who have no need nor any expectation of confidentiality. Thus, on a case-by-case analysis, the first criteria of the Wigmore test might never be met, yet the privilege will apply.
- [55] It seems to me that there is no point for me to attempt to classify that which may be impossible to classify into one or other of the categories discussed in Gruenke. The privilege does not replicate solicitor-client privilege as an absolute privilege, yet is not conducive to a case-by-case analysis.
- [56] The point that is critical for this case is that the privilege exists and that the Supreme Court of Canada has laid out the test, which is the dominant-purpose test: see Blank at paras. 59 - 60.
- [57] The creation or obtaining of the documents must be for the dominant purpose of litigation. If it meets the test, the privilege will apply. This is not to say that the privilege is not without its exceptions.
- [58] The RCMP have submitted that the privilege is similar to solicitor-client privilege and would only be set aside on the basis of innocence at stake in the context of these proceedings.
- [59] However, it is clear from Blank that the privilege does not carry the substantive force of law that is entrenched in the solicitor-client privilege. Indeed, the privilege may fall if there are abuse of process allegations: see para. 45.
- [60] I have considered the comments of Fish J. at paras. 56 and 57. I do not see him suggesting that the innocence-at-stake test must be met in the context of litigation privilege before the privilege is set aside. Indeed, he seems to suggest that in Blank the Crown may have been bound to produce documents that were otherwise subject to litigation privilege.

- [61] I conclude, on reading the entirety of the decision, and placing emphasis on the difference between solicitor-client privilege and litigation privilege as discussed within that case, including the fact that litigation privilege expires, that communications covered by litigation privilege may well be subject to disclosure, if disclosure is required to meet the constitutional requirement of full answer and defence, a standard lower in my view than innocence-at-stake.
- [62] I am affirmed in this conclusion by the decision of the Prince Edward Island Court of Appeal in *Llewellyn v. Carter*, 2008 PESCAD 12, 278 Nfld. & P.E.I.R. 96, where the Court found that litigation privilege could be limited by Rules of Court. Clearly, as a rule of law solicitor-client privilege could not be so limited.
- [63] In summary, if the document is made for the dominant purpose of litigation, then the litigation privilege will apply in criminal cases, subject to the right of the accused to argue that production is necessary on the basis of his or her need to make full answer and defence.
- [64] The Stinchcombe test does not apply, as Stinchcombe held that privilege was an exception to the disclosure requirements. The question will be whether the:
- ... recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege.
- Stinchcombe at 340; Blank at para. 56.
- [65] As with the claim for solicitor-client privilege, the RCMP chose not to file any affidavit material and took the position that the privilege was evident from the face of the document itself. If I find that it is not evident, then they concede I should order disclosure of the document.
- [66] There is no quarrel that litigation privilege applies to the work product of the Crown when it meets the dominant-purpose test. The more difficult issue is when the privilege applies to the RCMP, who are asserting the privilege, but who also have an obligation to investigate crime, combined with the Stinchcombe obligation of disclosure and the accused's constitutional right to disclosure.
- [67] One must take extreme care, as it is easy to say that when an investigation is underway, or an Indictment or Information has been laid, that anything from that point on is for the dominant purpose of litigation, but this is simply not so in the context of a criminal case.
- [68] Part of the difficulty stems from the fact that the litigation privilege results from communications between a lawyer or litigant, as unrepresented litigants are protected, and a third party or communications between the client and the third party. As counsel for Aneal Basi framed the question, "Where is the third party?" as the RCMP is the client. It appears that, in the unusual circumstances of the criminal law, the RCMP is both the client and the third party, in the sense that they are investigators seeking out information for the

litigation, as well as people who may obtain legal advice from the Crown and be protected by solicitor-client privilege.

[69] It is clear that some of what is protected in the civil litigation context, such as expert reports and witness statements, are not protected in the criminal law context. These are things in the hands of the Crown that will always be disclosed, subject of course to protecting the identity of informers and the safety of witnesses.

[70] In the Law of Privilege in Canada, the authors opine at page 12-3, paragraph 12.10, that:

Litigation privilege in criminal proceedings is usually called "work product privilege." ... The communications covered by work product privilege are generally narrower than those in a civil context and are confined to lawyers' notes, theories, opinions and strategies, and police work in preparation for trial (as opposed to investigative work).

[71] This definition appears to take into account the difficulty applying the privilege to the work of the police.

[72] Another element of the privilege is that the documents or communications must be prepared, gathered, or annotated by counsel, or person under counsel's direction, or the litigant himself if he is self-represented. Thus, in criminal matters, litigation privilege will apply to counsel's work product, which was prepared for the dominant purpose of litigation.

[73] In terms of the police, it will apply when the police acting under the direction of the Crown, here the PPSC, gather information or prepare documents, the dominant purpose is for litigation which means the preparation of trial. This protects the zone of privacy, while still maintaining the Stinchcombe obligation on the Crown, as it pertains to the accused's constitutional right to make full answer and defence.

[74] The next set of documents will be reviewed with this test in mind.

PUBLIC INTEREST PRIVILEGE

[75] I have an application for disclosure of a number of documents over which the RCMP are claiming privilege. This part of the decision relates to those documents over which public interest privilege is claimed and the reasons were delivered orally on January 5, 2009.

[76] Public interest privilege is protected by both s. 37 of the Canada Evidence Act, R.S.C. 1985, c. C-5, and the common law. The RCMP has invoked only the common law privilege and has not certified a public interest pursuant to s. 37.

[77] Public interest privilege is a case-by-case privilege and any application of the privilege involves a weighing of the factors both for and against disclosure. Public interest privilege is not the same as, nor a subset of, informant privilege: see *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, 7 C.C.C. (3d) 385; and *R. v. Lam*, 2000 BCCA 545, 148 C.C.C. (3d) 379.

- [78] Public interest privilege sometimes protects the identity of people who have assisted the police, for example by providing observation posts in their home or business, but this assistance does not, according to the case law, accord these persons necessarily with the status of an informant.
- [79] Informant privilege is an absolute privilege, subject only to innocence-at-stake, whereas public interest privilege is a case-by-case privilege and subject to the weighing of affected interests.
- [80] Here the police are invoking what is referred to as investigative technique privilege. This form of privilege is a subset of public interest privilege, and has been recognized as necessary to protect criminal investigations in certain circumstances, the disclosure of which would cause serious risk to the administration of justice.
- [81] In *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, the Court cautioned that judges must take care when dealing with police operatives and witnesses under this provision, but on the other hand also said that it is not appropriate to "keep secret a vast amount of enforcement information the disclosure of which would be compatible with the public interest": (at para. 35).
- [82] In *Mentuck*, the Court was addressing the issue of the publication of investigative techniques in the media and not for the purpose of disclosure to the accused. However, the analysis is similar, albeit, the right to make full answer and defence will weigh more heavily in favour of disclosure.
- [83] In *Mentuck*, the Court found that publishing details of a Mr. Big operation used to elicit a confession from a suspect would not constitute a serious risk to the efficacy of police operations: see para. 45.
- [84] At para. 51, the Court said:
- [51] As this Court recognized in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976, "participation in social and political decision-making is to be fostered and encouraged", a principle fundamental to a free and democratic society. Such participation is an empty exercise without the information the press can provide about the practices of government, including the police. In my view, a publication ban that restricts the public's access to information about the one government body that publicly wields instruments of force and gathers evidence for the purpose of imprisoning suspected offenders would have a serious deleterious effect. There is no doubt as to how crucial the role of the police is to the maintenance of law and order and the security of Canadian society. But there has always been and will continue to be a concern about the limits of acceptable police action. The improper use of bans regarding police conduct, so as to insulate that conduct from public scrutiny, seriously deprives the Canadian public of its ability to know of and be able to respond to police practices that, left unchecked, could erode the fabric of Canadian society and democracy.

- [85] The Court, however, did ban publication of the names of the officers involved in the operation for a specific period of time.
- [86] As with the other claims of privilege raised in this case, the RCMP chose not to file any affidavit material setting out the nature of the claim for privilege or the importance of the technique involved. If I cannot ascertain the significance from the face of the document, the RCMP does not wish to file any further material.
- [87] It was submitted by the defence that I should first ascertain if the technique was privileged before embarking on the weighing process. I agree that if a police technique is known in the community, then there is nothing to protect. However, if there is a concern that the privilege applies, then the importance of the interest to be protected will be weighed against the importance of the information to the right of the accused to make full answer and defence.
- [88] The nature of investigative technique privilege was comprehensively discussed in *Toronto Star Newspapers v. Canada* (2005), 204 C.C.C. (3d) 397 (Ont. S.C.J.), by Nordheimer J. At para. 14, Nordheimer J. said this:
- [14] Dealing with those bases that are challenged, I start with investigative technique privilege. While there are references in a few cases, such as *R. v. Trang* (2002), 168 C.C.C. (3d) 145 (Alta. Q.B.) for example, to investigative technique as a freestanding form of privilege, it appears that this privilege is more accurately considered a subset of what is varyingly referred to as public interest immunity or public interest privilege. In other words, the common law recognizes that there are matters that may need to be withheld from public disclosure because the failure to do so would damage other legitimate public interests such as national security, government relations and criminal investigations. It essentially recognizes what is made clear in *R. v. Mentuck*, [2001] 3 S.C.R. 442, that, in certain circumstances, a sealing order or other form of ban on publication respecting police investigative techniques may be justified on the basis that, to do otherwise, would give rise to a serious risk to the administration of justice. For example, there are circumstances where the police utilize a particular technique to investigate a particular crime that, if revealed generally, might undermine the use of that technique, both with respect to a current investigation as well as in future investigations. If the court is satisfied on proper evidence that such a result might occur, then the court will allow that technique to remain concealed in order to promote the greater societal interest of the effective investigation of criminal activity. It is a basis for secrecy that is, however, fairly narrow in its application and one that of necessity needs to be determined on a case by case basis.
- [89] In that case, the information sought to be kept secret was the investigation by forensic accountants and victim corporation model, which is a technique whereby a Board of Directors of a victim corporation will cooperate with the police.
- [90] Mr. Justice Nordheimer found at paragraph 18:

[18] ... there is nothing innovative in the concept of the police entering into agreements with some parties in order to obtain their information and co-operation for the purpose of pursuing other parties.

Needless to say, the privilege was not sustained by the Court.

[91] I have reviewed the documents and have heard submissions from counsel on the documents in question. I now, as stated by Lambert J.A. in *R. v. Meuckon* (1990), 57 C.C.C. (3d) 193 at para. 32, 78 C.R. (3d) 196, will consider whether the public interest in allowing the accused to make full answer and defence to a criminal charge can be overridden by the interest asserted by the Crown.

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

Tab 590: This vet is in relation to an investigation other than *Everywhichway*. It has no relevance to this case. To disclose this information could reveal information regarding another investigation and has no value in the context of the right to make full answer and defence. Therefore, public interest privilege applies.

Tab 591: The description of this tab is not correct. The correct description is found at Tab 599. The technique sought to be protected is the obtaining of information from other agencies. It is no secret that the police obtain information and assistance from other government agencies. There is no overriding public interest here and this document will be unvetted.

Tab 599: The description for this tab is incorrect. The correct description is found at Tab 591. The technique here refers to inquiries from another agency. The information has nothing to do with the investigation and was not pursued. Therefore, one page will be unvetted as there is no public interest that applies, but the second and third pages that are the results of the inquiry will not be disclosed. It contains private information unrelated to the investigation.

Tab 603: The description should include that the investigative technique sought to be protected is also the source of the information. This is the same agency as referred to in Tab 599 and the same technique. Similarly, the information was not connected to any investigative and was not followed up. The only information in the document is the nature of the investigative technique, which is the use of covert surveillance, again not something that the public would not be familiar with. The results were not appended. The document will be unvetted, but the results of the inquiries, which I do not have, but may identify more specifics of the surveillance, will not be released, subject to me reviewing it if necessary. The information likely contained therein is information that meets the public interest criteria.

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

Tabs 687 and 688: These have similar content, in the technique sought to be protected. The technique sought to be protected involves a covert operation involving another police department. It appears to have nothing to do with the charges before the Court. At this point I see nothing that weighs in favour of releasing this information when the relevant factors are balanced. Therefore, unless something new comes to light during the trial, this document is covered by public interest privilege.

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

Tab 974: The description of this document is also vague. In some ways, it is similar to the observation post analysis. The revealing of this information could reveal individuals who assisted the police in their investigation, but contains no source information. The individuals have no evidence to give in the context of this case. Therefore, the information is covered by the privilege.

[92] That concludes the public interest privilege documents.

[93] I turn now to the issue of what are referred to as "documents not disclosed". These are documents which the special prosecutor says are wholly unrelated to the investigation before the Court and should not be disclosed to the defence. The defence do not seek information unrelated to the case, but as these documents surfaced as part of the Everywhichway investigation, they seek the Court's review of the documents, and confirmation that the documents do not relate to Everywhichway.

[94] The first is Tab 34, which I understand has now been disclosed.

Tab 39: This contains a reference to a client of Mr. Harris, who has been involved in this case as a special prosecutor. Solicitor-client privilege has been raised. The concern is whether Mr. Harris had a conflict of interest in dealing with this case. I have received a letter from Mr. Harris indicating why he cannot receive instructions to waive privilege. I am satisfied that the case involving Mr. Harris's client is not related to Everywhichway or the governmental agencies involved in this case. Mr. Harris did not represent the government. This will remain vetted.

Tab 71: I believe that this also has been unvetted by the special prosecutor.

Tab 101: This is related to Tab 309 and, for the reasons stated above, this will remain vetted.

Tabs 123, 124 and 125: The documents here relate to unit commander meetings held on May 19, 2004, and October 27, 2004. This piece of information has already been given to the defence. The unit commander meetings are RCMP unit commanders.

Tab 123: This is a summary of decisions made at the October 27, 2004, meeting. Nothing in this document relates to Everywhichway and will not be disclosed.

Tab 124: This contains the minutes of the meeting and discuss funding of certain RCMP divisions. The funding issue is highly relevant to the defence position regarding how the police approached this case and steps they took. While I agree that most of the document is not relevant to Everywhichway, some of it is. Indeed, one sentence in relation to funding has already been disclosed. The following will be disclosed to the defence, but under the same implied undertaking as when they receive all disclosure. What will be unvetted are the words from "The only two places" to the ending, "to provincial funding okay." The special prosecutor can vet the names of other investigations referred to within this released paragraph.

Tab 125: This contains the minutes of the meeting held May 19, 2004. One line of this page has been released. On page 2 there is a reference to the funding of Everywhichway. This will be unvetted from the statement, "Pat, are we over," to the end where it says, "To Byron, no." Nothing else in the minutes addresses Everywhichway. Funding is discussed overall. However, it relates to certain aspects of policing that do not directly engage Everywhichway. Therefore, at this point it will not be unvetted.

Tab 155: This is a legal opinion by the Department of Justice. The Department of Justice has asserted solicitor-client privilege over this document. It is clear to me that this privilege applies. I add that the opinion appears to have nothing to do with Everywhichway or this case.

Tabs 371 to 372: The Special Prosecutor submitted that the redactions in these notes relate to comments by Sergeant Beth Killaly in relation to the appointment of a special prosecutor involving a Victoria police officer. I do not see that the notes are limited to this and these notes should be unvetted.

Tab 382: I believe the contents of this document has now been disclosed.

Tab 527: This information relates to the death of Crown witness Erik Bornmann's mother. The defence submits that any information relating to Mr. Bornmann is relevant. The contents of the document are personal and private. Rather than disclose the document, I will provide the following judicial summary:

Mr. Bornmann discovered the body of his mother in her apartment on June 18, 2005. The paramedics pronounced her dead upon their arrival. The coroner was called. Foul play was not suspected. Mrs. Bornmann, according to the note, worked as a returning officer for Federal Elections.

I do not see anything else in the document that is relevant to these proceedings.

Tab 579: This contains personal information of a witness. The defence indicated that they do not want this document.

[95] I believe that completes the review, and I understand that documents in the smaller binder, 156 to 167 and 69 have been released.

"E. Bennett J."

The Honourable Madam Justice Bennett

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