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Canada (Attorney General) v. Sander (B.C.C.A.)

Between
The Attorney General of Canada, James D. Bissel, Q.C. and Eugene Kucher, Respondents (Petitioners), and Stephen Sander, Appellant (Respondent)

[1994] B.C.J. No. 998

114 D.L.R. (4th) 455

[1994] 8 W.W.R. 512

44 B.C.A.C. 200

91 B.C.L.R. (2d) 145

90 C.C.C. (3d) 41

22 C.R.R. (2d) 348

[1996] 1 C.T.C. 74

23 W.C.B. (2d) 551

Vancouver Registry: CA016595 & CA016134

British Columbia Court of Appeal
Vancouver, British Columbia

Macfarlane, Wood and Hollinrake JJ.A.

Heard: June 8, 1993.
Judgment: filed May 4, 1994.

(60 pp.)

Practice -- Discovery -- What documents must be produced -- Privilege documents, attorney-client communications.

This appeal challenged the validity of sections 37(1) and 37(3) of the Canada Evidence Act and an order sustaining the Crown's objection to the disclosure of certain documents which related to the legal advice received by Revenue Canada investigators from the Department of Justice or other legal advisors regarding the retention of material seized to which the appellant claimed to be entitled under the pre-trial disclosure principles established in Stinchcombe. The appellant was charged with offences under the Income Tax Act following the re-seizure of documents by the investigators.

HELD: The appeal was allowed and the documents were ordered to be disclosed. The words "public interest in disclosure" in section 37(2) were construed as establishing a standard requiring the court, in a criminal case, to weigh the public interest specified as a justification for non-disclosure against the accused's constitutional right to make full answer and defence. Furthermore, a common-law claim of solicitor-client privilege could not be advanced as "a special public interest" on which a claim for public interest immunity could be maintained under section 37.

Statutes, Regulations and Rules Cited:

Canada Evidence Act, R.S.C. 1985, c. C-5, ss. 37(1), 37(2), 38, 39.
Canadian Charter of Rights and Freedoms, 1982, ss. 7, 8, 11(d), 24(1).
Criminal Code, s. 487.
Income Tax Act, S.C. 1970-71-72, c. 63, s. 231.3.

Counsel for the Appellant: T.R. Berger, Q.C. and D. Martin.
Counsel for the Respondent: J.R. Haig, Q.C. and D. Frankel, Q.C.

Reasons for judgment delivered by Wood J.A., allowing the appeal ([para1] to [para80]). Separate and concurring reasons in the result by Macfarlane and Hollinrake JJ.A. ([para81] to [para114]).

I. WOOD J.A.:-- This appeal challenges the constitutional validity of sub-sections 37(1) and (3) of the Canada Evidence Act, R.S.C. 1985, c. C-5, as well as the ruling made by the judge below upholding the Crown's objection to the disclosure of certain material to which the appellant claims he is entitled under the pre-trial disclosure principles established in R. v. Stinchcombe, [1991] 3 S.C.R. 326.

II. The appellant has been charged with several offences under the Income Tax Act, S.C. 1970-71-72, c. 63.

III. The charges arose out of an investigation which began in 1988. In June 1990, Revenue Canada investigators obtained and executed a total of seven warrants, issued under s.

231.3 of the Income Tax Act, authorizing the search of various locations including the appellant's personal residence and the business and accounting offices of his companies. These searches produced a large number of documents which were seized and ordered detained.

IV. In November 1990, the Federal Court of Appeal declared s. 231.3 of the Income Tax Act to be inconsistent with sections 7 and 8 of the Charter of Rights and Freedoms and consequentially of no force and effect: Baron v. A.G. Canada, [1991] 1 C.T.C. 125, aff'd Baron v. M.N.R., [1993] 1 S.C.R. 416, [1993] S.C.J. No. 6 (21 January 1993), No. 22298 (S.C.C.). As a consequence of its decision, the court ordered that the documents seized in the Baron case be returned forthwith. In supplementary reasons issued in February 1991, the court ruled that its judgment in R. v. Lagiorgia (1987), 42 D.L.R. (4th) 764, would be followed, and that all documents seized plus any copies which had been made were to be returned forthwith. In Lagiorgia that court had rejected obiter in Re Dobney Foundry Ltd. and The Queen (1986), 29 C.C.C. (3d) 285 (B.C.C.A.), which suggested that the Crown was entitled to retain illegally seized material for some period of time in order to facilitate its re-seizure under a valid warrant.

V. Notwithstanding the rulings in Baron and the demands made by the appellant's counsel, the documents seized in this case were not returned, and on 21 March 1991, some five weeks after the supplementary reasons in Baron, Revenue Canada investigators obtained a warrant under s. 487 of the Criminal Code which purported to authorize the re-seizure of the documents.

VI. The present charges were subsequently laid against the appellant. The Crown elected to proceed by way of indictment. Upon his arraignment the appellant elected to be tried by a judge without a jury in the Provincial Court.

VII. In March 1992 the appellant's counsel made a so-called "Stinchcombe" demand for disclosure of the prosecution's case. All demands for disclosure were met except those relating to particulars of the legal advice received by the Revenue Canada investigators from the Department of Justice or other legal advisors, with respect to the retention of the materials seized in this case under the original warrants and to the re-seizure of those materials under the subsequent Criminal Code search warrant.

VIII. In the appellant's application to compel disclosure before the trial judge in Provincial Court on 22 April 1992, the particulars requested were described in this way:

> Relevant notes, memoranda, reports, however described, documenting the deliberations of Revenue Canada officials with members of the Department of Justice, and or others, respecting whether to retain books and records seized pursuant to the warrants Exhibits 2 to 8 to the affidavit of Erin Berger, in light of the Federal Court of Appeal decision in Baron v. Canada [1991] 1 C.T.C. 125, and whether and how to purport to reseize the said records.

IX. The trial judge assumed, without deciding, that the material so described was subject to a common law claim of solicitor-client privilege, but he nonetheless ordered all of it disclosed, holding that the appellant's right to make full answer and defence included the right to explore whether not just the detention by the Crown and its agents, the Department of -- the investigators for the Income Tax Department subsequent to the 28th of November, 1990, was unconstitutional, but the considerations that the investigators brought to that decision and the advice they received, if any, from the Department of Justice as to what the legality of the procedure was and whether they abided by that advice or whether the advice itself was in conformity with the law, and if it were whether the investigators complied with the advice and what considerations they gave to the decision of the Federal Court of Appeal and to the rights of Mr. Sander to have his property returned.

X. In reaching his decision, the trial judge relied on an earlier decision of Oppal J. in R. v. Gray, [1992] B.C.J. No. 1363 (18 February 1992), Vancouver CC910548 (B.C.S.C.), a drug case in which the accused sought disclosure of the legal advice given by Crown counsel to investigating members of the Royal Canadian Mounted Police who were about to engage in a "reverse sting operation" by posing as sellers of illicit narcotics. The Crown's claim of solicitor-client privilege in that case was rejected by Oppal J., who concluded that the privilege must yield to the right of the accused to make full answer and defence.

XI. The Crown's response to the ruling of the trial judge in this case, as it was in the Gray case, was to launch the present proceedings by way of a petition in the Supreme Court to which was attached the s. 37(1) certificate of James D. Bissell Q.C., the Director of the Vancouver Regional Office of the Department of Justice, objecting to the disclosure of the material sought on the following specified grounds of public interest:

(a) Disclosure of information given by employees of the Department of National Revenue to obtain legal advice would be extremely injurious to the relationship between such employees and legal counsel in the Department of Justice: employees of the Department of National Revenue will be reluctant to consult legal counsel in the Department of Justice, and will not be able to have full and frank discussions with them;

(b) It is not in the public interest that the Crown be obliged to disclose materials in the nature of the above described communications as no issue has yet arisen in the proceedings to which such information could be relevant;

(c) The information sought to be disclosed is privileged from production under one or more of the following principles:

    (i) legal professional privilege,
    (ii) Crown privilege,
    (iii) solicitor-client privilege.

(d) Disclosure of legal advice given to employees of the Department of National Revenue by Crown counsel will impair the administration of justice. The failure to honour the privilege that pertains to this relationship will mean that the Minister of Justice and her agents will, unlike other solicitors or counsel, become compellable witnesses in cases involving prosecutions under the Income Tax Act and will be required to disclose the advice they give. The effect will be that when employees of Department of National Revenue seek advice on the legality of a search warrant or other investigative technique, legal counsel in the Department of Justice who give that advice would be required to testify on the very issue of lawfulness which is for the Court to decide.

(e) It is in the public interest that employees of the Department of National Revenue be able to divulge information in confidence and receive legal advice in confidence in connection with their enforcement of the Income Tax Act. Compliance with the Income Tax Act is based largely upon trust and tax evasion can be accomplished through a variety of shams, false bookkeeping, and other fictional devices. The public of Canada is entitled to protection from such evasion and to have employees of the Department of National Revenue equipped with legal advice to enable them to investigate tax evasion without their questions to and advice given by legal counsel of the Department of Justice being disclosed publicly. Not only is the public protected by legal advice which makes such law enforcement more effective, it is also protected by having legal advice given to employees of the Department of National Revenue to help avoid violations of Charter rights.

(f) It is contrary to the public interest in the administration of justice to have the nature of the advice exposed to public view, as this will have the effect of providing tax-evaders with guidance on methods to conduct their affairs in ways which will avoid detection and prosecution.

XII. The petition was heard by the judge below in two stages of argument on different dates. At the first hearing he dealt with the merits of the objection. At the second he considered the constitutional issues.

XIII. Following the first hearing, the judge below delivered reasons upholding the objection to disclosure: Re A.G. Canada and Sander (1992), 96 D.L.R. (4th) 85. It would appear that, like the trial judge, he assumed the material in question was subject to solicitor-client privilege. He concluded that the issue of privilege was the only ground which justified the non-disclosure order sought. He then reviewed the material in question, as he was entitled to do under s. 37(2) of the Income Tax Act, and noted:

I am not persuaded that advice given by the Department of Justice to the

> Department of Revenue with respect to either the retention of items seized under the impugned provisions of the Income Tax Act or the availability of reseizure under the provisions of the Criminal Code raises the spectre of unlawfulness.

XIV. The judge below questioned whether investigative moves dictated by decisions of the courts should attract critical scrutiny unless the questioned action is found to be a tactic aimed solely at circumventing a clear judicial direction or declaration. He also questioned whether the defendant needed the material to determine the appropriateness of Revenue Canada's actions, opining that effective cross-examination of the investigators would accomplish the same result. He then went on to conclude that it would not be in the public interest to require the Crown to disclose particulars of or documents pertaining to the legal advice given by the Department of Justice to the Department of Revenue. The following passages from p. 94 of the reported judgment set out the substance of his reasons for reaching that conclusion:

> However, the question to be answered is whether there is a reasonable possibility that the withholding of the information listed in the demand for disclosure will impair Mr. Sander's right to make full answer and defence. In other words, does the common law principle of privilege constitute a reasonable limit on Mr. Sander's right to make full answer and defence?
>
> Counsel for the petitioners submitted that the privilege which attaches to communications between solicitors and clients is a fundamental substantive right to be interfered with in only the most compelling of cases: Descoteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385, [1982] 1 S.C.R. 860. Ordering access to legal advice which an accuser has received can only be justified if it can be said that without such revelation an accused citizen will be seriously handicapped in the advancement of his defence.
>
> I have already suggested that cross-examination of Revenue Canada officials will determine the appropriateness of the action taken - a suggestion reflecting the receipt of advice in what counsel for the Crown calls "the most routine and ordinary context". Officials of Revenue Canada must answer for their decision to retain and then reseize the mentioned business records, and in doing so I am satisfied that a determination as to presence or absence of good faith can be made without establishing the exact nature of the advice they either followed or rejected.

Although I concede that the perceived complicity of Department of Justice lawyers in the decision to retain and reseize Stephen Sander's business records might, if proven, assist in establishing a Charter breach (absence of good faith), I make two observations.

First, I am mindful of the fact that Stephen Sander's trial is being conducted by a very experienced trial judge who can be expected to respond incisively if counsel manages to ferret out a Charter breach in what will likely be penetrating cross-examination of Revenue Canada investigators. In my view, communications with Revenue Canada's legal advisors are not critical to that exercise.

Secondly, and more importantly, the provisions of legal advice to departments of government and their officials is one of the most important functions of the Attorneys-General of Canada and the provinces. Embellishment of that statement is hardly necessary.

Obviously, the significance of the advisory role is such that before the privileged environment in which advice is given can be successfully assailed, the circumstances giving rise to the request for disclosure must be compelling. Such circumstances are not to be found in the present case.

XV. The constitutional challenge to s. 37(3) of the Canada Evidence Act was also rejected by the judge below: A.G. Canada v. Sander (1992), 76 B.C.L.R. (2d) 53. When that matter came on for hearing, the appellant argued the following:

1. The provision deprives a provincial court of criminal jurisdiction of the power to make effective disclosure and evidentiary rulings in a criminal trial thus violating the respondent's right to be tried according to law by an independent and impartial tribunal.
2. The circumstances under which the provisions of the Canada Evidence Act s. 37 may be invoked are unconstrained by limiting standards, rendering the legislation susceptible to prosecutorial abuse, thus violating the Respondent's right to a fair trial.
3. The provision, derogating as it does from the constitutional jurisdiction of a provincial court of criminal jurisdiction, violates the Respondent's right to equality before the law, a fundamental principle of justice.

XVI. These constitutional violations were said to flow from the fact that s. 37(3) of the Canada Evidence Act, itself an non-constitutional statute, has the effect of depriving the Provincial Court of its constitutionally entrenched jurisdiction to grant Charter relief to the appellant by giving the Crown the discretion to require that any public

interest immunity issue be decided by a court other than the trial court in a process which both impairs the ability of the trial judge to adjudicate the claim for Charter relief and necessarily causes a delay of the trial itself.

XVII. The judge below was not persuaded that the effect of s. 37(3) was to interfere with the jurisdiction of the trial court to grant Charter remedies in the course of the appellant's trial. Nor was he persuaded that the procedure which the section calls for when the public interest immunity question arises in the Provincial Court causes any undue delay. In dismissing the argument that s. 37(3) deprived the appellant of a fair trial, the judge below said this, at pp. 59-60 of the report:

> ... [T]he question to be answered here is whether the means Parliament chose to have public interest issues determined deprives Mr. Sander of a fair trial. I reluctantly conclude that it does not.
>
> Because they conduct trials of statutory offences on a daily basis, provincially appointed judges are in an obvious position to readily weigh and determine public interest issues. However, that does not mean that requiring an independent examination of public interest issues necessarily leads to unfairness.
>
> It may be trite to suggest that restricting the domain of a court of comprehensive criminal jurisdiction is, in terms of affecting the free flow of proceedings, problematic. Citizens have the right to expect that their trials will proceed without unnecessary interruption, at the first reasonable opportunity.
>
> Having said that, I must nevertheless observe that although counsel did not cite any jurisdictional parallels, I can think of two - the interception of private communications, and applications concerning the proceeds of crime. In those two areas, although superior court access or review often results in interruption of the trial process, issues to be examined invariably involve the rights of affected parties other than the accused. Independent review can generally be defended on that basis.
>
> In balance, it seems to me that forum choice, where a s. 37 objection to disclosure is made, can also be justified with respect to the scope of the review necessary to examine government conduct in proceeding such as this Income Tax Act prosecution. In any event, by opting for an independent superior court examination of public interest issues, I am unable to say that Parliament has thus

affected Mr. Sander's right to "a fair and public hearing by an independent and impartial tribunal" (s. 11(d), Canadian Charter of Rights and Freedoms).

XVIII Before us the appellant advanced two grounds of appeal relating to the constitutional issue, and a total of six grounds relating to the merits of the Crown's objection to disclosure of the material in question. I set the grounds out as they appear in the appellant's factum:

A. Constitutionality of the Canada Evidence Act, s. 37

1. Is Section 37(1) of the Canada Evidence Act of no force and effect for impermissible vagueness, contrary to the Charter of Rights and Freedoms, s. 7?
2. Is the Canada Evidence Act, R.S.C., E-10, s. 37(3) of no force and effect, as being ultra vires the Parliament of Canada to the extent that the said provision purports to derogate from the power of a provincial court of criminal jurisdiction exercising its jurisdiction as a "court of competent jurisdiction" within the meaning of the Canadian Charter of Rights and Freedoms, s. 24(1)?

B. Solicitor Client Privilege and Charter s. 7 and 11(d)

3. Does blanket solicitor-client privilege attach to communications between government lawyers in government departments, all of whom are state agents for Charter purposes?
4. Did the Learned Chambers Judge err in placing undue emphasis upon the importance of the generalized solicitor-client privilege claim?
5. Did the Learned Chambers Judge err in defining the "public interest in disclosure" within the meaning of the Canada Evidence Act, s. 37?
6. Did the Learned Chambers Judge err in finding that evidence material to unlawful government conduct is capable of constituting a "specified public interest" within the meaning of the Canada Evidence Act, s. 37?
7. Did the Learned Chambers Judge err in finding that the requested disclosure was not material to the accused's defence and in limiting the circumstances under which judicial review of investigative procedures is appropriate?
8. Did the Learned Chambers Judge err in finding that cross-examination was an appropriate and effective substitute for disclosure?

IS SECTION 37(3) OF THE CANADA EVIDENCE ACT OF NO FORCE AND EFFECT FOR IMPERMISSIBLE VAGUENESS, CONTRARY TO THE CHARTER OF RIGHTS AND

FREEDOMS, SECTION 7?

XIX. The relevant provisions of s. 37 of the Canada Evidence Act are as follows:

> 37. (1) A Minister of the Crown in right of Canada or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.
>
> (2) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a superior court, that court may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.
>
> (3) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a court, person or body other than a superior court, the objection may be determined, on application, in accordance with subsection (2) by
>
> > (a) the Federal Court - Trial Division, in the case of a person or body vested with power to compel production by or pursuant to an Act of Parliament if the person or body is not a court established under a law of a province; or
> >
> > (b) the trial division or trial court of the superior court of the province within which the court, person or body exercises it jurisdiction, in any other case.

XX. The appellant argues that use of the standard "public interest" as the justification for non-disclosure of information held by government, violates the constitutional standards of precision required by s. 7 of the Charter. In support of this argument, counsel relied upon the decisions of the Supreme Court of Canada in R. v. Nova Scotia Pharmaceutical, [1992] 2 S.C.R. 606, R. v. Zundel, [1992] 2 S.C.R. 731, and R. v. Morales, [1992] 3 S.C.R. 711.

XXI. The Nova Scotia Pharmaceutical case established the doctrine of vagueness as a principle of fundamental justice. The following passage, found at pp. 639-40 of the report, captures the essence of those characteristics which render a law unconstitutionally vague:

> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary.

XXII. Applying these standards to the provision in issue here, it is important to note that s. 37(1) does not provide for an objection to disclosure based simply on grounds of "public interest." It requires that the public interest invoked against disclosure be "specified." The requirement to specify the ground(s) upon which disclosure is resisted limits the "discretion" of the Crown and gives "fair notice to the citizen," in the sense that both the court and the party seeking disclosure will be aware of the precise basis upon which the Crown alleges disclosure would not be in the public interest. There is then an "adequate basis for legal debate" characterized by reasoned analysis and the application of legal criteria, as the court weighs the public interest in disclosure against the importance of the justification for non-disclosure which has been specified.

XXIII. The appellant argues, however, that even though the public interest must be "specified," the test still authorizes a "standardless" sweep "dependent on the idiosyncratic view of the judge." But this argument overlooks the fact, which will be discussed in more detail later in these reasons, that for the purposes of those proceedings to which the federal law of evidence applies, ss. 37, 38, and 39 of the Canada Evidence Act, which in 1982 replaced s. 41 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, have codified the common law of what used to be called Crown privilege but is today more commonly referred to as "public interest immunity." As such, the scope of the phrase "specified public interest" must be construed as being limited to those public interest grounds which were capable of supporting a claim for public interest immunity under the common law. Thus, the expression establishes a standard which is governed by a considerable body of precedent capable of being applied by judges with no more than the usual amount of idiosyncrasy.

XXIV. I would not give effect to this ground of appeal.

XXV. During the course of argument counsel for the appellant advanced the alternative submission that by requiring the court to weigh the specified public interest against "the public interest in disclosure," as opposed to the accused's interest in or right to disclosure, s. 37(2) sets a constitutionally insufficient test for determining whether government information ought to be disclosed.

XXVI. It must be recognized that s. 37, and its companion provisions found in ss. 38 and 39, are intended to govern in all proceedings to which the Canada Evidence Act applies, whether those proceedings be criminal, administrative or civil in nature. In those circumstances it would have been difficult, if not impossible, to draft the sections in

terms which contain the language essential to the discrete considerations applicable to each category of proceeding. Thus, in the case of each particular form of proceeding, it is necessary to construe the language used in a manner which is consistent both with the ordinary meaning of the words used and with the overall legislative purpose which the provisions were intended to serve.

XXVII. In the context of an accused seeking disclosure in a criminal prosecution, the reference to "the public interest in disclosure" in s. 37(2), if it is to be constitutionally sufficient, must establish as a standard the right of that accused to disclosure sufficient to enable him or her to make full answer and defence at trial. In other words, it must establish a standard consistent with the general principles set out in the Stinchcombe case.

XXVIII. In the context of a criminal prosecution, the "public interest in disclosure" is necessarily rooted in this nation's constitutional commitment to the principles of fundamental justice found in the Charter, which include the right of an accused to make full answer and defence. The public clearly has a stake in the preservation of a fair trial process governed by the principles of fundamental justice, and the public interest is thus served when the constitutional values which ensure the continuance of such a process are maintained. In my view, it neither strains the language used, nor frustrates the legislative purpose of the section, to construe the words "public interest in disclosure" in s. 37(2) as establishing a standard which requires the court, in a criminal case, to weigh the public interest specified by the government as a justification for non-disclosure against the accused's constitutional right to make full answer and defence.

XXIX. It follows that I would not give effect to this alternative ground of appeal.

IS THE CANADA EVIDENCE ACT, R.S.C., E-10, SECTION 37(3) OF NO FORCE AND EFFECT AS BEING ULTRA VIRES THE PARLIAMENT OF CANADA TO THE EXTENT THAT THE SAID PROVISIONS PURPORT TO DEROGATE FROM THE POWER OF A PROVINCIAL COURT OF CRIMINAL JURISDICTION EXERCISING ITS JURISDICTION AS A "COURT OF COMPETENT JURISDICTION" WITHIN THE MEANING OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, SECTION 24(1)?

XXX. This issue, as stated in the appellant's factum, raises potentially serious questions about the constitutional validity of a mere statute (the Canada Evidence Act) which purports to deny the Provincial Court, as a trial court, access to the facts necessary to the exercise of its constitutional jurisdiction under the Charter. However, as it is developed in the factum, and as it was argued before us, this ground of appeal has a very narrow focus. Because the implications of the broader question were not fully argued before us, and because I have in any event reached the conclusion that the appeal should be allowed for other reasons related to the nature of the disclosure objection raised by the Crown, I propose to confine my decision on this issue, and the reasons therefor, to the narrow point actually raised in argument.

XXXI. That point was that the effect of the Crown's successful objection to disclosure under s. 37 of the Canada Evidence Act was to render ineffective the relief ordered by the trial judge under s. 24(1) of the Charter when, on 22 April 1992, he ordered the Crown to produce the material in question in response to an application by appellant's counsel for an order compelling its disclosure.

XXXII. The problem with this argument is that the order of the trial judge was not made under s. 24(1) of the Charter. Neither the Notice of Motion filed on 22 April 1992 seeking an order "requiring the production to the defence" of the material in question nor the affidavit filed in support of that motion make any reference to the Charter. A trial judge, exercising the court's jurisdiction to control its process and to make such pre-trial orders as are necessary to ensure the proper conduct of the trial itself, is not granting relief under s. 24(1) of the Charter every time he or she makes an order resolving a disclosure dispute between Crown and defence. The fact that the accused has a constitutional right to make full answer and defence does not convert all contested disclosure motions into applications for Charter relief. If it were otherwise, every time the Crown took an objection to disclosure based on lack of relevance the result would be a full-blown constitutional inquiry.

XXXIII. There was no finding by the trial judge in this case that the Crown had breached the appellant's s. 7 right not to be deprived of his liberty except in accordance with the principles of fundamental justice. That in itself is a prerequisite to the granting of relief under s. 24(1). Continued refusal by the Crown to make the disclosure ordered, whether based on a judicially approved certificate of objection under s. 37 of the Canada Evidence Act or otherwise, would violate the accused's rights under s. 7 of the Charter if it adversely affected his ability to make full answer and defence. At that point the jurisdiction of the trial judge to order a remedy under s. 24(1) would arise. This case was a long way from reaching that point when the Crown initiated the proceedings leading to this appeal.

XXXIV. Accordingly, I would not give effect to this ground of appeal.

DOES BLANKET SOLICITOR-CLIENT PRIVILEGE ATTACH TO COMMUNICATIONS BETWEEN GOVERNMENT LAWYERS IN GOVERNMENT DEPARTMENTS, ALL OF WHOM ARE STATE AGENTS FOR CHARTER PURPOSES?

DID THE LEARNED CHAMBERS JUDGE ERR IN PLACING UNDUE EMPHASIS UPON THE IMPORTANCE OF THE GENERALIZED SOLICITOR-CLIENT CLAIM?

DID THE LEARNED CHAMBERS JUDGE ERR IN DEFINING THE "PUBLIC INTEREST IN DISCLOSURE" WITHIN THE MEANING OF THE CANADA EVIDENCE ACT?

DID THE LEARNED CHAMBERS JUDGE ERR IN FINDING THAT EVIDENCE MATERIAL TO UNLAWFUL GOVERNMENT CONDUCT IS CAPABLE OF CONSTITUTING A "SPECIFIED PUBLIC INTEREST" WITHIN THE MEANING OF THE CANADA EVIDENCE

ACT, SECTION 37?

DID THE LEARNED CHAMBERS JUDGE ERR IN FINDING THAT THE REQUESTED DISCLOSURE WAS NOT MATERIAL TO THE ACCUSED'S DEFENCE AND IN LIMITING THE CIRCUMSTANCES UNDER WHICH JUDICIAL REVIEW OF INVESTIGATIVE PROCEDURES IS APPROPRIATE?

DID THE LEARNED CHAMBERS JUDGE ERR IN FINDING THAT CROSS-EXAMINATION WAS AN APPROPRIATE AND EFFECTIVE SUBSTITUTE FOR DISCLOSURE?

> XXXVI. I have grouped all of these grounds of appeal together because I do not find it necessary to deal with them. In my view, the appeal must be allowed and the order made by the judge below under s. 37 of the Canada Evidence Act set aside for reasons which are quite distinct from and unrelated to any of the grounds originally argued before us.
>
> XXXVI. From reading the reasons given by the trial judge on 22 April 1992, it is clear that the Crown's original objection to disclosure was based on a common law claim of solicitor-client privilege. The trial judge rejected that claim. Whether he was right or wrong in that regard is not now an open question, for as was pointed out by this court in Re Regina and Gray (1993), 79 C.C.C. (3d) 332, there can be no interlocutory appeal from his ruling.

XXXVII. Notwithstanding the interlocutory immutability of the trial judge's ruling, however, the certificate of James D. Bissell Q.C. specified solicitor-client privilege as one of the public interest grounds upon which the Crown objected to disclosure of the information in question.

XXXVIII. Furthermore, it is apparent from the reasons of the judge below that he treated the s. 37 application as a review of the trial judge's ruling. He first concluded that a claim of solicitor-client privilege was the only basis upon which the Crown's petition under s. 37 could succeed:

> In my view, of the listed public interest grounds, only the issue of privilege justifies inhibiting the full disclosure now afforded to accused persons through reasonable application of s. 7 of the Charter. That is the only issue upon which I propose to concentrate in these reasons.
>
> With respect to the other listed concerns, it seems highly unlikely that revelation of the information sought in the tax evasion trial of Stephen Sander will visit upon Revenue Canada or any other department or agency of the Government of Canada the ominous consequences predicted in the Bissell certificate. (D.L.R. p. 89-90)

He then went on to question the trial judge's reasons for refusing to give effect to the Crown's

objection to disclosure based upon that claim:

> I have quoted at some length from the decision in Gray because in the present case, Judge Cronin indicated that the disclosure application would have presented him with greater difficulty had it not been for the Gray decision, emphasizing that "the principle is on all fours with the situation that was before Mr. Justice Oppal".
>
> In stressing the right of Mr. Sander to make full answer and defence Judge Cronin expressed concern for:
>
> 1. Mr. Sander's right to explore whether continued detention (of seized materials) was constitutional;
> 2. Considerations which the investigators brought to their decision to detain;
> 3. Advice investigators received from the Department of Justice, and whether they followed it;
> 4. Whether the advice was in conformity with the law.
>
> With respect, the issues to be considered in addressing the above concerns hardly parallel those facing Mr. Justice Oppal when he ordered disclosure in the face of the plea for preserving privilege in Gray. (D.L.R. p. 91)

Finally, in the passages from his reasons which I have set out at pp. 8-9 herein, it is apparent that he disagreed with the trial judge's conclusion that solicitor-client privilege must yield in this case to the right of the accused to make full answer and defence.

XXXIX. In the result, the Crown successfully invoked s. 37 of the Canada Evidence Act as a means of obtaining a review or a de facto interlocutory appeal from the order of the trial judge rejecting the common law claim of solicitor-client privilege.

XL. Following the conclusion of oral argument on the appeal, and after considering the foregoing, the court addressed a memorandum to counsel in which three questions were posed for their consideration:

> 1. Does s. 37 of the Canada Evidence Act create a statutory claim of solicitor-client privilege, distinct from the common law privilege and exclusive to government, or is it (together with ss. 38 and 39) limited to a codification of the common law of Crown privilege?
> 2. Does s. 37 of the Canada Evidence Act give the courts described therein the jurisdiction to entertain an interlocutory appeal from a ruling of a

Provincial Court trial judge on a common law claim of solicitor-client privilege?

3. If the answer to (2) is "No", what jurisdiction did the judge who heard the s. 37 Petition in this case have to give effect to the government's claim of solicitor-client privilege in paragraph 9(c)(iii) of the certificate of James D. Bissell Q.C.?

XLI. It is to those questions that I now turn.

XLII. With respect to the 2nd and 3rd questions, of course, as previously noted, this court's decision in Re Regina and Gray is conclusive. There the Crown appealed from the dismissal by Oppal J. of a s. 37 petition which had been brought in response to his earlier ruling that the Crown's claim of solicitor-client privilege, with respect to communications passing between Crown counsel and police officers, must yield to the right of the accused to make full answer and defence. In referring to the earlier proceedings, Taylor J.A. for the court noted:

> Counsel for the Crown at first took the position below that the communications concerned ought to be excluded under the ordinary common law rule of solicitor-client privilege. The trial judge rejected that contention and there can be no interlocutory appeal from that ruling. (pp. 334-35)

XLIII. I would only add that no interlocutory appeal can lie from such a decision in the absence of specific statutory authority for such an appeal, and none exists either in the Criminal Code or, more particularly, in s. 37 of the Canada Evidence Act.

XLIV. With respect to the first question, the issue which must be decided is whether, when properly construed, the words "a specified public interest" in s. 37 of the Canada Evidence Act can include a claim of solicitor-client privilege over that class of communications passing between servants of the state qua clients and servants of the state qua legal advisors, which is distinct from the common law claim of solicitor-client privilege ruled upon in this case by the trial judge.

XLV. As previously noted, ss. 37, 38 and 39 of the Canada Evidence Act replaced s. 41 of the Federal Court Act, enacted in 1970, which provided:

> 41. (1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper

> administration of justice outweighs in importance the public interest specified in the affidavit.
>
> (2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.

XLVI. This provision codified, with some modification, the claim of public interest immunity, as it then existed in common law. Following the decision of the House of Lords in Duncan v. Cammell, Laird & Co., [1942] A.C. 624, the law in England, at least in civil cases, was that a formal objection by the executive to the disclosure of any state information was conclusive and could not be questioned by the courts. Such was the prevailing view in that country until the unanimous decision of the House of Lords in Conway v. Rimmer, [1968] A.C. 910. There it was held that all claims of public interest immunity were subject to review by the court, which was bound to balance the public interest said to justify non-disclosure against the public interest in justice being done between litigating parties, and which could, if necessary, overturn the decision of the Minister not to disclose. In addition, all speeches delivered in that case expressed the view that low-level, routine communications could not expect to receive the same "protection" which the doctrine provided to high-level policy discussions.

XLVII. The conclusive nature of an executive objection to disclosure as asserted in Duncan v. Cammell, Laird & Co. was not easily accepted as the law in Canada. In R. v. Snider, [1954] S.C.R. 479, and Gagnon v. Quebec Securities Commission et al., [1965] S.C.R. 73, the Supreme Court of Canada recognized the right of the courts ultimately to decide whether the grounds advanced by the Minister justified a claim for disclosure immunity. But the law was by no means settled, and the extent to which deference was paid to the views of the executive respecting the public interest can be seen from the decision of this court in Gronlund v. Hansen (1968), 64 W.W.R. 74, where an objection to disclosure of a statement, made by the defendant in a shipping accident case to a Department of Transport investigator, was upheld on the Minister's assertion that disclosure would adversely affect the candour and completeness of such communications in future investigations.

XLVIII. With the passage of the Federal Court Act in 1970, s. 41(1) gave effect to the decision in Conway v. Rimmer with respect to all public interest immunity claims except those enumerated in s-s. (2). The latter provision, which codified the remaining influence of Duncan v. Cammell, Laird & Co., asserted an absolute immunity for a wide range of public interest claims, based on a certificate issued by the Minister which was conclusive. The scope of s-s. (2) was such that in Landreville v. The Queen (1976), 70 D.L.R. (3d) 122, Mahoney J. was prompted to suggest:

> Bearing in mind the fact that the House of Lords rendered its unanimous decision in Conway v. Rimmer ... in February, 1968, it is apparent that Parliament deliberately codified the common law as stated in Duncan v. Cammell, Laird & Co. ... to forestall application of Conway v. Rimmer in Canada.... That codification precludes the evolution in Canada of a Crown privilege where final decision on production in litigation of relevant documents rests with an independent judiciary rather than an interested executive, recognizing that the conflict, in such circumstances, is not between the public interest and a private interest but between two public interests.

XLIX. For the reasons already noted, I would not agree with the conclusion that the legislative intent underlying s. 41 of the Federal Court Act was to deny any Canadian application of the principles laid down in Conway v. Rimmer; however, there can be no doubt that by enacting the section Parliament sought to restrict the reach of that decision. In order to accomplish that objective it was necessary not only to codify the common law of public interest immunity, but also to distinguish between those classes of information to which each doctrine would have application. The latter goal was achieved by distinguishing between different specified "public interests" offered in support of the claim for disclosure immunity, and specifically by enumerating those specified public interests to which the law as stated in Duncan v. Cammell, Laird & Co. would continue to apply.

94 Although substantially re-worded, ss. 37, 38, and 39 of the Canada Evidence Act, which took effect 23 November 1982, reflect the same approach to public interest immunity as that mandated by s. 41 of the Federal Court Act. Apart from procedural changes, the principal substantive change in the new sections was to extend the reach of the doctrine in Conway v. Rimmer to all information for which a claim of public interest immunity is made, except that which constitutes "a confidence of the Queen's Privy Council for Canada."

LI. With that history of the legislation, it is now possible to turn to the issue at hand, namely, whether the phrase "a specified public interest" can properly be construed as including a claim of solicitor-client privilege. If it can, then the privilege can be advanced in support of an order under s. 37 that "information," in the form of communications between lawyers and "clients" who are both servants of the Crown not be disclosed before a court.

LII. The Crown's position on this question is reflected in the following passages taken from its supplementary factum filed in response to the questions posed by the court for counsel's consideration:

> 5. ...[I]t is submitted...that s. 37 does not create a purely statutory claim of solicitor-client privilege. Rather, it permits objections to be taken on a "public interest" basis, which may include, as a component, the assertion of a "privilege" which is otherwise recognized in the common law.

...

11. Although the expression "solicitor-client privilege" does not appear in s. 37, it does not follow, as the appellant submits in paragraph 13 of his memorandum, that s. 37 does not have "anything to do with" solicitor-client privilege. Non-disclosure of communications in Court proceedings by reason of solicitor-client privilege is based on public interest grounds preventing that disclosure. It is in the public interest that solicitor-client communication remain confidential to ensure that clients seek legal advice knowing such disclosure will remain confidential, and to ensure full disclosure of the facts by the client and a full and frank assessment of the client's legal position by the lawyer.
12. The application presented in this case is that communications between government lawyers and the Department of National Revenue, in which legal advice was sought and given with respect to criminal investigations, raises a prima facie case that the same public interest factors which support a privilege over communication between non-government lawyers and their clients ought to apply. Therefore, the objection here is advanced on grounds that constitute a "specified public interest" within the meaning of s. 37.

LIII. It is my view that these submissions cannot prevail if s. 37, and specifically the phrase "a specified public interest," is construed in accordance with the legislative intention of Parliament as described above.

LIV. I begin by noting that there is nothing either in the language of the present legislation or its predecessor, or in the circumstances existing at the time the respective legislative initiatives were undertaken, which would suggest that such a remarkable construction should be given to those words.

LV. I have already noted that when it enacted s. 41 of the Federal Court Act, Parliament's intention was to limit the scope of application in this country of the doctrine in Conway v. Rimmer. While that made it necessary to codify the common law of public interest immunity, it was not necessary, in order to achieve that goal, to interfere in any way with the continued application of the common law solicitor-client privilege.

LVI. Under the common law a claim of public interest immunity is asserted by the executive on behalf of the public interest. The claim does not belong to a private party nor to any witness. It applies whether or not the Crown is a party to the action in which it was raised. Even if it is not raised by the Crown the court is bound to apply the immunity if disclosure would be against the public interest. Leaving aside modern day concerns for the interest which the public has seeing in justice being done between litigating parties, as described in Conway v. Rimmer, and present-day Charter considerations, whether the claim succeeds depends on the content or the character of the information in question, and not on the circumstances of its creation.

LVII. Solicitor-client privilege, on the other hand, is the private, "fundamental civil and legal right" of the client: Solosky v. Canada, [1980] 1 S.C.R. 821 at 843. It exists to ensure the full and frank disclosure by the client to the solicitor of all information required to enable the latter to give informed advice to the former in connection with ongoing or pending litigation. It is said to exist for the protection of the client, and to be essential to the effective operation of the legal system: J. Sopinka, S. N. Lederman and A. W. Bryant, The Law of Evidence in Canada (Toronto: Butterworths 1992) at 636. Leaving aside the crime or fraud exception, and present-day Charter considerations, whether a claim of solicitor-client privilege prevails in respect of a particular communication depends upon the nature of the relationship between the parties and the purpose for which the communication was made - i.e., upon the circumstances of its creation, and not upon its content or character.

LVIII. Thus it can be seen that at common law the two "privileges" were, and remain, quite separate and distinct doctrines of law. They serve different interests and are governed by different rules. With the enactment, firstly of s. 41 of the Federal Court Act, and then ss. 37, 38 and 39 of the Canada Evidence Act, the common law of public interest immunity has been codified in respect of such claims by the Crown federal, but the two doctrines nonetheless remain distinct from one another both in their underlying rationales and in their application.

LIX. In my review of the authorities, I have been unable to find any case in which it has been suggested that at common law solicitor-client privilege could be advanced as the basis of a claim of public interest immunity. On the contrary, what authority there is on the matter points the other way. In the leading case of Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2), [1974] A.C. 405, claims of solicitor-client privilege and public interest immunity were simultaneously advanced with respect to a large number of documents which a taxpayer sought by way of discovery in an arbitration under the Purchase Tax Act, 1963. In his speech Lord Cross of Chelsea took pains to deal with each claim separately in respect of each of the four categories of documents. In the end he concluded that the Court of Appeal had incorrectly upheld a claim of solicitor-client privilege with respect to one category of documents, but that a claim of "privilege on the ground of 'public interest,'" could nonetheless be maintained in order to prevent their disclosure to the taxpayer. For this and other reasons the appeal was dismissed, although not for the reasons given by the Court of Appeal.

LX. That decision highlights the fact that although the two "privileges" may both be invoked in connection with the same document or communication, they must be considered and applied separately, each according to its own rules, and not as adjuncts of one another. If a claim of solicitor-client privilege prevails, there is no need to go on and consider whether a claim of public interest immunity could also prevail. On the other hand, if a claim of solicitor client privilege fails, a claim of public interest immunity may still prevail if the content or the character of the information in question is such that the specified public interest on which the claim is advanced outweighs the public interest in disclosure.

LXI. These very points were made in Waterford v. Commonwealth of Australia (1986) 71 A.L.R. 673 (H.C.A.). There the issue was whether solicitor-client privilege applied to communications passing between government employed lawyers and other government employees. In dismissing an argument that the doctrine of public interest immunity should apply to such communications, to the exclusion of solicitor-client privilege, Mason and Wilson JJ. noted:

> We believe that the appellant's argument with respect to public interest immunity is misconceived. While the area covered by the immunity doctrine may overlap with that covered by legal professional privilege, the application of each is the subject of an entirely separate exercise. If the conditions giving rise to legal professional privilege are satisfied, and the privilege is not waived, then the document is not disclosed. The fact that the document may or may not have attracted public interest immunity is immaterial. Legal professional privilege is by itself the product of a balancing exercise between competing public interests whereby, subject to the well-recognized crime or fraud exception (cf R v. Bell; Ex parte Lees (1980) 146 CLR 141; 30 ALR 489), the public interest in "the perfect administration of justice" (per Earl of Halsbury LC in Bullivant v. Attorney-General (Vic) [1901] AC 196 at 200) is accorded paramountcy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant documentary evidence. Given its application, no further balancing exercise is required. It follows that an established claim of legal professional privilege can never be set at nought by a finding, after inquiry, that the document is not one to which a claim to public interest immunity would attach. If that were the case it would have the effect of imposing a further general condition limiting the privilege to apply only to those communications in respect of which any question of public interest immunity was wholly irrelevant. Furthermore, if the question of public interest immunity is to be considered, the balancing exercise that is then required will be carried out by reference to the contents and character of the document rather than by regard to the circumstances of its creation. The fact, if it be the fact, that the document is also the subject of legal professional privilege is immaterial to that inquiry. (p. 679)

LXII. If Parliament, when it codified the federal law of public interest immunity in 1970, had intended also for some reason to include solicitor-client privilege as "a specified public interest" upon which a claim for public interest immunity could be advanced, one would have expected that such a radical departure from the common law would have been announced in the legislation in clear and unmistakable terms. But, as I have noted, no such indication is to be found in the language of either s. 41 of the Federal Court Act, or the present ss. 37, 38 and 39 of the Canada Evidence Act. Instead, both statutes were cast in the language of the common law claim of public interest immunity, a circumstance remarkably consistent with Parliament's legislative purpose, which was to codify, with some modification, that common law doctrine.

LXIII. There is another reason why, in my view, the phrase "a specified public interest" cannot reasonably be construed as including a claim of solicitor-client privilege as the basis for a claim of public interest immunity. Assuming, as did both the trial judge and the judge below, that common law solicitor-client privilege does attach to communications passing between servants of the Crown qua clients and servants of the Crown qua legal advisors, when such communications are made in contemplation of litigation, the result of giving such a construction to s. 37 is the concurrent existence of two parallel claims in respect of the privilege, one under common law and the other under the statute. That gives rise to the very anomaly experienced in this case, where the attempt to assert the common law privilege having failed, the Crown is said to have the opportunity of "trying again" under the guise of a statutory claim of public interest immunity. Whether one characterizes such a second attempt as an appeal, a review, or a de novo application, it represents a novel, if not a unique, proceeding in the law of evidence. While I would stop short of calling such a result an "absurdity," it is nonetheless one which I would have expected Parliament to have avoided if, indeed, there was any legislative intent to include solicitor-client privilege as a basis for advancing a statutory claim of public interest immunity under s. 37 of the Canada Evidence Act.

LXIV. I have noted the assumption common to the reasoning of both the trial judge and the judge below, that solicitor-client privilege can attach to communications when both solicitor and client are servants of the Crown. In light of the conclusion I have reached, it is unnecessary to consider that issue. It is worth noting, however, that if such were not the case there would then be no basis for advancing the privilege as "the specified public interest" justifying a claim of public interest immunity.

LXV. For the foregoing reasons, I am of the view that a common law claim of solicitor-client privilege cannot be advanced as "a specified public interest" on which a claim for public interest immunity can be maintained under s. 37 of the Canada Evidence Act.

LXVI. There remains one further matter which arises from the written submission filed by the Crown in response to the court's memorandum to counsel. It was there argued, inter alia, that this courts decision in Re Regina & Gray et al. stands as authority for the proposition that there exists an "interplay" between the doctrines of solicitor-client privilege and public interest immunity.

LXVII. I have already alluded to the fact that after the decision of Oppal J. in Regina v. Gray, in which he held that the solicitor-client privilege which might otherwise attach to communications passing between Crown counsel and police officers conducting a "reverse sting" operation in a drug investigation must yield in that case to the right of the accused to make full answer and defence, the Crown responded with a petition brought under s. 37 of the Canada Evidence Act. That petition was based on the Certificate of Assistant Commissioner Palmer of the Royal Canadian Mounted Police, seeking an order that the communications in question not be disclosed on the basis of a number of grounds of "specified public interest," which were set out in paragraph 15 of the Certificate, and included:

> (b) Disclosure of legal advice given to the R.C.M.P. by Crown counsel will impair the administration of justice. The failure to honour the privilege that pertains to this relationship will mean that the Minister of Justice and Her agents will, unlike any other solicitors or counsel, become compellable witnesses in every significant criminal trial and will be required to disclose the advice they gave. The effect will be that when members of the R.C.M.P. approach Crown Counsel for advice on the legality of a search warrant, an authorization to intercept private communications or other investigative techniques, Crown counsel who gives that advice will be required to testify on the very issue of lawfulness which is for the court to decide. The prospect of legal advisors becoming witnesses at the instance of every accused who finds it tactically advantageous to challenge the existence or correctness of legal advice will inevitably render Crown counsel who give such advice reluctant to provide it, particularly in unusual factual situations. (emphasis added)

LXVIII. The application by the Crown under s. 37(1) of the Canada Evidence Act for a "blanket order" that all such communications not be disclosed was refused by Oppal, J., who did not look at or consider their content. In his reasons, however, he indicated that the objection could be renewed from time to time as necessary if any specific objection based on "sensitivity, security or any other matter" were to arise. His order, as entered, provided:

> THIS COURT ORDERS THAT the objection to disclosure as set out in paragraph 15 of the aforesaid Certificate be and the same is hereby dismissed;
>
> AND THIS COURT FURTHER ORDERS THAT this order does not preclude the raising of further objections to disclosure of the aforesaid communications, under s. 37 of the Canada Evidence Act or otherwise, on grounds other than those set out in paragraph 15 of the aforesaid Certificate. (emphasis added)

LXIX. In considering the apparent scope of the order appealed from, Taylor J.A. noted the following:

> Thus the order appealed from may be taken to be one which precludes the possibility that objection could be taken to disclosure of any of the information or advice in question on grounds such as the need to protect a public interest in maintaining confidentiality with respect to information which, if made public, might prejudice ongoing police investigations, or which might be of use to those involved in criminal activities, or which might embarrass the Royal Canadian Mounted Police in dealings with other police agencies, or any other of the

> broadly stated grounds mentioned by the appellant in Paragraph 15 of his certificate. (pp. 337-38, emphasis added)

LXX. In giving his reasons for allowing the appeal in part, Taylor J.A reiterated that the ruling of Oppal J. with respect to the unavailability of common law solicitor-client privilege was not part of the decision under appeal. He then went on to state the following:

> I agree with the trial judge's conclusion that a 'blanket' right to exclusion cannot successfully be asserted under s. 37 of the Canada Evidence Act on the ground of a public interest in preserving confidentiality generally with respect to conversations between police authorities and their legal advisors. When s. 37 is invoked it is necessary to weigh the importance of items of information to a defence which may properly be raised by the accused against public interests specified in the certificate which favour the preservation of confidentiality with respect to that information. A factor which may, of course, be weighed in the balance in the present case is any public interest there may be in the preservation of confidentiality with respect to the information concerned having regard to the fact that the discussions were between police and legal advisor. (p. 338, emphasis added).

LXXI. The appeal from the order of Oppal J. was allowed to the extent that the right of the Crown to raise further objections to disclosure under s. 37 was no longer limited to grounds other than those set out in paragraph 15 of the original certificate.

LXXII. It is the highlighted portion of the final passage quoted from the judgment of Taylor J.A. which the Crown suggests supports the existence of an "interplay" between the doctrines of public interest immunity and solicitor-client privilege.

LXXIII. Two things are clear from the reasons of Taylor J.A. in this court. The first is that the ruling of Oppal J. with respect to the inapplicability of common law solicitor-client privilege was not open to re-consideration by this court. The second is that this court did not consider the substance of the specific objections raised in sub-paragraph (b) of paragraph 15 of the certificate filed in support of the claim for public interest immunity. Thus, the fact that the appeal was allowed cannot be taken as affirming the right of the Crown to raise solicitor-client privilege as a "specified public interest", as the certificate purported to do in the above emphasized portion of that sub-paragraph. The judgment of this court goes no further than to confirm that no "blanket" claim of immunity could be given effect with respect to any of the public interest grounds specified in the certificate, and to re-open for future consideration the specified public interest grounds upon which immunity was claimed in paragraph 15 of the certificate.

LXXIV. That said, it is in any event apparent from the reasons of Taylor J.A. taken as a whole, that in the passage relied upon he goes no further than to suggest that the preservation of confidentiality in respect of communications between police and their legal advisors is a factor to be weighed in the

balance when considering a claim of public interest immunity with respect to the content of those communications. This is hardly an assertion of any "interplay" between solicitor-client privilege and public interest immunity.

LXXV. Confidentiality and solicitor-client privilege are quite different concepts. Confidential communications are those that pass between parties to a confidential relationship, i.e., they are communications which originate in a confidence that they will not be disclosed. Many communications originate in the course of relationships that are regarded as confidential, at least by the parties, if not generally. But as is clear from the decision of the Supreme Court of Canada in Slavutych v. Baker, [1976] 1 S.C.R. 254, which adopted Wigmore's four criteria for the establishment of privilege on a case by case basis, confidentiality by itself is never enough to establish a privilege.

LXXVI. The fact that intra-government communications originated in what the parties thereto regard as a confidential relationship, may or may not be an important consideration when considering a claim for public interest immunity. Lord Cross expressed the view that it was in his speech in the Alfred Crompton Amusement Machines Ltd. case:

> Confidentiality is not a separate head of privilege, but may be a very material consideration to bear in mind when privilege is claimed on grounds of public interest. (p. 433)

LXXVII. It is possible that Taylor J.A. had this statement by Lord Cross in mind when he expressed the opinion that a factor which may be weighed in the balance, when considering a claim for disclosure immunity under s. 37, is the public interest in preserving the confidentiality of information passing between the police and their legal advisors. However, from a review of the factums filed in Re Regina and Gray, it does not appear that the complex concept of confidentiality was analyzed in the arguments presented to this court, nor does it appear to me that the comments of Taylor J.A. in that respect are essential to the decision actually rendered on that appeal. Thus I consider the "interplay," if any, between the legal concept of confidentiality and public interest immunity to remain an open question. In any event, it is clear that nothing said by Taylor J.A. can be taken to support the argument advanced by the Crown in this case.

LXXVIII. Returning to the certificate of James D. Bissell Q.C., it can be seen that paragraphs (a), (b), (d), (e), and (f) are cast in language which at least purports, in each case, to raise a specified public interest as a basis for objecting to disclosure of the material in question. To the extent they do so, they must be seen as claims of public interest immunity, advanced under s. 37(1) of the Canada Evidence Act. Paragraph (c) has the curious feature of raising both Crown privilege, which is apparently seen as distinct from the public interest immunity claims made in the other five paragraphs, and solicitor-client privilege, which for good measure is restated as "legal professional privilege," a description of the privilege more common to those countries where the legal profession is divided.

LXXIX. I have already pointed out that in his reasons given following the first stage of argument, the judge below dismissed all claims of public interest immunity. In light of the conclusions I have reached, I am of the view that he erred when he gave effect to a claim of solicitor-client privilege as though it were an objection to disclosure certified under s. 37(1) of the Canada Evidence Act. I am also of the view that he had no jurisdiction, under that section, to review the ruling made by the trial judge with respect to that common law claim. Given his rejection of the public interest immunity claims, it follows that the judge below ought to have dismissed the s. 37(1) objection of the Crown and ordered disclosure of the material in question.

LXXX. I would allow the appeal and set aside the order below, substituting in its place an order that the objection to disclosure certified in writing by James D. Bissell Q.C. be dismissed and that the material in question be disclosed to the appellant.

WOOD J.A.

LXXXI. MacFARLANE J.A.:-- I have had the advantage of reading the draft reasons of Mr. Justice Wood and agree with him that s. 37(1) of the Canada Evidence Act is not unconstitutional on the ground of impermissible vagueness, or on the ground that it purports to derogate from the power of a provincial court of criminal jurisdiction to invoke the Charter.

LXXXII. I also agree S.37 does not confer jurisdiction on a superior court judge to review the order of a judge of another court, or to entertain an interlocutory appeal from such an order.

LXXXIII. A s. 37 application is an independent enquiry which, by statute, may require the attention of a judge other than the trial judge. Section 37(3) makes that plain:

> (3) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a court, person or body other than a superior court, the objection may be determined, on application, in accordance with subsection (2) by ... (b) the trial division or trial court of the superior court of the province with which the court, person or body exercises its jurisdiction, in any other case.

LXXXIV. Thus, when an objection to disclosure under s. 37 is made at trial by the Crown in a court other than a superior court, the trial proceedings should be adjourned so the objection may be determined in a superior court. Construing s. 37 in that way, it cannot be said to authorize an interlocutory appeal or a review. In this case an objection to disclosure of the information was taken at trial on the basis of solicitor-client privilege, a common law privilege. A decision was made by the trial judge, but that decision was not subject to review at that stage by any superior court.

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

LXXXVI. An application under s. 37 concerns two questions. First, it involves a consideration of the public interest in the proper functioning of government. Secondly, it involves a consideration of the public interest in disclosure, and whether it outweighs a specified public interest bearing upon the proper functioning of government. In a criminal case the right to make full answer and defence is at the forefront of the question whether the public interest in disclosure must prevail.

LXXXVII. In the case at bar the s. 37 judge (if I may refer to the learned Chambers judge in that way) approached the application as if he were sitting on appeal from the order of the trial judge. In referring to s. 37 he said that the Minister of Justice "seeks a review of Judge Cronin's order ..." When he commenced his discussion he said:

> In my view, of the listed public interest grounds, only the issue of privilege justifies inhibiting the full disclosure now afforded to accused persons through reasonable application of s. 7 of the Charter. That is the only issue upon which I propose to concentrate in these reasons. (p. 89)

The trial judge's decision to follow the judgment of Mr. Justice Oppal in Gray was found by the s. 37 judge to be in error.

LXXXVIII. this way: At p.94, the s.37 judge stated the issue in

> However, the question to be answered is whether there is a reasonable possibility that the withholding of the information listed in the demand for disclosure will impair Mr. Sander's right to make full answer and defence. In other words, does the common law principle of privilege constitute a reasonable limit on Mr. Sander's right to make full answer and defence?

In my opinion that question does not address the relevant considerations under s. 37 of the Canada Evidence Act. What it does is limit the enquiry to the question that was before Judge Cronin, namely, whether disclosure ought to be ordered to enable Mr. Sander to exercise his right to make full answer and defence.

LXXXIX. The question is not whether s. 37 extends to solicitor-client privilege, but rather whether communications between servants of the state qua clients and servants of the state qua legal advisors are beyond the reach of s. 37.

XC. Confusion has arisen in this case because it was considered on the basis of solicitor-client privilege. Confusion has arisen in the law relating to public interest immunity by regarding non-disclosure of government communications as being based on Crown privilege. It is now clear that it is not privilege that justifies an order of non-disclosure under s.37. It is the broad public

interest that justifies such an order.

XCI. In Carey v. The Queen (1986), 30 C.C.C. (3d) 498 (S.C.C.), La Forest J., writing for the court, said, at pp. 510-511, that there is no Crown privilege, but instead the Crown can claim public interest immunity:

> The public interest in the non-disclosure of a document is not, as Thorson J. noted in the Court of Appeal, a Crown privilege. Rather it is more properly called a public interest immunity, one that, in the final analysis, is for the court to weigh.
> (emphasis added)

XCII. I agree with the analysis by Mr. Justice Wood of the difference between a claim of public interest immunity, and an assertion of solicitor-client privilege. I agree that they are separate and distinct doctrines of law. They serve different interests and are governed by different rules. Whether a solicitor-client privilege prevails in respect to a particular communication will depend upon the nature of the relationship between the parties, and the purpose for which the communication was made. The focus is on the circumstances of the creation of the communication, not on its content or the class into which it falls.

XCIII. Cases involving public interest immunity have been concerned with the class of documents or their actual contents: Duncan v. Cammell, Laird & Co., [1942] A.C. 624 (H.L.); Conway v. Rimmer, [1968] A.C. 910 (H.L.). Duncan was a contents claim. Conway was a class claim. But in Conway, the court insisted on a weighing of the substance of the information, particularly when deciding cases where lower level communications are in issue. At p. 986, Lord Pearce said, "it is essential to leave the vague generalities of wide classes and get down to realities in weighing the respective injuries to the public of a denial of justice on one side and, on the other, a revelation of government documents which were never intended to be made public ..." That balancing process is at the heart of s. 37 of the Canada Evidence Act. It is not the focus of an inquiry with respect to solicitor-client privilege.

XCIV. Section 41(1) of the Federal Court Act, R.S.C. 1970 (2d Supp.), c.10 was concerned with class or content, and the public interest in the proper administration of justice. Section 37 refers to none of those three factors. The language of s. 37 is much broader. It would appear to focus on substance.

XCV. The question whether ss. 37 to 39 of the Canada Evidence Act is a codification of the common law is of little assistance to me in deciding the questions in this appeal. But I must say that the sections capture neither the full impact of Duncan or of Conway. They appear to represent a Canadian solution to the ever changing English common law.

XCVI. It is not helpful to me in construing s. 37 to ask whether the privilege arising from the relationship between a solicitor and a client may give rise to an order under s. 37. The relationship is not at the heart of the matter. It is the substance of the public interest question which must be considered. It is not critical to ascertain who was involved. What matters is whether the particular communication is such that it gives rise to a public interest reason to deny disclosure which outweighs the public interest in disclosure.

XCVII. Section 37 does not say what particular matters may fall within the words "specified public interest". No particular communications are excluded. What particular interest deserves protection is left for decision on a case to case basis. I see no reason why the proper functioning of government may not include a public interest in maintaining the confidentiality of discussions between government lawyers and those government officials they advise.

XCVIII. In R. v. Gray (1993), 79 C.C.C. (3d) 332, this court directed an enquiry under s. 37 into matters of specified public interest of that nature.

XCIX. At issue in R. v. Gray was the objection to disclosure of communications between Crown counsel and members of the R.C.M.P. Mr. Justice Oppal had ruled at trial that no solicitor-client privilege existed in respect of these conversations. This ruling was not and could not be appealed at that stage. Subsequently, a certificate was filed under s. 37. Mr. Justice Oppal held that the order that he had made at trial did not preclude an application under s. 37. He observed that s. 37 contemplates different considerations with different issues than arise in an application for disclosure of solicitor-client communications. Nevertheless, on the s. 37 application he came to the conclusion, after balancing the competing interests, that disclosure was necessary to enable the accused to make full answer and defence. In coming to this conclusion he did not inspect the material in question. He ordered that the objection to disclosure based on the certificate filed in the case be dismissed. He also ordered that further objections to disclosure, pursuant to s. 37, could be made but on grounds other than those set out in the certificate filed before him.

C. An appeal was taken to this Court from the dismissal of the s. 37 application. It was held that in such circumstances, s. 37 requires that the judge dispose of the objections taken only when satisfied that he has a sufficient understanding of the particular communications in question to make a final determination. This appears to recognize that at the heart of a s. 37 application is the substance of the communication. The matter was remitted to the superior trial court so that the court could inspect the material in question before making any order.

CI. In remitting the matter to a s. 37 judge, Mr. Justice Taylor said that the appellant was at liberty to object to disclosure of any particular information or advice, whether on a ground listed in the certificate filed with Mr. Justice Oppal or any other ground. That left open for consideration as a specified ground of public interest the need to protect communications between the police, and lawyers who advise them.

CII.

Mr. Justice Taylor noted that:

> When s. 37 is invoked it is necessary to weigh the importance of items of information to a defence which may properly be raised by the accused against public interests specified in the certificate which favour the preservation of confidentiality with respect to that information. A factor which may, of course, be weighed in that balance in the present case is any public interest there may be in the preservation of confidentiality with respect to the information concerned having regard to the fact that discussions were between police and legal advisor. (p. 338)

CIII. I understand that R. v. Gray stands for the proposition that the type of specified public interest that arises in this case is a proper matter for consideration in an application under s. 37 for public interest immunity.

CIV. Another decision, involving an application for public interest immunity, although not under s. 37 of the Canada Evidence Act, is Evans v. Chief Constable of Surrey Constabulary (1988), [1989] 2 All E.R. 594 (Q.B.). The plaintiff, in an action for wrongful arrest and false imprisonment, sought discovery of a report submitted by the Chief Constable to the Director of Public Prosecutions. The police sought advice on whether or not to charge the plaintiff with a murder that had been committed. The court balanced the competing interests but ruled against disclosure. In my view the case stands for the same proposition, at common law, that this court recognized in R. v. Gray, supra: that legal communications between government investigators and Department of Justice lawyers can be subject to public interest immunity.

CV. Of course, legal-professional privilege (solicitor-client privilege) may be claimed independently of the doctrine of public interest immunity to which s. 37 gives effect. That was the case in Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2) (1973), [1974] A.C. 405, [1973] 2 All E.R. 1169 (H.L.), and in Waterford v. Commonwealth of Australia (1987), 71 A.L.R. 673 (H.C.). In neither case was it said that facts giving rise to legal-professional privilege could not be considered on an application for public interest immunity. It is true that the two are separate doctrines, but factual situations which give rise to one may also give rise to the other. In short, the two may overlap: see Waterford at pp. 678-79 (per Mason and Wilson JJ.), and pp. 686-87 (per Brennan J.). Whether a claim at common law of solicitor-client privilege succeeds or fails, a claim of public interest immunity may prevail if the substance of the communications or information is such that the specified public interest outweighs the public interest in disclosure.

CVI. Thus, in my opinion, s. 37 may be applied to grant public interest immunity in respect of legal

communications between a lawyer and another, when both are functioning in a government environment, and despite the fact that a claim for solicitor-client privilege might not prevail at common law.

CVII. I do not view the availability of a claim at common law for solicitor-client privilege as being a basis for construing the phrase "a specified public interest" as excluding communications between a government lawyer and an agency of government. As I have said, solicitor-client privilege and public interest immunity are separate doctrines, with separate rules, serving different interests. Moreover, privilege is not at the heart of public interest immunity.

CVIII. The authorities indicate that pursuing one claim does not exclude the other. The problems experienced in this case arise from failing to separate the two claims, and in dealing with the s. 37 application as if it was a review of the disclosure order made at trial. Furthermore, if the provisions of s. 37(3) had been employed, the application at trial for disclosure should have been objected to immediately, with a request for an adjournment to allow the Crown to pursue the s. 37(1) application. If that procedure had been employed, and if the proper considerations had been advanced on the s. 37(1) application the confusion could have been avoided.

CIX. I conclude that communications between government persons and their legal advisors may be protected by an order under s. 37 of the Canada Evidence Act. In this case, however, the s. 37 judge erred in proceeding as if the issue was solicitor-client privilege and as if he had jurisdiction to review the order of the trial judge. I am unable to construe his reasons as indicating a proper appreciation of the considerations which might give rise to an order under s. 37. Accordingly, I would set the order aside, and dismiss the application under s. 37.

CX. I have one additional comment. It arises from what La Forest J. said in Carey v. The Queen (1986), 30 C.C.C. (3d) 498 at 525:

> There is a further matter that militates in favour of disclosure of the documents in the present case. The appellant here alleges unconscionable behaviour on the part of the government. As I see it, it is important that this question be aired not only in the interests of the administration of justice but also for the purpose for which it is sought to withhold the documents, namely, the proper functioning of the executive branch of government. For if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed. The purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct by the government. This has been stated in relation to criminal accusations in Whitlam, and while the present case is of a civil nature, it is one where the behaviour of the government is alleged to have been tainted.
>
> Divulgence is all the more important in our day when more open

> government is sought by the public. It serves to reinforce the faith of the citizen in his governmental institutions. This has important implications for the administration of justice, which is of prime concern to the courts. As Lord Keith of Kinkel noted in the Burmah Oil case, supra, at p. 725, it has a bearing on the perception of the litigant and the public on whether justice has been done.

CXI. My comment is that the proper functioning of government may be better served in some circumstances by permitting disclosure.

SUMMARY

CXII. 1. Section 37(1) of the Canada Evidence Act is not unconstitutional for impermissible vagueness, or on the alleged ground that it derogates from the power of a provincial court of criminal jurisdiction to invoke the Charter.

CXIII. 2. A "specified public interest" may result in the non-disclosure of communications between government lawyers and government.

CXIV. 3. Section 37 does not empower a superior court to hear and decide an interlocutory appeal from or review a disclosure order made by a trial judge. In this case the s. 37 judge purported to do. Thus, his order must be set aside, substituting in its place an order that the objection to disclosure certified in writing by James D. Bissell Q.C. be dismissed and that the material in question be disclosed to the appellant.

MacFARLANE J.A.

HOLLINRAKE J.A.:-- I agree.