COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia (Police Complaint Commissioner) v. The Abbotsford Police Department,* 2015 BCCA 523 [REDACTED]

Date: 20151217
Docket: CA42705

Between:

The Police Complaint Commissioner of British Columbia

Appellant
(Applicant)

And

The Abbotsford Police Department,
The Attorney General of British Columbia

Respondents
(Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated March 11, 2015 (*New Westminster Police Department (Re)*, 2015 BCSC 978, Vancouver Docket No. OTR 140548).

Counsel for the Appellant:	D.K. Lovett, Q.C. M. Tammen, Q.C.
Counsel for the Respondent The Abbotsford Police Department:	D.G. Butcher, Q.C. A. Srivastava
Counsel for the Respondent The Attorney General of British Columbia:	P.W. Hogg
Place and Date of Hearing:	Vancouver, British Columbia November 12-13, 2015
Place and Date of Judgment:	Vancouver, British Columbia December 17, 2015

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Savage

Summary:

The Police Complaint Commissioner sought to appeal an order directing sealed materials relating to confidential informants to be returned by Police Act investigators back to the police departments from which the materials were obtained under an earlier order. Held: Appeal quashed. This court has no jurisdiction to hear the appeal because it is an interlocutory appeal of a criminal proceeding. Despite the appellant's attempt to frame the proceeding as civil, an application to obtain materials sealed in a criminal proceeding must be treated as criminal in nature. In the alternative, as important as police oversight is, informer privilege cannot be balanced with other policy objectives. The circle of privilege cannot be expanded to include investigators pursuing disciplinary duties under the Police Act.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This appeal raises two primary issues, one of appellate jurisdiction, and the other of substantive law – whether the Police Complaint Commissioner of British Columbia ("PCC") in his supervisory role over the conduct of municipal police under the *Police Act*, R.S.B.C. 1996, c. 367, and investigators carrying out duties under that Act, may be given access to information, sealed in a packet in a criminal proceeding, that could reveal the identity of confidential police informants. The answer to the second question is in my view clear: aside from the "innocence at stake" exception (which is not engaged here), the police informant privilege, or "secrecy rule," is not to be 'balanced' or weighed against other interests or objectives, however worthy. It is, in the words of the Court in *Bisaillon v. Keable* [1983] 2 S.C.R 60, a "legal rule of public order by which the judge is bound" and in that sense is "absolute". For the same reason, the 'circle of privilege' may not in my opinion be expanded to include investigators under the *Police Act*, the PCC himself or others carrying out "disciplinary" or "administrative" duties and not involved directly in criminal law enforcement.

[2] On this basis, I would dismiss this appeal, assuming for the moment that it was properly brought. Whether that assumption is correct is less clear. It requires us to characterize the nature of the order from which the appeal is taken as either criminal or civil. If it is the former, this appeal must be quashed as no statutory authority exists for this court to determine the appeal.

[3] Before turning to that issue, however, it is necessary to review the nature of the informant privilege and the provisions of the *Criminal Code* that now incorporate it.

Police-Informant Privilege

[4] The sanctity of the rule that protects the confidentiality of police informants has long been part of the criminal common law. In 1794 in *Rex v. Hardy* (1794) 24 St. Tr. 199, for example, witnesses were not permitted to be asked "questions which

tend to the discovery of the channels by whom the disclosure was made to the officers of justice …". In the seminal case of *Marks v. Beyfus* (1890) 25 Q.B.D. 494 (C.A.), Lord Esher stated:

> In the case of *Attorney General v. Briant* (1), Pollock, C.B., discussing the case of *Rex v. Hardy* (2), says that on all hands it was agreed in that case that the informer, in the case of a public prosecution, should not be disclosed; and later on his judgment, Pollock, C.B., says: "The rule clearly established and acted on is this, that in a public prosecution a witness cannot be, asked such questions as will disclose the informer, if he be a third person ... and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer." Now, this rule as to public prosecutions was founded on grounds of public policy, and if this prosecution was a public prosecution the rule attaches; I think it was a public prosecution, and that the rule applies. 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. <u>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 whether he should tell the witness to answer or not.</u> [At 498; emphasis added.]

(See also *Bisaillon* at 88-98, citing *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)* [1981] 2 S.C.R. 494 and *D. v. National Society for the Prevention of Cruelty to Children* [1978] A.C. 171 (H.L.))

[5] The modern rule has been stated by Sopinka, Lederman and Bryant in *The Law of Evidence in Canada* (4th ed., 2014) as follows:

> The court cannot compel the disclosure of the identity, or information which might disclose the identity, of persons who have given information to the police acting in the course of their investigative duties. The rule does not protect any other information communicated by the informant (although a more general claim for Crown immunity may apply).
>
> . . .
>
> This so-called "secrecy rule" or "informer privilege" applies not only where a person with knowledge of the identity is testifying, such as the police officer, but also where the witness himself or herself is the informant. The rule applies in criminal, civil and administrative proceedings. It applies to both documentary evidence and oral testimony. Because of its importance, no judicial balancing exercise takes place when the rule applies: "once

> established, neither the police nor the court possesses discretion to abridge it." [At 1087-9.]

[6] The authors also note that strictly speaking, the rule is not an aspect of Crown immunity (even though it is animated by the public interest), nor is it an evidentiary privilege in the sense that it must be asserted before the court may apply it. Indeed in *Bisaillon* the Court confirmed that no formal application is required to invoke the rule and that it is the court's duty to apply the rule of its own motion if the Crown fails to invoke it in a given case. (At 93; see also *R. v. Barros* 2011 SCC 51 at para. 35; *R. v. Basi* 2009 SCC 52 at para. 38.) The privilege may be waived only by both the Crown and the informant: see *Bisaillon* at 94; *Barros* at para. 35; *Basi* at para. 40.

[7] At stated, the only exception to the privilege occurs where innocence is at stake. In *R. v. Scott* [1990] 3 S.C.R. 979 at 993-998, Cory J. for the majority described three situations in which it may be "essential" for an accused to have access to information that might disclose the identity of an informant -- where an accused challenges the validity of a search warrant, where the informant is a material witness to the crime, or where he or she has acted as an *agent provocateur.* These were noted again in *R. v. Leipert* [1997] 1 S.C.R. 281, which found no inconsistency between the right to disclosure of Crown documents affirmed in *R. v. Stinchcombe* [1991] 3 S.C.R. 326 and the "common law rule of informer privilege." (At para. 25.) The Court then added:

> Absent a basis for concluding that disclosure of the information that may reveal the identity of the informer is necessary to establish the innocence of the accused, the information remains privileged and cannot be produced, whether on a hearing into the reasonableness of the search or on the trial proper. [At para. 27.]

Thus it appears the three situations referred to in *Scott* were regarded by the Court in *Leipert* as examples of the "innocence at stake" exception.

Criminal Code Provisions

[8] As observed in *Bisaillon* at 108-9, the privilege was imported into the criminal law of Canada by s. 7(2) of the *Criminal Code*, R.S.C. 1970, c. C-34, and s. 37 of the

Canada Evidence Act, R.S.C. 1970, c. E-10. In 1997, it was referred to and incorporated into provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, dealing with the obtaining of search warrants. What is now s. 487.3 states:

> *Order denying access to information*
>
> 487.3 (1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that
>
> > (*a*) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
> >
> > (*b*) the reason referred to in paragraph (*a*) outweighs in importance the access to the information.
>
> *Reasons*
>
> (2) For the purposes of paragraph (1)(*a*), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure
>
> > (*a*) if disclosure of the information would
> >
> > > (i) compromise the identity of a confidential informant,
> > >
> > > (ii) compromise the nature and extent of an ongoing investigation,
> > >
> > > (iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or
> > >
> > > (iv) prejudice the interests of an innocent person; and
> >
> > (*b*) for any other sufficient reason.
>
> *Procedure*
>
> (3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

> *Application for variance of order*
>
> (4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.
>
> [Emphasis added.]

[9] In 1974, what is now Part VI of the *Code*, headed "Invasion of Privacy", was enacted, including s. 187. As will be seen, s. 187 provides a "comprehensive and integrated regime" relating to the interception of private communications, including information provided by confidential sources. It states in material part:

> 187**.** (1) All documents relating to an application made pursuant to any provision of this Part are confidential and, subject to subsection (1.1), shall be placed in a packet and sealed by the judge to whom the application is made immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be dealt with except in accordance with subsections (1.2) to (1.5).
>
> *Exception*
>
> (1.1) An authorization given under this Part need not be placed in the packet except where, pursuant to subsection 184.3(7) or (8), the original authorization is in the hands of the judge, in which case that judge must place it in the packet and the facsimile remains with the applicant.
>
> *Opening for further applications*
>
> (1.2) The sealed packet may be opened and its contents removed for the purpose of dealing with an application for a further authorization or with an application for renewal of an authorization.
>
> *Opening on order of judge*
>
> (1.3) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet.
>
> *Opening on order of trial judge*
>
> (1.4) A judge or provincial court judge before whom a trial is to be held and who has jurisdiction in the province in which an authorization was given may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet if
>
> > (*a*) any matter relevant to the authorization or any evidence obtained pursuant to the authorization is in issue in the trial; and

> (*b*) the accused applies for such an order for the purpose of consulting the documents to prepare for trial.
>
> . . .
>
> *Editing of copies*
>
> (4) Where a prosecution has been commenced and an accused applies for an order for the copying and examination of documents pursuant to subsection (1.3) or (1.4), the judge shall not, notwithstanding those subsections, provide any copy of any document to the accused until the prosecutor has deleted any part of the copy of the document that the prosecutor believes would be prejudicial to the public interest, including any part that the prosecutor believes could
>
> (*a*) compromise the identity of any confidential informant;
>
> (*b*) compromise the nature and extent of ongoing investigations;
>
> (*c*) endanger persons engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used; or
>
> (*d*) prejudice the interests of innocent persons.
>
> [Emphasis added.]

[10] The *Criminal Code* is of course founded in the federal power over "Criminal Law … including the Procedure in Criminal Matters" under s. 91(27) of the *Constitution Act*, *1867* (U.K.), R.S.C. 1985, App. II. No. 5. The phrase "criminal law" in this context has been interpreted broadly (see *Reference re Validity of Section 5(a) of the Dairy Industry Act* [1949] S.C.R. 1 at 49-50, *aff'd* [1951] A.C. 179 (J.C.P.C.)) and has been said to encompass both a prohibitive branch and a preventative branch: see *R. v. Swain* [1991] 1 S.C.R. 933 at 998-1003.

[11] The *Police Act* rests on the provincial head of power in s. 92(14), the "Administration of Justice … including Procedure in Civil Matters." In *Bisaillon*, the Court confirmed that the regulation of the manner in which the duties of (provincial) police may be exercised falls "within the administration of justice and … [covers] the discipline of police forces and their members." (At 79.) Consistent with this, the Supreme Court has endorsed the objectives of police oversight and accountability that underlie provincial statutes such as the *Police Act*. In *Wood v. Schaeffer* 2013 SCC 71, for example, the majority observed with respect to a 'special investigation unit' ("SIU") under the *Police Services Act*, R.S.O. 1990, c. P-15 that:

> The SIU was born out of a crisis in public confidence. Whether or not police investigations conducted into fatal police shootings in the 1980s were actually biased, the public did not perceive them to be impartial (see, e.g., Task Force Report). This history teaches us that appearances matter. Indeed, it is an oft-repeated but jealously guarded precept of our legal system that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*R. v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259, *per* Lord Hewart C.J.). And that is especially so in this context, where the community's confidence in the police hangs in the balance.
>
> The legislative scheme is designed to foster public confidence by specifically combating the problem of appearances that flowed from the old system of "police investigating police". [At paras. 48-49.]

(See also *Peel (Police) v. Ontario (Special Investigations Unit)* 2012 ONCA 292 at paras. 33-40; *Florkow v. British Columbia (Police Complaint Commissioner)* 2013 BCCA 92 at para. 38.)

[12] This province's *Police Act* provides in Part XI for the investigation of police misconduct, discipline and complaints. As noted at para. 1 of *Florkow*, Part XI evolved as the result of various reports and recommendations made by various experts in the context of a continuing public debate. At para. 2, the Court did not disagree generally with the PCC's description of the Act as "highly specialized labour relations legislation dealing with the employment of police officers and the protection of the public by means of the disciplinary tools provided by the statute." A summary of the process established by the Act for the investigation of allegations of police misconduct, including the separate roles of the PCC, the discipline authority ("DA") and investigating officer ("IO") thereunder appears at paras. 7-11of *Florkow*. I will not repeat that summary here except to note that the PCC does not decide complaints on their merits, but is tasked with the more 'neutral' role of ensuring that allegations of police misconduct are dealt with appropriately in the public interest and in accordance with the Act.

Factual Background

R. v. A.B.

[13] I turn now to the factual and legal background of the order from which this appeal is brought. It will be noted that the style of cause in this appeal purports to

describe a civil proceeding. It was initiated by application said to be made by the PCC and Sgt. Mullin, acting as an IO under the *Police Act,* to the Supreme Court of British Columbia on January 23, 2015. The application invoked Rule 2 of the *Criminal Rules of the Supreme Court of British Columbia* and the provisions of the *Police Act*. (In this court, counsel for the PCC stated that the reference to the *Criminal Rules* was mistaken, and that Rule 8-1 of the *Supreme Court Civil Rules* should have been invoked instead.)

[14] In order to appreciate fully how the legal issues arose, however, it is necessary to go back to a previous application, this one filed by Chief Cst. David Jones (acting as a DA under the *Police Act*) on October 31, 2013, in a criminal proceeding entitled *R. v. A.B.*

[15] Cst. A.B. is a member of the Abbotsford Police Department ("APD"). He was arrested and charged in May 2013 with several criminal offences including breach of trust and wilful obstruction of justice. In July, he was also charged by way of direct indictment with ten counts including counselling the commission of an offence. [REDACTED] Cst. A.B. has not yet been tried on any of the charges.

[16] When the Chief Constable of the APD became aware of the allegations against Cst. A.B., he requested that the Vancouver Police Department ("VPD") conduct an external criminal investigation ("Project Scrap Iron"), as well as an 'audit' of the APD's informer payment process ("Project H–Scrap Iron"). In the course of the investigation, the VPD obtained two authorizations to intercept private communications, and APD "office copies" of search warrants and Informations to Obtain ("ITOs"). The VPD informed the APD that charges against two other APD officers had been considered and that there were 20 files involving six other officers of the APD that might involve breaches of the Act. (Para. 4.)

[17] In May 2013, the APD requested the PCC to undertake an investigation into Cst. A.B.'s conduct under the *Police Act*. On August 15, the PCC directed the New Westminster Police Department ("NWPD") to look into the allegations concerning

Cst. A.B. Chief Constable David Jones (of the NWPD) was appointed as the DA and in turn appointed Sgt. Christopher Mullin (also of the NWPD) as the IO.

[18] On October 31, 2013, Chief Constable Jones applied in the *R. v. A.B.* proceeding to the Supreme Court of British Columbia for "access to" materials in the possession of the VPD, consisting of a report to Crown counsel in respect of a particular VPD file and the two intercepted communications, and affidavits supporting the authorizations related thereto. The application was brought *in camera*, and was heard by Madam Justice Brown on October 31, 2013. (Brown J. has been assigned the trial of the case and is acting as the case management judge.) Counsel for Cst. A.B., VPD and the Crown in right of the Province appeared in addition to counsel for the applicant. The Court granted the order, specifying that the requested materials were to be delivered personally by a VPD officer to Chief Constable Jones and were not to be disclosed or distributed by him to anyone other than police officers within the Professional Standards Section ("PSS") of the NWPD who were involved in the investigation of Cst. A.B. under the *Police A*ct or to staff or legal counsel assisting Chief Constable Jones or PSS investigators. The order, which I shall refer to as the "2013 Order", was silent as to disclosure to the PCC himself. No appeal was taken from the order.

[19] Associate Chief Justice Cullen, in making the later order from which the present appeal is taken, found that in addition to the materials referred to in the 2013 Order, PSS investigators received draft ITOs from the VPD as well as copies and drafts of sealed ITOs from the APD that had been obtained by the VPD in Project H-Scrap Iron in the summer of 2013. He said there were approximately 550 ITOs written by APD members. (Para. 8.)

[20] Over 2014, the PCC's investigation was enlarged to include additional members of the APD and the investigation of Cst. A.B. was expanded.

[21] On June 20, 2014, Sgt. Mullin applied for a second order, which was granted by Cullen, A.C.J. by consent. On this occasion, the application and order were not styled in the *A.B.* criminal proceeding, but as follows:

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN CAMERA

AND IN THE MATTER OF AN APPLICATION BY STAFF SERGEANT CHRIS MULLIN OF THE NEW WESTMINSTER POLICE DEPARTMENT FOR AN ORDER RESTRICTING DISCLOSURE OF MATERIALS IN THE POSSESSION OF THE NEW WESTMINSTER POLICE DEPARTMENT PROFESSIONAL STANDARDS SECTION

AND IN THE MATTER OF OFFICE OF POLICE COMPLAINT COMMISSIONER INVESTIGATION FILE NOS. 2014-9474-01 TO 2014-9474-07 AND NEW WESTMINSTER POLICE DEPARTMENT FILE NO. DA2013-049

At the hearing, Sgt. Mullin was represented by counsel, as were the PSS investigators, the PCC, the Crown, the VPD and the APD.

[22] The order recited, *inter alia*, the expansion of the VPD investigation, the fact that s. 98 of the *Police Act* requires investigators to produce periodic reports and "copies of any record, relating to the investigation" to the PCC and that:

> Unrestricted production of the NWPD files, as contemplated by the *Police Act*, to the Police Complaint Commissioner would violate the rules of confidentiality and privilege protecting the informants, and solicitor–client–privilege, and/or police–Crown public interest privilege."

The order directed Sgt. Mullin and PSS investigators to examine progress reports prepared under the Act to determine those which it would be "contrary to the public interest to produce". This included documents which "could disclose or reveal, or tend to disclose or reveal the identity of, or compromise the safety or security of a, or any, police informant or confidential human source" and documents which would disclose the existence of private communications under Part VI of the *Code*. Documents satisfying these criteria were ordered not to be disclosed to the PCC.

[23] In the fall of 2014, the PCC added further allegations of misconduct to his investigation of Cst. A.B. and ordered investigations into eight other members of the APD, for a total of 14. Some but not all of these investigations relate exclusively to ITOs. (Para. 12.)

[24] The PCC suspended various aspects of his investigations on two occasions – once on April 28, 2014 until June 24, and again on January 15, 2015. I understand this suspension remains in force. Other investigations remain on foot.

[25] On January 23, 2015, a third application was brought, again *in camera*, under the following style of cause:

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN CAMERA

AND IN THE MATTER OF AN APPLICATION BY STAFF SERGEANT CHRIS MULLIN OF THE NEW WESTMINSTER POLICE DEPARTMENT FOR AN ORDER RESTRICTING DISCLOSURE OF MATERIALS IN THE POSSESSION OF THE NEW WESTMINSTER POLICE DEPARTMENT PROFESSIONAL STANDARDS SECTION

AND IN THE MATTER OF OFFICE OF POLICE COMPLAINT COMMISSIONER INVESTIGATION FILE NOS. 2014-9474-01 TO 2014-9474-07 AND NEW WESTMINSTER POLICE DEPARTMENT FILE NO. DA2013-049

AND IN THE MATTER OF AN APPLICATION BY THE POLICE COMPLAINT COMMISSIONER FOR DIRECTIONS IN RESPECT OF DISCLOSURE OF MATERIALS IN THE POSSESSION OF THE NEW WESTMINSTER POLICE DEPARTMENT PROFESSIONAL STANDARDS SECTION

[Emphasis added.]

[26] The application recited the events I have described, including the making of the orders of October 31, 2013 and June 20, 2014. Under the heading "Events Post June 20, 2014", it then continued:

> 19. The PCC expected, based upon the terms of the June 20, 2014 order, that he would commence receiving a large body of source documentary investigative material, redacted pursuant to the limiting terms of that order.
>
> 20. Since June 24, 2014, the [PCC] has received limited disclosure of source documents, largely consisting of task action reports and a small number of transcribed witness statements. The [PCC] has not been provided with any ITOs, or even draft ITOs, but rather select summaries of the information contained therein.
>
> 21. The parties require clarification from this Honourable Court as to the scope of the June 20, 2014 order, in particular whether it covers the ITOs presently in possession of the NWPD.

> 22. In addition, the PCC wishes to receive the Part VI material which was disclosed to DA Jones pursuant to the October 31, 2013 order of Brown, J. [Emphasis added.]

[27] The application cited again Rule 2 of the *Criminal Rules* and the *Police Act* generally and sought the following relief:

> 1) Directions with respect to, and clarification of, the order of this court made June 20, 2014, and in particular the following:
>
> a) A direction that the [PCC] is entitled to receive from the NWPD redacted copies of any draft ITOs;
>
> b) A direction that the [PCC] is entitled to receive redacted copies of the ITOs provided to the NWPD either from VPD as part of the Project H-Scrap Iron audit or from the APD pursuant to separate requests made during the *Police Act* investigation;
>
> 2) Directions from the court with respect to the procedure to be followed on applications to unseal original ITOs which remain subject to sealing orders within the Abbotsford registry;
>
> 3) An order that the [PCC] receive, in edited form, and on appropriate terms, the intercepted communications and affidavits for the authorizations falling under P4\13 and P7\13 (New Westminster Supreme Court), referred to in the order of Brown J. of October 31, 2013.
>
> [Emphasis added.]

[28] In the course of the hearing of the application on January 30, 2015 it became evident to the Associate Chief Justice that "investigators working under the direction of Sergeant Mullin would be seeking to identify, interview, and report on the evidence of various confidential informants". (Para. 18.) Cullen A.C.J. raised the question of "whether the *Police A*ct process warranted or justified widening of the circle of privilege of those informants to any investigators, counsel, adjudicators, and others involved in the *Police Act* process". The application was adjourned to permit counsel to respond.

[29] Speaking on January 30, 2015, Mr. Tammen on behalf of the PCC told the Court at the outset that his client did "not wish to be brought into the circle of privilege, nor wish to receive any documents that might in any way tend to reveal the identity of confidential informants." He hoped to persuade the Court, he said, that the

"ITO materials" should be disclosed by the PSS investigators to the PCC in redacted form. At the same time, he said:

> I will then seek some direction from the court regarding [the] procedure to be followed in applications to unseal warrant packets.

Later he told the Court that with respect to the PSS investigators he hoped to find a way of:

> … getting to some form of quick unsealing mechanism for the actual sworn ITOs. Now, of course, at some point the investigators are going to need to compare draft to sworn copy to see if there were any material changes, that will be central … but in any event its down the road.

He ended his submission by suggesting that in making the order sought, the judge in chambers would be 'wearing his criminal hat,' paraphrasing Frankel J.A. at para. 167 of *Director of Civil Forfeiture v. Hells Angels Motorcycle Corporation* 2014 BCCA 330.

[30] The PSS investigators were represented separately below. Speaking on their behalf on February 27, 2015, Mr. McKnight left no doubt that their position was that they 'need to know' the identity of the confidential informants to "substantiate or unsubstantiate" charges against certain APD members and to "conduct informant interviews, to review source files, to conduct CPIC checks, to conduct criminal record checks." Counsel described his clients as "acting in the same role as Crown".

[31] For its part, the Crown in right of the Province took the opposite position to that taken by the PCC and the investigators. Mr. Hogg opposed the expansion of the 'circle of privilege', as did Mr. Butcher for the APD. The latter also relied on the ruling in *Bisaillon* that a provincial statute:

> … cannot constitutionally affect the secrecy rule regarding police informers' identity, either because it is in all respects a rule of criminal law and such a statute would be *ultra vires,* or because, even if such a statute were valid in certain respects, it would be inoperative in the current state of the law. [At 109]

and characterized the *Police Act* investigations as "strictly disciplinary" and not criminal in nature.

[32] Judgment was reserved until March 11, 2015.

The Chambers Judge's Reasons

[33] Cullen A.C.J. began his analysis with the proposition that as important as the PCC's role is in overseeing investigations into alleged police wrongdoing, and as important as the openness of that process is, the need to respect and maintain the police informer privilege is "of paramount or fundamental importance". (Para. 20.)

[34] The chambers judge referred to the decision of the Federal Court of Appeal in *Canada (Royal Canadian Mounted Police Public Complaints Commissioner) v. Canada (Attorney General)* 2005 FCA 213 *("RCMP*"). Its facts were somewhat similar to those of the case at bar, although it came to court by way of judicial review and did not involve a provincial police matter. The case began when a complaint was referred to the RCMP Complaints Commission pursuant to s. 45.35(3) of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 concerning the search of the complainant's property for which a warrant had been obtained. The search had disclosed no evidence of criminal activity. The complainant was told that the information used to obtain the search warrant and to formulate reasonable grounds had come from confidential sources and as such could not be made available to her. She then wrote to the Complaints Commission requesting a review. In the course of the review, the Complaints Commissioner requested the Commissioner of the RCMP (the "Commissioner") to provide the report and any other materials under the RCMP's control that was relevant to the complaint. The Commissioner provided some material but not the materials sworn in support of the search warrant. Only vetted copies of the officer's notes relating to the day of the incident were provided. No mention was made in the material of the reason why the notes had been vetted, or who had done the vetting.

[35] The Commissioner continued to take the position that the Complaints Commission was not entitled to have access to the full materials and eventually, the Complaints Commission initiated a judicial review proceeding in respect of the Commissioner's refusal. It sought an order of *mandamus* "requiring the Commissioner to comply with his statutory obligation to furnish relevant material" and a declaration to similar effect. (Para. 21.) The Complaints Commission relied in large part on the unrestricted wording of s. 45.41(2)(b) of the *Royal Canadian Mounted Police Act*, which states:

> Where a complainant refers a complaint to the Commission pursuant to subsection (1),
>
> (a) The Commission Chairman shall furnish the Commissioner with a copy of the complaint;
>
> (b) The Commissioner shall furnish to the Commission Chairman with the notice under subsection 45.36(6) or the report under section 45.4 in respect of the complaint, as the case may be, and such other materials under the control of the Force as are relevant to the complaint.

[36] The judge of first instance, Russell J. of the Federal Court, dismissed the application on the sole ground that a confidential informant had provided information to the RCMP that was subject to the informer privilege and nothing in the statute created an exception to that privilege of which the chair of the Complaints Commission could partake.

[37] The Court of Appeal agreed, noting that where Parliament has intended to foreclose the protection afforded by privileges, it has clearly said so and has indicated which privilege will continue to be available. (Para. 31.) Even applying a purposive interpretation, the Court said, s. 45.41(2)(b) could form "no valid basis for a conclusion that Parliament intended to place the [Complaints] Commission Chairperson, in the exercise of her functions and duties, above the law of privileges."

[38] The Chair of the Complaints Commission also argued that in light of her important oversight role, she should be included in the group entitled to share confidential informant information on a "need to know" basis. The respondent, the

Attorney General of Canada, on the other hand took a narrow view of the concept of "Crown" and submitted that:

> Police informer privilege … originates in the context of law enforcement and criminal prosecutions. The notion of "Crown" refers to police officers and Crown prosecutors who assume responsibilities for enforcing and administering criminal law … [At para. 41.]

[39] After reviewing some of the cases mentioned above, including *Bisaillon* and *Leipert*, the Court of Appeal stated its conclusions thus:

> To summarize, under the existing law, police informer privilege is a legal rule of public order designed to promote efficiency in enforcement and implementation of the criminal law. Essential to the achievement of that objective is the protection of the identity of the informer which can only be obtained if disclosure and circulation of his name, and information likely to reveal his name, are limited to what is necessary to enforce the criminal law. Extending the concept of "Crown" so as to include the Commission Chairperson and some of her staff would be truncating the privilege and, in the long run, jeopardizing its usefulness and eventually its existence. If the concept were extended to the appellant because of its supervisory role over the use of police powers, there would be nothing to prevent further extension to other police complaints commissions and, for that matter, even to *ad hoc* commissions of inquiry. Indeed, in *Canada (Royal Canadian Mounted Police - RCMP) v. Saskatchewan (Commission of Inquiry into the death of Leo LaChance)*, [1992] 6 W.W.R. 62, the Saskatchewan Court of Appeal had to issue an Order prohibiting a commission of inquiry set up to inquire into a fatal shooting from requiring disclosure of a police informer's identity. Quoting excerpts from the *Bisaillon* case, the Court of Appeal refused to broaden the exception to the rule governing police informer privilege. The position taken by the Saskatchewan Court of Appeal and the one that I adopt are consistent with the teachings of the Supreme Court that there should be no "weakening of a rule which should remain firm": see *Bisaillon v. Keable*, *supra*, at page 95. [At para. 48; emphasis added.]

The appeal was dismissed.

[40] Returning to the case at bar, counsel for the PCC, the VPD and the NWPD investigators sought to distinguish *RCMP* on the basis that s. 100 of the *Police Act* "gives broad power to obtain information from a municipal police department without warrant or order." (Para. 34.) Section 100 provides in material part:

> 100 (1) For the purposes of an investigation under this Part, the investigating officer is entitled to access at any reasonable time, without a warrant or any order,

> (a) the premises of a municipal police department,
>
> (b) any thing on or in the premises of a municipal police department, including, without limitation, any vehicle, equipment, device or other thing used or operated by a member or former member, and
>
> (c) any record in the custody or under the control of a municipal police department.
>
> …
>
> (2) The investigating officer may do one or more of the following for the purposes of the investigation:
>
> …
>
> (e) search for, or require a person employed by the municipal police board concerned to produce within a reasonable time, any record or thing in the person's possession or control that the investigating officer has reason to believe is relevant to the investigation, except a record that is subject to solicitor-client privilege or the disclosure of which
>
> (i) would be an offence under an Act of Parliament, or
>
> (ii) could reasonably be expected to do any of the things described in section 15 (1) of the *Freedom of Information and Protection of Privacy Act*; [Emphasis added.]

Section 15(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, also provides:

> 15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> …
>
> (d) reveal the identity of a confidential source of law enforcement information.

[41] Cullen A.C.J. was not persuaded that s. 100 extended to override the privilege. He reasoned:

> Although the Provincial Legislature could not constitutionally abrogate or limit the police informer privilege, it does not follow, in my view, that the proscription in s. 100(2)(e)(ii) and (iv) of the *Police Act* and s. 15(1)(d) of the *Freedom of Information Act* is inapplicable to a determination whether investigators under the *Police Act* are, in the context of their function and duties, brought within the circle of privilege covering informants in a criminal or quasi-criminal investigation.
>
> On the contrary, I conclude that the applicable statutory provisions represent a recognition that there is a bright line separating investigations under the

> *Police Act* pursuing administrative objectives, and the enforcement of criminal or quasi-criminal law. In other words, not only does the applicable legislation not purport to permit those performing investigative functions under the *Police Act* access to informant information, it enforces the common-law proscription against it. [At paras. 65-6; emphasis added.]

[42] Counsel for the PSS investigators conceded that the *Police Act*, being provincial legislation, "does not and could not … override informant privilege". Instead, the investigators argued that their claim to access to the privileged information was "grounded in the common-law understanding of who is part of the circle of informant privilege." (Para. 38.) On this point they relied on the observation in *Leipert* that the purpose of the privilege is "to protect citizens who assist in law enforcement and to encourage others to do the same." (My emphasis.) The investigators argued that they are directly involved in the enforcement of the law (see para. 43 of *RCMP*); that they "need to know" such information for law enforcement purposes (para. 46 of *RCMP*); and that although an investigation under the *Police Act* is "administrative in nature", its underlying purpose is to ensure effective law enforcement.

[43] Despite these and related arguments, Cullen A.C.J. ruled that adding the PSS investigators to the 'circle of privilege' was not countenanced either by the Act or at common law. With respect to the PCC's attempt to distinguish *RCMP*, he observed:

> … At common law, the issue that confronts me is similar to that which confronted the Federal Court of Appeal in the *RCMP* decision, although in that case the issue was whether the police informant privilege could be construed so as to include the chair of the Public Complaints Commission within the circle of privilege, while at bar the issue is whether those officers investigating complaints against police officers [are included], the distinction is not, in context, significant.
>
> The reasoning of the Federal Court of Appeal in the *RCMP* case did not depend upon the status of the Chairperson of the [Complaints] Commission. Rather, it depended on the nature and objective of the function implicating informant privilege. The distinction drawn by the court in the *RCMP* case was not between police officers performing an investigative role in disciplinary matters and a person appointed by the Governor in Council to oversee matters of police discipline. Rather, the court drew the distinction between "those persons who are directly involved in the enforcement of the law" - which it defined in para. 48 as the criminal law - and those involved in holding the police accountable for the exercise of the powers granted to them

> in the administrative context, no matter how important that function may be in the administration of justice.
>
> Contrary to the submissions of the investigators, the PCC, the VPD, and the discipline authority, I conclude the Court's reliance on the enforcement of the criminal law (which include quasi-criminal proceedings) as a foundation of the privilege is central rather than incidental to its conclusion. It is not, thus, *obiter dicta*.
>
> . . .
>
> It is clear, in my view, that read in context, the *RCMP* decision cannot be taken as authority that police officers who are conducting an investigation for a purpose other than the enforcement of the criminal law are brought within the circle of privilege in relation to privileged information. If the function being performed has "a purpose other than that of law enforcement in the strict sense" (e.g., criminal or quasi-criminal law) then, as laudable as the alternate function being performed might be, it cannot justify granting access to the privileged information. [At paras. 55-7, 60; emphasis added.]

[44] In the closing paragraph of his reasons, Cullen A.C.J. declined to give directions with respect to the procedure to be followed "on application to unseal original Informations To Obtain which remain subject to sealing orders with the Abbotsford registry" until it was determined either that no informant's identity is at issue or that any confidential informants whose identity could be compromised by access to the ITOs, and the Crown, had waived the privilege.

[45] In the result, he ordered that the materials comprising the criminal investigation that had led to the charges against Cst. A.B., including the intercepted private communications, affidavits and authorizations, be returned to the VPD "to be reviewed and, if and as necessary, to be redacted to prevent the disclosure of the identity of any confidential informant." As well, he ordered that "All other material or records created or obtained by the NWPD PSS investigators that might reveal the identity of an informant be sealed and held in a sealed state until further order of the Court." (My emphasis.)

[46] It is from this order that the PCC appeals.

On Appeal

[47] In this court, the PCC submits that the chambers judge made the following legal errors in judgment:

> 1. The learned Chambers Judge erred in finding that the circle of informer privilege does not include police officers investigating allegations of misconduct under the *Police Act* involving the handling and payment of informers;
> 2. The learned Chambers Judge erred by interpreting s. 100 of the *Police Act* as precluding investigating police officers from having access to informer information;
> 3. The learned Chambers Judge erred by declining to order that the PCC be entitled to receive redacted copies of ITOs, ITOs and the intercepted communications and affidavits for the authorizations falling under P4 13 and P7 13, referred to in the October 31, 2013 Order from the NWPD.

[48] In his factum the PCC seeks orders:

> (a) Setting aside the order of the Honourable Associate Chief Justice Cullen dated March 11, 2015;
>
> (b) Providing directions that,
>
> i. The materials returned to the VPD or held in a sealed state pursuant to the order of March 11, 2015 be returned to the NWPD investigators and/or unsealed; and
>
> ii. The PCC is entitled to receive from the NWPD redacted copies of any draft ITOs; and redacted copies of ITOs provided to the NWPD either from the VPD as part of the Project H-Scrap Iron audit or from the APD pursuant to separate requests made during the *Police Act* investigation;
>
> (c) Remanding the matter to Associate Chief Justice Cullen for determination of the following issues:
>
> i. The procedure to be followed on applications to unseal original ITOs which remain subject to sealing orders within the Abbotsford Registry; and
>
> ii. The PCC's application for an order that it receive, in edited form, and on appropriate terms, the intercepted communications and affidavits for the authorizations falling under P4/13 and P7/13 (New Westminster Supreme Court), referred to in the order of Brown J. of October 31, 2013; and
>
> That each party bear its own costs of this appeal.
>
> [Emphasis added.]

[49] In his reply factum, the PCC acknowledged that unsealing wiretap packets and search warrants is a "criminal process" and that accordingly, the relief stated at subparagraph (b)(i) may not be granted in this proceeding. The PCC sought in his Reply – and counsel for the other parties did not object – to amend the relief sought such that para. (b)(i) would read:

> Providing directions that,
>
> > i. The materials returned to the VPD or held in a sealed state pursuant to the order of March 11, 2015 be returned to the NWPD investigators on the terms of Justice Brown's order of October 31, 2013. [Emphasis added.]

The PCC also elected not to press for the relief sought at subparagraphs (b)(ii) and (c) and asked that they be remitted to the court below.

[50] The result of the PCC's amendments is that effectively, he seeks an order that the materials returned to the VPD or held in a "sealed state" pursuant to the order appealed from be returned to Chief Constable Jones on the terms set forth in the 2013 Order – i.e., that Chief Constable Jones and the PSS officers who are conducting investigations of Constable A.B. and/or others, and staff and legal counsel assisting them, shall be given full access to such materials. (It will be recalled that the Order was silent as to disclosure to the PCC himself.)

Appellate Jurisdiction

[51] There is, however, a preliminary challenge that must be resolved before we may address the primary substantive question. That challenge, made by the APD, is that the subject-matter of this appeal is criminal in nature and that accordingly, this court has no jurisdiction to hear it or to grant the relief sought by the appellant. This is because, as all counsel acknowledged, the *Criminal Code* does not provide for interlocutory appeals to this court: see *R. v. Sandhu* 2012 BCCA 73 at paras. 10-12; *Mills v. The Queen* [1986] 1 S.C.R. 863 at 959; *Basi* at para. 19; *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835.

[52] Counsel also seem to agree that the following passage from E.G. Ewaschuk, *Criminal Pleadings and Practice in Canada* (2nd ed., looseleaf) correctly states the law:

> An appeal is either civil or criminal in nature. The nature and character of the appeal is *not* determined by the result of the proceedings being appealed from but, rather, by the nature of the law upon which the proceedings are based. The test is whether the proceedings being appealed are criminal or civil in nature and founded on the federal criminal law power, or whether the proceedings are civil in nature and founded on provincial legislative powers. [At 23–4; emphasis added.]

This passage has been approved by this court: see *R. v. Ciancio* 2006 BCCA 311 at para. 18; *R. v. Sandhu* 2012 BCCA 73 at para. 18; *Hells Angels* at para. 144.

[53] Counsel for the PCC submits that the application below was civil (i.e., founded on Rule 8-1 of the *Civil Rules* and in the inherent jurisdiction of the Supreme Court of British Columbia) and that accordingly this appeal may be brought pursuant to s. 6(1) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77. In this sense, Mr. Tammen takes a rather literal view of the phrase "the law upon which the proceedings are based" in Ewaschuk's commentary. Mr. Tammen also emphasizes that the constitutionality of the *Police Act* has not been challenged by the respondents, and the public importance of police oversight and accountability, as recognized in cases such as *Wood v. Schaeffer, Peel (Police*), and *Florkow*.

[54] Mr. Butcher on behalf of the APD submits on the other hand that "law upon which the proceedings are based" in this case is criminal law. He emphasizes that the first application was brought in *R. v. A.B.* and that although the second and third applications purported to be brought under a separate (and civil) style of cause, they also relied on the *Criminal Rules*. Further, he contends the *Police Act* confers no authority on the PCC or PSS investigators to obtain access to wiretap affidavits or ITOs prepared in connection with search warrant applications. If it did, he argues, such provisions would be *ultra vires* the Legislature (as Mr. Tammen seemed to concede below). On the other side of the coin, the *Criminal Code* permits only certain persons to 'deal with' sealed packets in certain circumstances. In

Mr. Butcher's submission, these restrictions cannot be circumvented by "tucking an application to open a wiretap packet into an omnibus application for third-party disclosure."

[55] I agree that the form of the application brought below cannot be determinative of the characterization of the proceeding below as criminal or civil. If authority is needed, one can refer to the recent decision of this court in *Hells Angels*. In that instance, it was the Director of Civil Forfeiture who had initiated a (civil) action against various 'Hells Angels' respondents under the *Civil Forfeiture Act*, S.B.C. 2005, c. 29. They had been the subject of a criminal investigation entitled "Project Halo" and police had obtained wiretap authorizations in the course of their investigation in 2002-3. The documents relating to the authorizations were sealed in accordance with s. 187(1) of the *Code*. Criminal charges were laid, but were later stayed. The respondents then applied under three separate statutory provisions – Rule 7-1 of the *Supreme Court Civil Rules* (and in particular, Rule 7-1(18), which deals with documents in the possession of third parties); s. 187(1.3) of the *Code*, with respect to the wiretap packets; and s. 487.3(4) with respect to unsealing the ITO. (Para. 106.) The RCMP responded that it did not have possession of the affidavits but relied on s. 187(1.3) of the *Code* to seek conditions in the event the Court decided to unseal the packets. The Director and the Attorney General of British Columbia took a similar position.

[56] The chambers judge ordered the unsealing of the packets pursuant to s. 187(1.3). (The parallel in this case is to the 2013 Order in the A.B. proceeding.) The Director then applied to this court for leave to appeal the unsealing order. The respondents objected on the basis that there was no jurisdiction to entertain an interlocutory criminal appeal and that the Director could appeal only to the Supreme Court of Canada, under s. 40(1) of the *Supreme Court Act*, R.S.C., 1985, c. S-26, with leave of that court. The Supreme Court of Canada granted leave but adjourned the appeal *sine die* pending the decision of this court. (Paras. 9-10.) (The Director later discontinued the appeal to the Supreme Court.)

[57] The majority of this court held that the appeal was criminal in nature and thus quashed both the notice of appeal and the application for leave. To regard the proceedings as civil would, the majority ruled, elevate form over substance. In the analysis of Frankel J.A.:

> Contrary to the position advanced by the Director, the respondents' application was not brought "in the civil action". That would be so even if they had initiated the process by filing and serving a written application to open the packets bearing the style of cause and court file number of the civil action. To accept the Director's argument would be to elevate form over substance. An application to open a packet is an application brought in the authorization proceeding itself. While such an application may be brought for a purpose relating to a civil action and before a judge who is otherwise involved in that action, it is not a step in that action. To put it colloquially, when Davies J. was dealing with the application to open the packets he was wearing a criminal hat, not a civil one. [At para. 167; emphasis added.]

[58] In any event, the majority continued, it would not have been open to anyone acting under the *Civil Forfeiture Act* to obtain access to sealed packets for provincial purposes, given that Parliament has enacted a "comprehensive and integrated regime with respect to the interception of private communications" and the scheme includes provisions for the sealing and unsealing of packets. In these circumstances, an order granting or refusing an application to open the packet or permit access to it by others will by necessity be criminal in nature. Again in Frankel J.A.'s analysis:

> In enacting what is today Part VI of the *Criminal Code*, Parliament put in place a comprehensive and integrated regime with respect to the interception of private communications. That regime includes provisions dealing with management of the documents filed in support of an application for an authorization. It requires those documents to be sealed in a packet and kept in a place to which the public does not have access. It also provides for the opening of a packet and confers jurisdiction on certain judges to do so. As the authorization process is criminal in nature and within the exclusive jurisdiction of Parliament, I cannot accept that an order granting or refusing an application to open a packet will sometimes be criminal and sometimes be civil. [At para. 166; emphasis added.]

[59] From the foregoing, I take two propositions. First, even if the application had been brought in a civil action, that fact would not have been determinative, as doing so would elevate form over substance. Second, the *Code* creates a comprehensive regime for the sealing and unsealing of packets. Once a packet has been sealed in

connection with an authorization given under Part VI of the *Code*, only those judges specifically permitted by the *Code*, in the circumstances delineated by the *Code*, may unseal the packet, and only for the purposes implicit or expressed in the *Code*. It would not be open to a province to expand the class of persons who may unseal a packet or who may be given access to information in the packet. To accept that possibility could, as Frankel J.A. stated, result in differing laws across Canada expanding or restricting rights (including rights of appeal) with respect to the opening of packets sealed for the protection of confidential informants. This was the procedural "mish-mash" referred to by La Forest J. for the majority in *Kourtessis v. M.N.R.* [1993] 2 S.C.R. 53:

> … I am quite unable to accept the appellants' thesis that the provinces share jurisdiction with the federal Parliament to regulate procedure over matters exclusively vested in Parliament by the Constitution. This is a far cry from the principle they cite that "where no other procedure is prescribed, a litigant suing on a federal matter in a provincial court takes the procedure of that court as he finds it" (emphasis added); see *Laskin's Canadian Constitutional Law* (5th ed. 1986), vol. 1, at p. 185. There may be other cases where Parliament, because it has created a substantive right that is clearly dependent for its functioning on the rules governing general civil procedure in the province, may be assumed to have adopted necessary parts of such procedure, or to adapt the words of Laskin J.A. in *Adler v. Adler*, [1966] 1 O.R. 732 (C.A.), at p. 735, where substantive law within federal jurisdiction feeds the jurisdiction of the provincial court by giving it material upon which to operate. *Ontario (Attorney General) v. Pembina Exploration Canada Ltd*., [1989] 1 S.C.R. 206, is another recent example; there s. 22 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, expressly provided for concurrent jurisdiction. But no such assumption can be made in the present case. Here a comprehensive procedure is prescribed by the legislative body having power over the matter.
>
> The admixture of provincial civil procedure with criminal procedure could, I fear, result in an unpredictable mish-mash where, in applying federal procedural law, one would forever be looking over one's shoulder to see what procedure the provinces have adopted (and this may differ from province to province) to see if there was something there that one judge or another would like to add if he or she found the federal law inadequate. And I see no reason in principle why appeals could not be read in for other interlocutory proceedings, or indeed why other provincial rules of procedure might not be adopted … That, barring federal adoption, is in my view constitutionally unacceptable. It is certainly impractical. In dealing with procedure, and particularly criminal procedure, it is important to know what one should do next. That is why, no doubt, Parliament adopted a comprehensive procedure under the *Criminal Code*, and that is why it adopted that procedure for the enforcement of penal provisions in other statutes, including the *Income Tax Act*. [At 79-80 of *Kourtessis;* emphasis added.]

[60] The Court in *Hell's Angels* reviewed the other leading cases – *R. v. Meltzer* (1986) 29 C.C.C. (3d) 266 (B.C.C.A.); *R. v. Cass* (1985) 71 A.R. 248 (Alta. C.A.); *Michaud v. Quebec (Attorney General)* [1996] 3 S.C.R. 3; *Sandhu*; *R. v. Ciancio*; *Canadian Broadcasting Corporation v. Ontario* 2011 ONCA 624; *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835; *R. v. White* 2008 ABCA 294; *R. v. Consolidated Fastfrate Transport Inc*. (1995) 125 D.L.R. (4th) 1; and *Angel Acres Recreation and Festival Property Ltd. v. British Columbia* 2006 BCCA 285 on the 'characterization' question. The authorities in which proceedings were found to be criminal in nature arose in ongoing criminal proceedings where the rights of accused persons to a fair trial required protection – *Ciancio, Sidhu, Dagenais* – or where applicants sought to vary, renew or otherwise affect orders that had been made in criminal proceedings – *Meltzer*, *Cass*, *Michaud*. It was not surprising that the applications were found to be criminal in nature.

[61] In *CBC v. Ontario*, however, the Ontario Court of Appeal characterized as civil an application by the broadcaster "CBC" for access to a video entered as an exhibit in the bail hearing of an accused who had been acquitted at trial. (No issue of confidential informants arose.) Having obtained an order releasing the video, the CBC argued on appeal that the proceedings in the court below had been criminal in nature, in part because the effect of the order was to "to deny to the Crown and [the accused] what would be tantamount to a sealing order in respect of the video." (Para. 13.) Thus there was no right of appeal. Crown counsel went even further: she submitted that "any application for the return of, or access to, and exhibits filed in the criminal proceeding is itself a criminal proceeding no matter when, where, why or by whom that application is brought." (At para. 14.) For his part, the accused took the position that the case was simply "about property" and that CBC's application in the court below had not in any way engaged any order made in his criminal proceedings. (Para. 15.)

[62] Mr. Justice Doherty for the Court suggested at para. 17 that it will usually not be difficult to distinguish between a criminal and civil proceeding. He continued:

> An application for an order made in the course of a criminal proceeding, an application for an order directly impacting on an ongoing or pending criminal proceeding, or an application for an order rescinding or varying an order made in a criminal proceeding will all be criminal proceedings: see *Canadian Broadcasting Corp. v. The Queen*, [2011] 1 S.C.R. 65 … *Dagenais; French Estate v. Ontario (Attorney General)* (1998), 122 C.C.C. (3d) 475 (Ont. C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 139.
>
> The order under appeal does not fit into any of the categories set out above. It was not made in the course of a criminal proceeding and has no effect on any ongoing criminal proceeding. Indeed, there is no ongoing criminal proceeding. Nor does the order obtained by the CBC rescind or vary any order made in a criminal proceeding. The only order made in the criminal proceeding that could potentially be affected is the non-publication order made at the bail hearing. However, all counsel agree that the non-publication order ended with the acquittal. [At paras. 17-18; emphasis added.]

[63] After briefly referring to *Dagenais,* in which "the orders were seen as protective of the administration of criminal justice" and were therefore characterized as criminal, Doherty J.A. in *CBC* continued:

> The present case is readily distinguishable from the cases relied on by the CBC. Here, the criminal proceedings are over. [The accused's] fair trial rights are no longer at play. Nor does the order under appeal rescind or vary any order made in the criminal proceedings. In short, it has nothing to do with any criminal proceeding other than that it provides access to an exhibit tendered in a criminal proceeding.
>
> I would characterize the order sought as simply a request that the Superior Court exercise its authority over exhibits in the possession of the Ontario Court of Justice. This motion is, of course, not concerned with the existence or extent of that authority. However, the exercise of that authority is neither inherently criminal nor civil. I see no reason to characterize an application for access to an exhibit exclusively by regard to the nature of the proceedings in which the exhibit was filed when those proceedings are no longer in existence.
>
> I also cannot accept the CBC's submission that the nature of the issues raised on the application for access should dictate whether the proceeding is criminal or civil. Why should a dispute between two parties over ownership of an exhibit in the possession of the court be characterized as civil, but a dispute over CBC's access to the exhibit for its journalistic purposes be characterized as criminal? Constitutional concerns that arise on an application like that brought by the CBC can and do arise in both criminal and civil proceedings: see *Hollinger Inc. v. The Ravelston Corp.* (2008) 89 O.R. (3d) 721, (C.A.), leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 260. [At paras. 27-9; emphasis added.]

In the result, the proceedings were said to be civil and the accused's appeal was found to have been properly brought under s. 6(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The motion to quash the appeal was dismissed.

[64] The Court did not deal expressly with the Crown's argument that any application for access to an exhibit filed in a criminal proceeding would 'always and in all circumstances' be properly characterized as criminal, and it is arguable that it rejected that contention. The Court did accept, however, that while a criminal proceeding is ongoing, an order rescinding or varying an order made in the proceeding would be properly characterized as criminal. No such proceeding was still extant in *CBC* – unlike at the case at bar. The exhibit sought by the applicant was simply seen as a piece of "property" and in any event, as Doherty J. A. emphasized, the order sought did not affect any order made in the criminal proceedings, or the criminal trial rights of any accused. Furthermore, since informant privilege was not involved, no informant's safety was at issue and the public's interest in encouraging witnesses to come forward was not engaged.

[65] *CBC* may be contrasted with *Angel Acres*. It was first brought as a civil application by "Angel Acres" for an injunction aimed at the dissemination of material gathered by a law enforcement agency at the defendant's property under a search warrant. The motion was dismissed on the basis that the matter was criminal, not civil. Angel Acres then sought a writ of prohibition, but the application was dismissed. Angel Acres initiated an appeal, relying on s. 784(1) of the *Code*, which provides an appeal from a decision granting or refusing relief by way of prohibition. However, the appeal was eventually dismissed as abandoned. The application before this court was for an order reinstating it.

[66] This court dismissed the application and found that no right of appeal existed. Although the applicant had sought to "prohibit" dissemination of the information, no prerogative writ of prohibition within the meaning of s. 784(1) had been sought. (Para. 22.) Further, the "subject matter" of the application had been criminal in nature. In the words of Mr. Justice Donald:

> The present case does not fit within the narrow bounds of *Consolidated Fastfrate*. It has nothing to do with preservation of assets, preventing repeat violations, or any purpose ancillary to but separate from the criminal law. In my judgment, the matter originated as a criminal investigation and none of the process surrounding the search and seizure authorized by the warrant has lost its criminal character. The applicant styled its first motion as a civil application under the *Supreme Court Rules*, but that motion failed on the determination by Dohm A.C.J. that the subject matter was criminal in nature. Rather than appeal that disposition, the applicant brought the notice of application in question here under the *Criminal Rules, 1997*. It is too late for the applicant to assert that this is a civil proceeding. [At para. 27; emphasis added.]

He added that in any event, no extraordinary remedy was necessary, since it was open to the applicant to return to the judge who had authorized the search warrant and ask that he amend it to impose confidentiality restrictions on the police agency.

[67] Unlike *CBC*, the case at bar of course involves the privilege that protects confidential informants – an objective that will not end when Cst. A.B. and any other persons also charged, have been tried. It cannot be said that the unsealing of the packets will not "affect" sealing orders made in criminal proceedings for the protection of informants or, equally important, the informants themselves (who with the Crown are the beneficiaries of the secrecy rule). The application for disclosure to Sgt. Mullin was first made in the criminal proceeding of *R. v. A.B.* and in my opinion has, like the "matter" in *Angel Acres*, not lost its criminal character by reason of the change in the style of cause or the PCC's invocation of the *Civil Rules* and the inherent jurisdiction of the Supreme Court of British Columbia.

[68] This is not a constitutional case in which inter-jurisdictional immunity or paramountcy has been asserted. It is not necessary for us to decide whether, as the Crown submitted in *CBC*, any application for access to a sealed packet is criminal in nature "no matter when, where, why or by whom" it is brought. It is sufficient to say that the "comprehensive and integrated regime" that has evolved in the *Code* for the protection of informant secrecy (originally a matter only of common law) leaves no room for the operation of a provincial law (or of a judicial power relying on provincial

law) that would vary, reverse or affect a sealing order made in a criminal proceeding for the protection of a police informant.

[69] In the result, I conclude that although the PCC purported to frame his application as civil in nature, an application to obtain access to a packet that has been sealed in a criminal proceeding must, in the context of the law as it now stands, be treated as criminal in nature. It follows that the order made by the Associate Chief Justice on March 11, 2015 was also criminal and that no appeal to this court is available. On this basis, I would quash the appeal.

Alternative Argument

[70] Although the foregoing is sufficient to dispose of this appeal, counsel asked us to go on to decide the substantive question since, like the issue at stake in *R. v. F.(S.)* (2000) 141 C.C.C. (3d) 225 (Ont. C.A.), it is an important one that will "most certainly arise for consideration later." (At 232.) Accordingly, in the event I am wrong concerning jurisdiction, I turn to consider the PCC's argument that either by virtue of Rule 8-1 of the *Civil Rules*, the inherent jurisdiction of the Supreme Court of British Columbia, or s. 100 of the *Police Act* (which latter basis was ultimately conceded by Mr. Tammen to be foreclosed), police officers engaged in the investigation of municipal police conduct should have access to informant information or that the "circle of privilege" should be widened, or a specific exception made, to permit such access. I propose to address these arguments together given that they would all have the same effect.

[71] Mr. Tammen began his submission with the proposition that the application before Cullen A.C.J. dated January 23, 2015 had sought only directions of the Court with respect to, and clarification of, the earlier order of June 20, and directions "with respect to the procedure to be followed on applications to unseal original ITOs". (My emphasis.) In counsel's submission, Brown J. did not order the "unsealing" of any packets; rather, she ordered delivery of the contents of the VPD investigation file to Constable Jones for use (only) by members of the PSS section of the NWPD and staff or legal counsel assisting them.

[72] With respect, the PCC's argument ignores the fact that the application also sought "an order that the [Office of the PCC] receive, in edited form, and on appropriate terms, the intercepted communications and affidavits for the authorizations" referred to in the 2013 Order. Further, there is no doubt that Brown J. intended to permit the PSS investigators, their staff and legal counsel to have access to all the contents of the files and that much information was turned over to them. As Cullen A.C.J. recounted:

> On October 21, 2013, Madam Justice Brown ordered that Chief Constable Jones obtain access to the investigation materials in the hands of the Vancouver Police Department, including "a hard drive and intercepted communications and affidavits for the authorizations P4 and P7". The materials are limited to Chief Constable Jones, Sergeant Mullin, or his designated PSS investigators.
>
> The investigators also received a copy of the Vancouver Police Department investigation file, which included draft Vancouver Police Department Informations To Obtain. In addition, the investigators obtained copies and drafts of sealed Informations To Obtain from the Abbotsford Police Department obtained by the Vancouver Police Department as part of its audit in the summer of 2013. There are approximately 550 Informations To Obtain written by the Abbotsford Police Department members. [At paras. 7-8.]

[73] The order operated in a manner similar to the impugned order at issue in *Basi*, where the Court stated:

> The inevitable result of the trial judge's decision was to require the Crown to reveal to defence counsel information over which the informer 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 of privileged information to defence counsel, who were prohibited from sharing it with anyone else, her decision constituted an order of disclosure nonetheless. [At para. 30; emphasis added.]

In Mr. Tammen's phrase, the PSS investigators were "brought within the circle of privilege". I cannot agree, then, that the 2013 Order simply gave 'directions' or clarification of a civil nature.

[74] With respect to the merits of the appeal, counsel acknowledged the non-discretionary nature of confidential informant privilege, as referred to, for example, in *Basi*:

> The informer privilege has been described as "nearly absolute". As mentioned earlier, it is safeguarded by a protective veil that will be lifted by judicial order only when the innocence of the accused is demonstrably at stake. Moreover, while a court can adopt discretionary measures to protect the identity of the informer, the privilege itself is "a matter beyond the discretion of a trial judge" (*Named Person*, at para. 19). [At para. 37.]

[75] This being the case, Mr. Tammen argued in favour of what he called a "modest expansion" of the circle of privilege to PSS investigators, their staff and counsel. He again emphasized that although s. 98 of the *Police Act* contemplates that that the PCC himself is entitled to receive "all of the evidence and the records" referred to in a final investigation report (see ss. 98(6) and (7)), the PCC has said in this case that he wishes to receive only redacted information – i.e., redacted to exclude the material that could identify confidential informants. Counsel invited us to "read down" the Act to this extent.

[76] On a policy basis, counsel emphasized that since PSS investigators are police officers, they can be trusted to keep the information secret and are in no different position from ordinary officers who are routinely trusted to preserve informant confidentiality in the course of criminal investigations. Mr. Tammen challenged the Court of Appeal's reasoning in *RCMP*, in which it declined to take a broad view of "Crown" for purposes of expanding the circle of privilege. At para. 46 of *RCMP*, the Court expressed concern at the number of persons who had had access to the privileged information in that case "thereby increasing the risk of disclosure and of defeating the purpose of the privilege." Létourneau J.A. for the Court had stated:

> … If potential informers were made aware of the way information was shared in this instance, I am not sure that many of them would be keen on coming forward in the future. Furthermore, the fact that information may have improperly shared in this case cannot serve as support for the appellant's position. To add the Chairperson of the Commission and some of her staff to an already long list would be to add persons who are interested in accessing the privileged information in order "to ensure the highest possible standard of

> justice". However, as laudable as this goal may be, it cannot justify granting access to persons who are not persons who need to know such information for law enforcement purposes as required in the context of police informer privilege: see *Bisaillon*. I am persuaded that, if consulted, informers would, for safety reasons, strongly oppose the opening of an additional circuit of distribution of their names, especially where the justification for this distribution is the furtherance of a purpose other than that of law enforcement in the strict sense. [At para. 46.]

Accordingly, the Court agreed with the respondent's argument in *RCMP* that the notion of "Crown" should be "narrowly defined and refers to those persons who are directly involved in the enforcement of the law." (At para. 43.)

[77] The Supreme Court of Canada took a similarly strict view of the circumstances in which police informant privilege should be extended in *Barros*, where Binnie J. stated for the majority:

> … Once informer privilege is found to exist, no exception or balancing of interests is made except "if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence" … However, precisely because informer privilege can place a significant limitation on the activities of the defence, it is important not to extend its scope beyond what is necessary to achieve its purpose of protecting informers and encouraging individuals with knowledge of criminal activities to come forward to speak to the authorities. [At para. 28.]

[78] Mr. Tammen contended that that if the 2013 Order is restored, the confidential information would continue to be protected and will be subject to unsealing only in the event of the application of the principle of "innocence at stake". But even this statement had to be qualified: he also acknowledged the possibility that at a later stage of the *Police Act* investigation, the PCC might, even if the 2013 Order were restored, find it necessary to return to court to seek an order bringing still more persons into the circle of privilege. Where, for example, the DA under the Act proposes disciplinary or corrective measures to be taken against an officer, the officer may under s. 133(5) request a public hearing or a "review on the record" by a retired judge. Counsel conceded that a public hearing would not be possible (despite the mandatory wording of s. 137(1)) and that the retired judge carrying out the review on the record would also have to seek a court order permitting him access to

material protected by informant privilege. The circle would again have to be widened.

[79] On a more general level, counsel again emphasized the public importance of the police complaints process (which of course was also at issue in *RCMP*.) It was said this should inform our interpretation of s. 100 of the *Police Act* and our application of authorities such as *RCMP*, *Leipert*, *Named Person v. Vancouver Sun* 2007 SCC 43, and *Basi*.

[80] All of these arguments, with respect, were aimed at having this court and other courts in future instances carry out a "balancing" of competing interests – on one side, the importance of police informant confidentiality to the administration of the criminal justice system, and on the other hand, the laudable goal of improving public confidence in our police forces by instituting an open oversight process. The Supreme Court of Canada has consistently stated that such a balancing is not permitted. The Court stated in *Leipert*, for example, that:

> Informer privilege is of such importance that once found, courts are not entitled to balance the benefit enuring from the privilege against countervailing considerations, as is the case, for example, with Crown privilege … [At para. 12.]

and in *Bisaillon*:

> This procedure, designed to implement Crown privilege, is pointless in the case of secrecy regarding a police informer. In this case, the law gives the Minister, and the Court after him, no power of weighing or evaluating various aspects of the public interest which are in conflict, since it has already resolved the conflict itself. It has decided once and for all, subject to the law being changed, that information regarding police informers' identity will be, because of its content, a class of information which it is in the public interest to keep secret, and that this interest will prevail over the need to ensure the highest possible standard of justice. [At 97-8; emphasis added.]

and in *Basi*:

> The "specified public interest" at issue in this case is the protection of the identity of informers, more generally known as the "informer privilege". The informer privilege is a class privilege, subject only to the "innocence at stake" exception. It is not amenable to the sort of public interest balancing contemplated by s. 37(5) [of the *Canada Evidence Act*]. [At para. 22.]

and in *Named Persons*:

> … The informer privilege rule is mandatory (subject only to the "innocence at stake" exception). To permit trial judges wide discretion in determining whether to protect informer privilege would undermine the purposes of the rule. Part of the rationale for a mandatory informer privilege rule is that it encourages would-be informers to come forward and report on crimes, safe in the knowledge that their identity will be protected. A rule that gave trial judges the power to decide on an *ad hoc* basis whether to protect informer privilege would create a significant disincentive for would-be informers to come forward, thereby eviscerating the usefulness of informer privilege and dealing a great blow to police investigations. [At para. 39.]

Consistent with this, criminal courts have on occasion even been compelled to let serious offenders go free (see e.g., *R. v. X.Y.* 2011 ONCA 259) – so important and inflexible is the protection of informant privilege. (See also *R. v. Omar* 2007 ONCA 117 at para. 38; *A. v. Drapeau* 2012 NBCA 73 at paras. 10-16.)

[81] We are, of course, bound by the rulings of the Supreme Court of Canada. It is thus not open to us, in my opinion, to "create" a new exception to the rule or to circumvent it by 'expanding' the circle of privilege for the PCC or for PSS investigators under the *Police Act*. If we were to extend the circle of privilege beyond those police officers who are directly involved in enforcing the criminal law to include officers carrying out "administrative" or "disciplinary" duties under the *Police Act*, we would in my view contravene the letter and spirit of the Supreme Court's admonition that the protection of confidential informants is an overarching objective to be protected by a "bright line". The comments of the Court in *RCMP* are also apposite:

> … the accountability mechanism, as necessary and useful as it is and should be, is peripheral to the law enforcement process of which police informer privilege partakes. It is not, in my respectful view, a sufficient justification to enlarge the scope and definition of "Crown" so as to increase the number of persons sharing the privileged information. I am supported in my belief by the following conclusion of the Supreme Court of Canada in *Bisaillon v. Keable*, supra, where, at pages 97-98, the Court, in comparing police informer privilege with Crown privileges based on Wigmore's four-part test, wrote:
>
> > This procedure, designed to implement Crown privilege, is pointless in the case of secrecy regarding a police informer. In this case, the law gives the Minister, and the Court after him, no power of weighing or evaluating various aspects of the public interest which are in conflict, since it has already resolved the conflict itself. It has decided once and for all, subject to the law being changed, that information

> regarding police informers' identity will be, because of its content, a class of information which it is in the public interest to keep secret, and that this interest will prevail over the need to ensure the highest possible standard of justice.
>
> Accordingly, the common law has made secrecy regarding police informers subject to a special system with its own rules, which differ from those applicable to Crown privilege. [At para. 44.]

[82] For the forgoing reasons, if this appeal had been properly brought, I would have dismissed it.

[83] I do not find it necessary to deal with the question of the standing of the APD as a respondent or with the standing of the PCC to have brought the application of January 23, 2015 in the court below.

[84] With thanks to all counsel for their able arguments, I would quash the appeal.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Mr. Justice Savage"