Litigating Informer Privilege under Section 37 of the Canada Evidence Act: A Critique of R v Basi

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Introduction

The Supreme Court of Canada has long held that an informer’s identity is privileged information. This is to protect informers from retribution and to encourage citizens to help police. In criminal proceedings, informer privilege claims are usually resolved at common law, not under statute. However, if a claim fails at common law the Crown occasionally litigates an informer privilege claim under section 37 of the Canada Evidence Act (CEA).¹ That provision allows courts to prohibit the disclosure of government information if it engages a “specified public interest” that needs protection, such as safeguarding intelligence-gathering techniques or the work of the public service. The public interest immunity provision reads as follows:

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¹. RSC 1985, c C-5, s 37 [CEA].
37. (1) Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.2

Until the Supreme Court decision in *R v Basi,*3 no case in which the Crown invoked section 37 to litigate informer privilege had reached Canada’s highest court. *Basi* thus gave the Court its first chance to consider whether it was sound to extend the application of section 37 to cover informer privilege claims. Unfortunately, the Court did not take up this opportunity, likely because the issue was not squarely raised on appeal. I argue that the Court was wrong to apply section 37 to informer privilege claims and that it treated the provision as a screen through which any claim to secrecy—including informer privilege—may pass.4 Although it may sometimes be necessary to stretch a statutory provision to further the public interest, to produce a “just and reasonable outcome”,5 or to respond to an “unforeseen or changing social reality”,6 the Court did not cite any such reasons for expanding the scope of section 37. Rather, it simply glossed over a procedural review problem.

In practice, the Crown invokes section 37 on informer privilege claims chiefly to gain access to statutory mechanisms of review unavailable at common law. Nothing in section 37’s text, however, evokes the restrictive rules and the minimal judicial discretion that characterize informer privilege. Informer privilege is a type of class privilege. Class privileges are close to being absolute, are only subject to limited exceptions and demand a presumption that the information in question is inadmissible. In contrast, section 37 provides for a discretionary, interest-balancing process—one which is appropriate for public interest immunity, but not for class privilege.

2. *Ibid,* s 37(1).
While the misapplication of section 37 to informer privilege is admittedly not the most prevalent issue facing the criminal bar, it does raise important concerns. Most significantly, extending section 37 to include informer privilege is an example of dubious statutory interpretation from our highest court. Moreover, it also creates at least two practical problems: delay and inefficient use of court resources. A right to an interlocutory appeal accompanies any ruling made under section 37. Pursuing this route interrupts a criminal trial’s flow. Invoking section 37 to litigate informer privilege after an unfavourable production order at common law also means a second “kick at the can” for the Crown—and possibly several kicks, including up to the Supreme Court of Canada.7 In Basi, the various appeals and cross-appeals on the informer privilege issue took two years to litigate from trial level to the Supreme Court.8 The criminal justice system is already strained; duplicate effort and added delays compound the problem. In R v Omar, for example, the Ontario Court of Appeal recognized that consuming five weeks of trial time to litigate informer privilege first at common law, then under section 37, “fell well short of the ideal of efficient trial management”.9

In Part I of this comment, I review the facts in Basi and the Supreme Court’s reasoning, with a focus on how section 37 was deployed in the informer privilege context. In Part II, I explain the procedural considerations that lead the Crown to harness section 37, if it obtains an unfavourable informer privilege ruling at common law. In Part III, I undertake a close reading of section 37, informed by the common law of public interest immunity. I argue that the provision is structured to reflect the common law approach, and that its domain should therefore be limited to resolving public interest immunity claims. Next, I contrast public interest immunity law with the special rules that exist for informer privilege to provide further evidence that the domain of section 37 was not intended to extend to class privileges. I then review the legislative debates on section 37, which provide scant indication that its drafters intended it to cover informer privilege. In Part IV, I return to critique the case law in

9. 2007 ONCA 117 at paras 25–26, 84 OR (3d) 493.
which the Crown has invoked section 37 in informer privilege claims. I
argue that the Supreme Court’s unfortunate assertions in Basi flow from
the insubstantial analysis in lower court jurisprudence. I conclude by
proposing that this doctrinal drift can best be checked by amending the
legislation to allow controlled, streamlined review of informer privilege
claims, rather than by distorting existing statutory provisions in an ad hoc
effort to make the system work.

I. R v Basi: Facts and Judgments

Basi involved an appeal from one of several pre-trial rulings in a highly
publicized British Columbia trial of three former provincial public
servants charged with corruption, fraud and breach of trust. Two of the
accused have since pled guilty, and charges against the third were stayed.10

At pre-trial, the Crown disclosed police notes to the defence with
portions redacted or blacked out. The defence applied for “un-redacted”
copies. The Crown objected, invoking informer privilege, and took the
position that in this case such privilege could only be established in an
in camera, ex parte hearing, with live testimony from a police officer.
Defence counsel applied to attend the hearing without their clients.
Justice Bennett ruled that defence counsel could participate fully at the in
camera hearing, subject to undertakings and a court order.11

Reiterating the need for an ex parte hearing, the Crown then invoked
section 37 of the CEA, citing informer privilege as the specified public
interest.12 Section 37 states that when it is invoked by the Crown, the
judge has the discretion to make one of three orders:

10. See “BC Rail corruption trial ends with guilty pleas” CBC News (18 October 2010),
online: CBC News <http://www.cbc.ca>.
11. R v Basi, 2007 BCSC 1888 at paras 2, 4, 32, 170 CRR (2d) 260 [Basi BCSC (Dec 6)]; Basi
SCC, supra note 3 at paras 6–11.
12. R v Basi, 2007 BCSC 1898 at para 11, 170 CRR (2d) 275 [Basi BCSC (Dec 7)].
• Under subsection 37(4.1), the court may order disclosure of the contested information, unless it determines that disclosure would infringe a specified public interest;\textsuperscript{13}
• Under subsection 37(5), the court may order disclosure of the contested information despite the fact that doing so would infringe a specified public interest. This requires the court to determine that the public interest in disclosure outweighs the public interest in nondisclosure;\textsuperscript{14}
• Under subsection 37(6), if the court does not order disclosure under the above two options, the court must prohibit disclosure of the contested information.\textsuperscript{15}

When the Crown invoked section 37 in \textit{Basi}, the trial judge simply reaffirmed her ruling that defence counsel could attend the informer privilege hearing. The Crown immediately appealed that ruling, invoking section 37.1, which provides an interlocutory right to appeal any order made under subsections 37(4.1) to (6).\textsuperscript{16} The British Columbia Court of Appeal held that it had no jurisdiction to hear the appeal because the trial judge had only made a preliminary ruling and not an order under those sections. Alternatively, the majority would have upheld the trial judge’s ruling to

\textsuperscript{13} \textit{CEA, supra} note 1, s 37(4.1): “Unless the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, the court may authorize by order the disclosure of the information”.

\textsuperscript{14} \textit{Ibid}, s 37(5):

If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

\textsuperscript{15} \textit{Ibid}, s 37(6): “If the court does not authorize disclosure under subsection (4.1) or (5), the court shall, by order, prohibit disclosure of the information”.

\textsuperscript{16} \textit{Basi} BCSC (Dec 7), \textit{supra} note 12 at para 23; \textit{R v Basi}, 2008 BCCA 297, 59 CR (6th) 165 [\textit{Basi} BCCA].
allow defence counsel into the hearing.\textsuperscript{17} In her dissenting opinion, Ryan JA held that the trial judge’s ruling amounted to a disclosure order under subsection 37(4.1) and that the trial judge erred in ruling that defence counsel could attend the hearing.\textsuperscript{18}

The Crown then appealed to the Supreme Court of Canada, arguing that the trial judge erred in permitting defence counsel to attend the hearing. The accused cross-appealed, claiming that the trial judge’s decision to allow defence counsel to attend did not amount to a disclosure order under section 37.\textsuperscript{19}

Resolving the jurisdictional cross-appeal first, the Supreme Court followed Ryan JA’s dissent in holding that the trial judge’s ruling amounted to a very limited disclosure order under subsection 37(4.1); the inevitable result of the judge’s ruling would be to reveal to defence counsel information which the Crown had claimed was privileged. The Court then allowed the Crown appeal, holding that a trial judge should not allow defence counsel into a closed hearing to determine informer privilege.\textsuperscript{20}

The jurisdictional cross-appeal, as developed in the three defence factums, was narrowly focused on the submission that the judge’s decision to allow defence counsel to attend the informer privilege hearing was a mere procedural ruling not subject to review under section 37’s appeal provisions.\textsuperscript{21} No defence brief raised the broader question of whether section 37 even applies to informer privilege claims.

In its reasons, the Supreme Court responded only to the defence’s narrow submission and did not deal with the applicability of section 37 to informer privilege. Justice Fish, writing for a unanimous Court, made the following \textit{obiter dicta} statement about the litigation of informer privilege under section 37:

\begin{itemize}
  \item \textsuperscript{17} \textit{Ibid} at paras 62–69.
  \item \textsuperscript{18} \textit{Ibid} at paras 74–75.
  \item \textsuperscript{19} \textit{Basi} SCC, supra note 3 at para 18. A key issue in \textit{Basi} was whether defence counsel should be allowed to attend a closed hearing to determine informer privilege. That aspect of the judgment has been subject to comment elsewhere. See Mirza, supra note 8. By contrast, the focus of this comment is whether section 37 even applies to the informer privilege context.
  \item \textsuperscript{20} \textit{Basi} SCC, supra note 3 at paras 30, 44 (following Ryan JA’s dissent in \textit{Basi} BCCA, supra note 16).
  \item \textsuperscript{21} \textit{Basi} SCC, supra note 3 at paras 26–28.
\end{itemize}
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)...

When s. 37 is invoked to protect the informer privilege—a relatively rare occurrence, since the claim of privilege will usually be settled under the common law alone—its strictness is not relaxed.22

On this reasoning, the informer privilege claim is insulated from interest balancing under subsection 37(5) and the trial judge is left to resolve the informer privilege claim under subsection 37(4.1) or subsection 37(6).23 Subsection 37(4.1) would apply if the court determines that disclosure of the information does not put a specified public interest at risk. For example, the judge determines the person is not an informer or the judge invites amicus curiae into the circle of privilege. Subsection 37(6) would apply in the event that a disclosure order is not made under subsection 37(4.1) and results in total non-disclosure. A trial judge reading Basi for direction today must conclude that if the Crown raises informer privilege under section 37, the balancing mechanism under subsection 37(5) does not apply.

Although the Supreme Court’s brief comments regarding how section 37 applies to informer privilege in Basi are obiter, they are close enough to the ratio of the case that judges and lawyers will likely rely on them as authoritative.24 Consequently, the obiter here invites critical evaluation. Moreover, the common law’s evolution requires growth and creative thought.25 There is still a possibility—broached in the conclusion—that a future Court panel might, with the benefit of a properly refined argument, revisit Basi and delineate the domain of section 37 with precision. To understand the need for careful delineation it is necessary to explain the Crown’s motivation for invoking section 37 on informer privilege claims.

II. Why the Crown Harnesses Section 37 to

22. Ibid at paras 22–23 [references omitted].
23. Ibid at paras 20–25.
25. Ibid at para 56.
Litigate Informer Privilege

In *Basi*, the Crown’s initial objection to disclosure on the grounds of informer privilege was raised at common law. When Bennett J ruled at the preliminary inquiry that defence counsel could attend the hearing on the matter of the privilege, the Crown invoked section 37. In its oral submissions at the Supreme Court, the Crown left the Court with these final words on the procedural value of section 37: “in the important issue of informer privilege it affords an appeal”. Endings carry power, and the Court heard this plea. “Importantly”, wrote Fish J, “the CEA provides the Crown with an immediate right of appeal of certain evidentiary orders”.

No such appeal exists when informer privilege is raised at common law. If the Crown objects to disclosure unsuccessfully and the judge orders production, there are few plausible statutory mechanisms available to a Crown who remains concerned that production will improperly disclose an informer’s identity. The *Criminal Code* governs Crown appeals in all criminal matters and it does not permit interlocutory appeals of pre-trial or mid-trial rulings, such as those made in the context of informer privilege. In rare cases, the Crown may rely on subsection 40(1) of the *Supreme Court Act* to obtain review directly from the Supreme Court of Canada. Under that provision, however, the Supreme Court’s practice has been to limit review to such issues as the constitutional validity of *Criminal Code* provisions and matters ancillary to a lower court’s judgment. The Court demurs from accepting subsection 40(1) appeals for rulings integrally related to the conduct of proceedings. An informer privilege ruling is more likely to be characterized as integral rather than ancillary.

If the Crown fears that an order will disclose an informer’s identity, then it has three options at common law. From the prosecution’s

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28. RSC 1985, c C-46, s 676(1); *Mills v R*, [1986] 1 SCR 863 at 959, 26 CCC (3d) 481.
29. RSC 1985, c S-26, s 40(1). I thank Anil Kapoor for discussion on this point.
perspective, all of them are imperfect and inefficient, and all of them effectively abort the trial.

First, the Crown may withdraw the charge. When the Crown believes it has a strong case against the accused, it will strenuously resist this option.

Second, the Crown may call no further evidence. This will likely result in an acquittal. The Crown may then appeal the acquittal and ask for a new trial on the ground that the judge erred in her informer privilege ruling. This roundabout way to extract review does give the Crown access to a court of appeal, but when the accused has been acquitted, the informer privilege point becomes merely “academic”. The process raises concerns about the efficient use of state resources, especially where the Crown anticipates a lengthy and complex prosecution.

The Crown’s third option is to stay the proceedings and recommence before another judge. In R v Scott, the Supreme Court of Canada approved this prosecutorial practice if it was done specifically to protect an informer’s identity. Still, using a stay as a way to extract review raises the spectre of prosecutorial “‘judge-shopping’ . . . in the hope of a different ruling”. It also creates concerns about impartiality in the administration of justice, because it permits the Crown—but not the defence—to circumvent a judge’s ruling without using the normal appeal process. Prosecutors must be sure, and must state on the record, that protecting the informer’s identity is the sole motivation for the stay. Otherwise they risk being called as witnesses on an abuse of process application by the defence.

These less-than-desirable options have led the Crown to look elsewhere for a way to review the denial of an informer privilege claim at common law—namely, to the “specified public interest” provision in section 37 of the CEA. Crucially, a section 37 application has been held to be a

32. See e.g. R v Leipert, [1997] 1 SCR 281, 112 CCC (3d) 385.
35. Ibid at 1008, McLachlin J, dissenting.
36. Ibid at 1008–09, McLachlin J, dissenting.
“separate proceeding” from the trial or preliminary inquiry and it carries its own appeal provisions. Any order under subsections 37(4.1) to 37(6) may be appealed to the provincial court of appeal or to the Federal Court of Appeal, depending on which court heard the section 37 application. The legislation also facilitates applying for leave to appeal to the Supreme Court of Canada.

Invoking section 37 to protect an informer’s identity is still a rare practice, but in all of the cases I have collected in which it has been raised, it has succeeded. This is true at the preliminary inquiry stage, during pre-trial or trial proceedings and on appeal. Commentators have also flagged it as a “valuable tool in the Crown’s arsenal”, a “fail-safe mechanism” and a “creative” ticket to remedy the “flawed” common law procedure for reviewing informer privilege claims.

38. R v Richards (1997), 34 OR (3d) 244 at 248, 115 CCC (3d) 377 (CA); R v Pilotte (2002), 156 OAC 1 at paras 39–40, 163 CCC (3d) 225 (CA).
39. CEA, supra note 1, s 37.1(1)(a)–(b).
40. Ibid, s 37.2(a)–(b).
42. R v Alawar, [1990] OJ no 3422 (QL) (Ct J (Gen Div)); R v Chretien, [1995] OJ no 3595 (QL) (Ct J (Gen Div)); R v Robinson (1996), 32 WCB (2d) 181 (available on QL) (Ont Ct J (Gen Div)), aff’d in R v Gray, [1997] OJ no 1601 (QL) (CA); R v Walker (1999), 24 CR (5th) 179, 41 WCB (2d) 318 (Ont Ct J (Gen Div)); R v Babes (2000), 146 CCC (3d) 465, 161 OAC 386 (CA) (preliminary inquiry judge’s production order overturned in Superior Court, which was affirmed on appeal).
43. Newfoundland v Trayne, PCJ, Walker, Quinlan and Jensen (1984), 51 Nfld & PEIR 203, 15 CCC (3d) 532 (SC (TD)); Archer, supra note 33 (trial judge refused production, affirmed on appeal); R v Virgo, [1992] OJ No 2352 (QL) (Ct J (Gen Div)); Pilotte, supra note 38 (trial judge refused production; defence appeal not challenging substance of that ruling); R v Tingley, 2011 NBCA 8, 266 CCC (3d) 544 (trial judge refused production; accused’s appeal against the order adjourned until trial’s end).
44. Omar, supra note 9 at para 44 (Court of Appeal reversed the trial judge’s production order); Basi SCC, supra note 3 at paras 4–5 (Supreme Court reversed the trial judge’s production order).
46. Hubbard, Magotiaux & Duncan, supra note 41, ch 3 at 44.
47. Cooper, supra note 33 at 125 (calling for statutory reform of Crown privilege appellate review procedures should juristic developments prove insufficient).
A generic example illustrates the strategic benefits for the Crown. Pursuing a prosecution in provincial court, the Crown will typically deal with disclosure matters early. If at this stage the Crown faces an unsuccessful informer privilege ruling at common law, it may still invoke section 37 to challenge the disclosure of the information in question. Sometimes, as in *Basi*, the whole matter is put on hold until the informer privilege issue is resolved. Alternatively, the Crown may move forward on two parallel tracks. In provincial court, the Crown proceeds with the preliminary inquiry or the trial. Section 37 specifies, however, that a superior court judge or a trial judge of the Federal Court must hear the section 37 application. So, on another track, the Crown proceeds with its section 37 application in superior court, invoking informer privilege as the “specified public interest” justifying non-disclosure. Section 37 thus effectively provides preliminary review in superior court of the provincial judge’s common law ruling on informer privilege. However, if the trial judge is a superior court judge, as in *Basi*, the section 37 process amounts to a “reconsideration of the same material” by the same person.

If the section 37 judge also orders production, the Crown may access further review—a “prime advantage” of invoking the provision. Practically, the Crown gains “an interlocutory appeal mechanism” on informer privilege rulings. It would appear that the Crown has thereby solved the awkward problem of how to obtain review of an unsuccessful informer privilege claim at common law. But is this solution appropriate?

III. Ascertaining the Domain of Section 37

A. Statutory Framework

The Crown in *Basi* employed section 37 to litigate informer privilege on the basis of an expectation—“widespread” among litigants—“that there must be some way to appeal the decision of a court of first instance”.

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48. Richards, supra note 38 at 248; Pilotte, supra note 38 at para 43.
49. Richards, supra note 38 at 248.
50. Hubbard, Magotiaux & Duncan, supra note 41, ch 3 at 45.
51. Ibid. If the defence wishes to appeal the section 37 ruling, however, it must typically wait until the trial’s end in case the issue becomes moot. See Archer, supra note 33 at para 18; Tingley, supra note 43 at paras 4–6.
52. Kourtessis v MNR, [1993] 2 SCR 53 at 69, 81 CCC (3d) 286 [emphasis added].
At first glance, section 37 might appear to encompass informer privilege claims. Informer privilege promotes a specific “public interest”: effective, efficient law enforcement.\(^{53}\) Moreover, section 37 lacks an itemized list of the interests it protects. It also lacks a “zipper [clause]”\(^{54}\) specifically excluding informer privilege from its scope. In the modern regulatory state, legislators increasingly frame statutes broadly to give courts and tribunals “flexibility in applying legislation to a wide variety of circumstances”.\(^{55}\) Section 37’s broad heading, “Specified Public Interest”, appears to follow this trend.

Had the Court in \textit{Basi} looked more closely at the scope of section 37, however, it would have reached a more nuanced and ultimately different conclusion. It would have discovered that section 37 codifies the common law approach to public interest immunity claims; that the procedures followed in public interest immunity claims and those involved in informer privilege claims are incompatible; and that nothing in the legislative history of section 37 supports its amenability to informer privilege claims.

Section 37 is a procedural provision in the \textit{CEA}, which was amended as part of the 2001 \textit{Anti-terrorism Act}.\(^{56}\) The words of section 37 must “be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”.\(^{57}\) The text of the provision is the touchstone, but sound statutory interpretation looks outward to such broader considerations as its common law history, its evolution and to parliamentary debate.\(^{58}\) Indeed, in two other decisions, one before \textit{Basi} and one afterwards, the Supreme Court dealt with procedural legislation

\(^{53}\) See \textit{Bisaillon v Keable}, [1983] 2 SCR 60 at 97, 7 CCC (3d) 385.
\(^{56}\) \textit{CEA}, supra note 1 as amended by \textit{Anti-terrorism Act}, SC 2001, c 41, s 43.
stemming from the *Anti-terrorism Act*, and showed itself capable of such nuanced interpretation.\(^59\) In both of those cases, the Court examined the statute’s text, history, purposes and legislative intent.\(^60\) A similarly careful approach to section 37 would reveal that it is geared entirely to public interest immunity—and not at all to informer privilege.

**B. The Common Law Development of Public Interest Immunity**

Parliament created sections 37 to 39 of the *CEA* (and their predecessors) to codify the common law of public interest immunity as it applies to claims by the federal Crown.\(^61\) Sections 37 to 39 of the *CEA* form an integrated statutory scheme regarding public interest immunity. Section 37 is the most general provision, allowing objections to disclosure on the basis of any “specified public interest”. Sections 38 and 39 address more particular objections to disclosure in the public interest: the protection of sensitive or potentially injurious information regarding international relations, national defence or national security (section 38); and the protection of confidences of the Queen’s Privy Council (section 39).\(^62\)

As of 2001, subsections 37(4.1) to (6) may be understood as lying at the core of section 37—they guide a judge’s reasoning in resolving claims under the provision. The common law of public interest immunity infuses those subsections with meaning because they embody a reasoning process patterned on the common law.\(^63\) The statute’s common law origins help delineate the domain of section 37 as limited to resolving public interest

\(^59\) *Ahmad*, supra note 57; *Re Application under s. 83.28 of the Criminal Code*, 2004 SCC 42, [2004] 2 SCR 248.

\(^60\) Careful statutory interpretation underpinned the Court’s reasoning in *Ahmad*, in which section 38 of the *Canada Evidence Act* was upheld as constitutional. *Ahmad*, supra note 57. In *Re Application*, methodical statutory interpretation helped ground a narrow majority’s reasoning in upholding the constitutional validity of section 83.28 of the *Criminal Code* (a controversial provision regarding judicial investigative hearings in terrorism cases). *Re Application*, supra note 59. A companion decision dealt more specifically with the level of secrecy appropriate for such hearings. *Re Vancouver Sun*, 2004 SCC 43, [2004] 2 SCR 332.

\(^61\) *Canada (AG) v Sander* (1994), 114 DLR (4th) 455 at 462, 483, 485, 90 CCC (3d) 41 (BCCA).


\(^63\) See *R v LB*, 2011 ONCA 153, 270 CCC (3d) 208 (“t]racing a statute from its common law and legislative roots to its current version can shed considerable light on the meaning of the present day provision” at para 64).
immunity claims. Further, while section 37 codifies public interest immunity claims by the Crown, it neither overrules nor departs from the common law of public interest immunity. Rather, public interest immunity at common law and under statute have evolved together over time to allow for more judicial discretion.

At common law, public interest immunity allows the state to withhold evidence in the interests of national security, effective government conduct, or less commonly, effective criminal law enforcement. Disclosing certain government documents may also impair national defence, diplomacy or the work of the public service. The public interest in non-disclosure of government documents is not a Crown privilege, although historically it was so termed. Even the current phrase “public interest immunity” is imprecise since the state may only claim qualified protection. The basic principle that all facts must be available to the court still frames the analysis under common law or statute, and it competes against the public interest in non-disclosure.

To reconcile these competing principles, judges at common law hold a two-part discretion to resolve public interest immunity claims. The process set out in subsections 37(4.1) and 37(5) essentially embodies the same form of discretion. First, judges engage in “reconnaissance” to determine if a public interest in secrecy is in play; second, they balance the public interest in secrecy against the public interest that all relevant

66. See Bisaillon, supra note 53 at 97.
67. See R v Lam, 2000 BCCA 545 at paras 19, 41, 148 CCC (3d) 379 (where the court noted that the policy reasons for keeping police observation posts secret are, to a degree, analogous to the policy reasons for informer privilege).
71. See Carey, supra note 69 at 647.
facts are before the court.72 This two-pronged reasoning process was first set out by the Supreme Court of Canada in *R v Snider*73 and *Gagnon v Quebec Securities Commission*.74

Crucially, the Court in *Snider* directed judges to engage in a “preliminary determination”75 to “satisf[y]”76 themselves that a public interest in non-disclosure did indeed exist, rather than making judges “subject to any opinion formed, rational or irrational, by a member of the executive”.77 In a 1955 case comment, John Willis re-articulated the *Snider* directive: “[I]f the minister states his ground for declaring that non-disclosure is required by the public interest and those grounds do not, in the opinion of the court, show the existence of such an interest the court will order production”.78 Subsection 37(4.1) codifies this principle. It states that the court may authorize the disclosure of information unless it concludes that disclosure would encroach on a specified public interest.79

At the time *Snider* was decided, no English court had attempted to set down any such rule.80 The English courts were, however, increasingly articulating the importance of the judicial role in balancing competing interests in public interest immunity claims. Lord Denning, in *Re Grosvenor Hotel*, proposed that judges “weigh in the balance” the public interest stated by the Minister against the interests of justice as between the parties in determining whether to withhold production.81

In 1964, the Supreme Court of Canada’s decision in *Gagnon* tied together the principles from *Snider* and *Re Grosvenor Hotel*. The Court referred approvingly to *Re Grosvenor Hotel* in stating that, in resolving public interest immunity claims, judges “must be able reasonably to satisfy themselves that the interest of the State goes beyond that of the litigant,”

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75. *Supra* note 73 at 485, Rand J.
76. *Ibid* at 494, Estey J.
77. *Ibid* at 485, Rand J.
79. *CEA, supra* note 1, ss 37(4.1).
80. Willis, *supra* note 78 at 355.
or at least that the departmental objection is not unreasonable”.82 The first part of this passage gives voice to interest-balancing, and the second part to the preliminary determination principle from Snider.83 Four years after Gagnon, the House of Lords in Conway v Rimmer confirmed the need for judicial balancing in public interest immunity cases.84 Canadian legislators imported the Conway balancing test verbatim into the predecessor of section 37, subsection 41(1) of the Federal Court Act.85

Today, subsection 37(5) sets out the balancing test for objections to disclosure on the grounds of a specified public interest, but the text of section 37 continues to reflect the influence of the common law. Amendments to section 37, passed under the Anti-terrorism Act, track the common law of public interest immunity, as developed in Snider and Gagnon, more faithfully than earlier versions. Earlier versions of section 37, as well as its 1982 predecessor, section 36.1, always required the judge to balance the public interest in non-disclosure against the public interest in full disclosure in furtherance of the administration of justice.86 But none of the earlier versions of section 37 gave voice to the Snider imperative endowing the judge with preliminary discretion to determine whether a public interest in non-disclosure was being encroached at all.87 The text in subsection 37(4.1)—a new addition in 2001—does. This mirroring of the common law procedure supports the understanding that section 37, as it stands today, ought to be reserved for public interest immunity claims.

82. Gagnon, supra note 74 at 333.
83. See especially Carey, supra note 69 at 651.
84. [1968] 1 All ER 874 at 880, 887–88, 891 (HL).
85. See Bushnell, supra note 68 at 578–79.
87. It was left to judges to articulate this point when interpreting the provisions on disclosure of government information, then ss 36.1–36.3 (CEA 1982–88, supra note 86). See Re Goguen and Albert and Gibson (1984), 10 CCC (3d) 492, 7 DLR (4th) 144 (Fed CA) (judges must “verif[y] and examin[e]” all objections to disclosure on grounds of public interest, to “[assess] the validity and seriousness of the claim” at 504–05).
C. Contrasting Public Interest Immunity with Informer Privilege

While section 37 evokes the common law of public interest immunity, it does not embody the special rules attached to class privileges. Contrasting public interest immunity law with informer privilege thus provides further evidence of the limited domain of section 37. In the 1983 case of *Bisaillon v Keable*, the Supreme Court cautioned that it is a “mistake” to “confus[e]” informer privilege with public interest immunity—a caution the Court in *Basi* appears to have overlooked. Commentators have also argued that informer privilege is not an “aspect”, “facet” or “subset” of public interest immunity. It is true that informer privilege, like public interest immunity, is an evidentiary principle that enables the state to withhold evidence. However, as Terrence Cooper put it, the law of informer privilege “evolved independently” from public interest immunity doctrine.

Informer privilege is a type of class privilege, and operates as a robust exception to the truth-finding process in litigation. More specifically, information protected by class privilege is presumptively inadmissible, because class privilege is virtually absolute—not qualified. It leaves the trial judge with no discretion, and it is only subject to limited exceptions that engage public policy. The rationale for class privilege lies in the societal importance of protecting specific relationships “inextricably linked with the justice system”: the informer-police relationship and the

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88. Supra note 53 at 96.
91. Hubbard, Magotiaux & Duncan, *supra* note 41, ch 3 at 44.
92. Cooper, *supra* note 33 at 183.
client-lawyer relationship. Canadian common law therefore recognizes two class privileges: informer and solicitor-client.

In the informer context, the privilege is non-discretionary and nearly absolute, a point the majority of the Supreme Court in *Named Person v Vancouver Sun* reiterated no less than nineteen times. If the person who supplies police with information has informer status, the privilege will apply and that person’s identity must be kept secret. Informer privilege is subject only to the narrow innocence at stake exception, which engages the accused’s right to be presumed innocent under section 11(d) of the *Canadian Charter of Rights and Freedoms*. To override the privilege, the accused must establish that disclosing the informer’s identity is necessary to demonstrate the accused’s innocence. This exception applies where the informer is a material witness to the events in question; the informer has acted as an *agent provocateur*, including cases in which the accused claims

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97. Ibid at paras 19–21. The informer may provide the state with other information which does not disclose her identity, but may still engage a public interest in secrecy. When such “other information communicated by the informant” is at issue, “a more general claim for [public interest] immunity may apply”. See Sopinka, Lederman & Bryant, supra note 90 at 882.
entrapment; or the accused needs the informer’s evidence to establish the illegality of a search under section 8 of the Charter.100

Ultimately, as the Supreme Court has said, the common law “has made secrecy regarding police informers subject to a special system with its own rules”, which differ from the principles that control public interest immunity101 evoked in section 37’s text. In public interest immunity law, the judge balances the public interest in state secrets against the public interest in having full access to the relevant facts—a balancing which the text in subsection 37(5) steadfastly tracks. By contrast, a weighing process is “pointless” when the state asserts informer privilege.102 The common law has already resolved—“once and for all”—that information which reveals the informer’s identity is “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”.103 Section 37 is silent on these special informer privilege rules.

All of this leaves the Crown in an awkward position. The authors of The Law of Privilege in Canada (all of whom are Crown prosecutors) concede that section 37 is “not designed to cover informer privilege”,104 but do not go on to explain what this concession implies. Judges, however, have a responsibility before applying a statute to ascertain whether it extends in the direction a litigant claims. In Basi105, the Supreme Court cited The Law of Privilege in Canada to the very page where the authors make their concession, but the Court declined to address the problem in its reasons. Only Bennett J’s reasons at trial broached the possibility that section 37 might not extend to informer privilege. She acknowledged the Supreme Court’s obiter in Bisaillon,106 which had observed that section 37’s predecessor, section 41 of the Federal Court Act, did not apply to informer privilege.107 Justice Bennett then asserted that section 37 of the CEA, the successor of section 41 of the Federal Court Act, has “changed sufficiently to allow for a reconsideration” on this point.108 But any suggestion that the

100. Scott, supra note 34 at 996.
101. Bisaillon, supra note 53 at 98.
102. Ibid at 97.
103. Ibid at 98.
104. Hubbard, Magotiaux & Duncan, supra note 41, ch 3 at 44.
105. Supra note 53 at 108.
106. Basi BCSC (Dec 6), supra note 11 at para 39.
107. Ibid [emphasis added].
text of section 37 has evolved in a way that points toward class privileges is unfounded. Section 37 and its predecessors have all directed judges to balance competing interests when the state objects to disclosure in the public interest, and all have been silent on the special informer privilege rules. What did change—palpably—was the Canadian sensibility about protecting state secrets after the catastrophic events of 9/11.

D. A Look at Hansard

Since sections 37 and 38 of the CEA were amended as part of the Anti-terrorism Act passed shortly after 9/11, it is worth considering whether the legislative debates at the time provide any clues that the drafters intended section 37 to include informer privilege.108

The debates in 2001 preceding the passage of the Anti-terrorism Act reveal that witnesses to the Senate and House of Commons Committees, as well as parliamentarians, worried about protecting informers who assisted in counter-terrorism intelligence work. Paul Wilkinson, an anti-terrorism expert from the United Kingdom, testified before the House of Commons Committee that secret intelligence services would be thwarted without robust informer protection.109 In the same vein, Senator Kelleher said: “You cannot run a spy service if you have to reveal your sources”.110 The government was especially concerned with assuring allies who provided Canada with information from confidential sources that those sources would not be compromised, and that the information would not fall into terrorist hands.111

Yet, nowhere in the voluminous debates in both the House and Senate Committees did anyone discuss using section 37 of the CEA to protect informers, either generally or in the specific case of protecting counter-terrorist spies. Senator Kelleher did ask Donald Piragoff, Senior

108. CEA, supra note 1 as amended by Anti-terrorism Act, SC 2001, c 41, s 43. I thank James Stribopoulos for correspondence on this point.
110. Senate, Proceedings of the Special Senate Committee on the Subject Matter of Bill C-36, No 1, 37th Parl, 1st Sess (22 October 2001) at 63.
111. House of Commons Debates, 37th Parl, 1st Sess, No 95 (16 October 2001) at 6166–67 (Hon Anne McLellan); Senate, Proceedings of the Special Senate Committee on the Subject Matter of Bill C-36, No 2, 37th Parl, 1st Sess (23 October 2001) at 64.
General Counsel at the Department of Justice and a key drafter of the *Anti-terrorism Act*, what provisions of that *Act* prosecutors might now look to if a judge ordered disclosure that threatened to compromise the identity of informers assisting in counter-terrorism work. Mr. Piragoff directed the Senator, not to section 37, but to the Attorney General’s new power under section 38.13 of the *CEA*.112 This section allows the Attorney General to issue a certificate prohibiting disclosure of information to protect international relations, national defence or national security, even after a judge has ordered the information’s disclosure.113 The power is a drastic one requiring intervention from the most senior law officer of the Crown, and a section 38.13 certificate would not apply to commonplace informer privilege claims such as the one in *Basi*.

Only in 2004, in the context of a corrective amendment to section 37, did a Minister connect informer privilege with section 37. Minister of Justice Irwin Cotler, explaining to the Senate Committee why mandatory closed hearings under section 37 represented an overreach in the heated post-9/11 climate, used the identity of informers as an example of the kind of information closed hearings could protect:

As a consequence of 9/11, we have in the legislation at this point [referring to section 37] a mandatory in-camera exclusion of certain kinds of information, *such as the identity of an informant*. Here, one might say, is an example of where we somewhat overreached in our legislation in the immediate aftermath of the 9/11 fallout.114

The Minister went on to clarify that closed hearings under section 37 would hereafter be discretionary, not mandatory.115

It is hard to see Minister Cotler’s comment as clearly indicating that Parliament intended section 37 to let informer privilege in. The Minister was not speaking directly about the scope of section 37, and his comments must be read in conjunction with earlier debate in 2001, which disclose no legislative intent to include informer privilege in section 37. In sum,

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112. *Senate, Proceedings of the Special Senate Committee on the Subject Matter of Bill C-36, No 1, 37th Parl, 1st Sess* (22 October 2001) at 63–64.

113. *CEA, supra* note 1, s 38.13.


Hansard provides little support for litigating informer privilege under section 37.

IV. Revisiting R v Basi

The above discussion provides the reflective analysis on section 37’s domain that the Court in Basi did not undertake. Only against the backdrop of a careful analysis can the issue of section 37’s applicability to informer privilege be properly understood. On that issue, the lower courts have been largely unreflective. The Supreme Court may be viewed as a both a teacher and student in its relationship to lower courts and tribunals.116 In Basi, it failed in both of these roles.

A. A Lack of Scrutiny in the Lower Courts

No lower court in which the Crown has claimed informer privilege under section 37 appears to have analyzed whether section 37 actually reaches so far. They instead seem content to defer to the Crown’s assertion that section 37 covers informer privilege.117 In a 1987 case, the Quebec Court of Appeal did refer to the scope of section 37 (then section 36.1), writing that the new legislation reflected the “trend in the direction of openness” in the disclosure of government information.118 The provision, Rothman JA continued, gave qualified protection to information in the government’s hands, but in contrast to informer privilege provided “no absolute immunity . . . for information or for documents as a class”.119 In no subsequent case in which informer privilege has been claimed under section 36.1 or section 37 have Rothman JA’s comments ever been addressed.

Two years later, the Alberta Court of Appeal held there to be “nothing offensive or unfair” in using section 37 (still section 36.1) to deal with

117. See Jensen, supra note 43 (the first reported case in which the Crown claimed informer privilege under section 37 (then section 36.1)).
118. Canada (AG) v Belanger (1987), 42 CCC (3d) 82 at 91, 61 CR (3d) 388 (QB CA).
119. Ibid at 89.
informer privilege claims, but offered no analysis on the issue beyond this declarative statement. In apparent confusion, the Court approved the trial judge’s attempt to balance competing interests when informer privilege was raised under the provision, while citing passages from Bisaillon indicating that judges have no discretion to engage in balancing when informer privilege is invoked.

The Ontario Court of Appeal also approved using section 37 to resolve informer privilege claims with minimal scrutiny of whether the provision actually covers class privileges. Pilotte, for example, recognized the procedural benefits for the Crown of a second chance to litigate the privilege and an appeal route should the trial judge order production. The Court questionably characterized informer privilege as a “for[m]” of public interest immunity, thereby avoiding the task of analyzing whether section 37 actually extends to informer privilege.

In 1994, the British Columbia Court of Appeal tasked itself to reason through whether section 37 extends to solicitor-client privilege in Canada (AG) v Sander. The Court held that section 37 does not apply to solicitor-client privilege, emphasizing that solicitor-client privilege and public interest immunity are “separate doctrines, with separate rules, serving different interests”. Unfortunately, no trial or appellate court in which section 37 has been invoked to litigate informer privilege has grappled with the Court’s reasoning in Sander. Louis Belleau convincingly posits that the Sander reasoning is analogous to the question of litigating informer privilege under section 37. But courts applying section 37 to informer privilege, including the Supreme Court in Basi, have avoided the thoughtful statutory interpretation which Sander models. By contrast, they seem content to take the Crown’s word that the statute applies, and the Crown’s success with this strategy suggests that some defence counsel have been content to do the same.

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120. Archer, supra note 33 at para 16.
121. Ibid at paras 15–17.
122. See Pilotte, supra note 38; Omar, supra note 9.
123. Supra note 38 at paras 43–44.
124. Ibid at para 62.
125. Supra note 61 at 478–90.
126. Ibid at 464, Macfarlane JA. See also ibid at 461–62 (Macfarlane JA), 483, 485 (Wood JA).
127. Belleau, supra note 4 at 40, 42.
B. A Lack of Scrutiny in the Supreme Court of Canada

In *Basi*, only in oral argument did one defence counsel posit that section 37 was unsuited to resolving informer privilege claims: “I raise this unfortunately at a rather late stage in the proceedings”, said counsel for Mr. Virk,\(^{128}\) perhaps recognizing for the first time the potential of this broader question. That counsel went on to argue that litigating informer privilege under section 37 “ignores the clear language” in subsection 37(5) “geared towards a balancing of interests”. Balancing, however, is inappropriate for class privileges such as informer privilege, counsel continued.\(^{129}\) He also highlighted the element of expediency in the Crown’s use of section 37: “[T]he Crown is going to say, well we need Section 37 because it gives us an immediate right of appeal and that’s certainly an advantage but I say that it distorts the plain meaning of the Section to interpret that Section 37 of the *Canada Evidence Act* in that fashion”.\(^{130}\)

In questioning counsel, McLachlin CJC fastened onto the possibility that subsection 37(4.1) could apply to informer privilege because “we don’t have a balancing instruction” in that provision.\(^{131}\) Counsel for Mr. Virk responded that full disclosure without conditions as envisaged under subsection 37(4.1) would be unlikely in the informer privilege context, and that balancing was central to the statutory text.\(^{132}\) Justice Charron, unsatisfied, asked counsel to come back on the point, but he reiterated only the centrality of balancing to the statutory scheme.\(^{133}\) Justice Charron then put to counsel, in a charged description, the consequences of making section 37 unavailable to the Crown in informer privilege claims. Should a trial judge wrongly order disclosure, Charron J suggested, interlocutory review under section 37 would be “wiped out from the possible procedure”.\(^{134}\) Counsel for Mr. Virk retreated and moved on to discuss who should attend the closed hearing.\(^{135}\)

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\(^{129}\) Ibid at 40.

\(^{130}\) Ibid at 42.

\(^{131}\) Ibid at 40–41.

\(^{132}\) Ibid at 41.

\(^{133}\) Ibid at 41–42.

\(^{134}\) Ibid at 42–43 [emphasis added].

\(^{135}\) Ibid at 43.
The Chief Justice’s suggestion in oral argument—that subsection 37(4.1) allows informer privilege claims to be resolved under section 37 because it carries no balancing instruction—plainly swayed the Court in Basi. The Court then pronounced the balancing provision under subsection 37(5) to be inapplicable when informer privilege is invoked. This statutory interpretation, however, ultimately bristles with problems.

First, it offends a common sense reading of section 37 to suggest that the balancing test in subsection 37(5) is intermittently applicable, depending on the nature of the public interest specified. Read together, subsections 37(4.1), (5) and (6) evoke the discretionary, interest-balancing process appropriate to public interest immunity, not the lack of discretion which marks the informer privilege context. Subsection 37(5) cannot simply be severed from its companions, subsections 37(4.1) and 37(6), and nothing in Hansard suggests that legislative drafters contemplated such severance.

Second, just because subsection 37(4.1) does not contain a balancing instruction does not mean class privilege claims can be forced through the provision. The Supreme Court’s statutory interpretation twists the meaning of subsection 37(4.1) if, as I have argued, that provision evokes the preliminary judicial determination under public interest immunity law as elucidated in Snider.136 The Court in Basi paraphrased subsection 37(4.1) to include the word “privilege”,137 despite the fact that it is not employed in the provision. Courts do still use the word “privilege” interchangeably with the phrase “public interest immunity”, but such linguistic imprecision is best avoided since public interest immunity only provides qualified protection. By including “privilege” in the paraphrase, the Court appears to have subtly extended section 37’s domain to class privileges. The better reading may be that the Court’s paraphrase was more reflex than intention. Meanwhile, as Hamish Stewart has noted, the Anti-terrorism Act which amended section 37 “nowhere describes” public interest immunity as a privilege.138

It is true that parallels exist in resolving a public interest immunity claim and an informer privilege claim. In both situations, the state invokes a public interest in non-disclosure: effective government or national

136. Supra note 73.
137. Basi SCC, supra note 3 (a “court ‘may authorize by order the disclosure of the information’ over which privilege is claimed” at para 21 [emphasis added]).
138. Stewart, supra note 65 at 257, n 15.
security in the case of public interest immunity; and effective, efficient law enforcement in the case of informer privilege. 139 Further, in both situations, the judge must make a preliminary determination about the public interest. In a public interest immunity claim, the judge may order disclosure if she concludes that no viable public interest in non-disclosure is in play. In an informer privilege claim, the judge determines at the first-stage hearing whether a person has informer status before applying the non-discretionary rule. 140 These two parallels—invocation of a public interest and preliminary determination by a judge—may have been what led the Court in Basi to think that informer privilege could be resolved under subsection 37(4.1).

The competing priorities a judge must weigh in making a preliminary determination under subsection 37(4.1) differ fundamentally from the single priority that a judge must consider when informer privilege is at issue. In resolving a public interest immunity claim, the judge must at all times look both to the public interest in non-disclosure as well as to the competing public interest in full disclosure to further the administration of justice. In accordance with the latter priority, the judge has the discretion to determine at the outset if a viable public interest in non-disclosure even exists before balancing competing interests. In line with the former priority, the judge must take full account of the Crown’s objection to disclosure, bearing in mind the importance of having all of the facts before the court. Ultimately, the judge retains discretion, but the fact remains that this is a balancing test—two distinct priorities are weighed against each other in order to reach a conclusion.

By contrast, when resolving an informer privilege claim, the judge’s one overarching priority, at all times, is to protect the informer’s identity. The public interest in full disclosure to further the administration of justice is not a priority. Even in the first-stage hearing, when the judge ascertains a person’s status to determine whether the privilege applies, “all caution must be taken on the assumption that it does apply”. 141 Protecting the informer’s identity is so critical that it directs how the judge conducts the first-stage hearing. Only the Crown and the reputed informer may

139. See Bisaillon, supra note 53 at 96–97.
140. See Named Person, supra note 96 at paras 40, 47.
141. Ibid at para 47, cited in Basi SCC, supra note 3 at para 44.
attend, and in rare cases, amicus curiae.\textsuperscript{142} But the media and their counsel cannot attend, nor can the accused’s counsel, for fear that they will inadvertently disclose the informer’s identity.\textsuperscript{143}

The Supreme Court’s interpretation of subsection 37(4.1) in \textit{Basi} would have us believe the text is to be read to reflect different judicial priorities depending on the nature of the public interest invoked. If the public interest in question is informer privilege, then the only priority that factors into the judge’s ruling is the protection of the informer’s identity. If the public interest in question is not informer privilege, then the competing priorities of non-disclosure and full disclosure must be weighed. This is a difficult position to sustain if, as the Court has recently affirmed, “discretion conferred by statute must be exercised consistently with the purposes underlying its grant”.\textsuperscript{144} In the case of section 37, the purpose underlying the grant of judicial discretion is to codify the judge’s reasoning process in the public interest immunity context. Subsection 37(4.1) reflects the dual priorities that the judge ought to consider. Section 37 is not meant to give statutory form and augmentation to informer privilege rules, which are concerned almost exclusively with protecting the informer’s identity.

\textbf{Conclusion}

Judges have a responsibility to respect the integrity of statutory text as well as the safety of putative informers. As ostensibly neutral decision-makers, judges fulfil a key role in our democracy by working with statutory text cautiously and not using statutory language for instrumental ends. Lower courts rely on the Supreme Court for direction in applying statutory provisions. Consequently, the Court has a strong obligation or teaching function to give full and informed consideration to the scope of any particular provision.\textsuperscript{145}

Opportunities do still exist to halt the statutory creep of section 37 toward informer privilege. The accused in \textit{Basi} did not mount a full

\begin{footnotesize}
\begin{enumerate}
\item \textit{Named Person, supra} note 96 at para 48.
\item \textit{Ibid} at paras 64–65; \textit{Basi SCC, supra} note 3 at paras 44–46.
\item \textit{See MacLauchlan, supra} note 116 at 297.
\end{enumerate}
\end{footnotesize}
challenge to litigating such privilege under section 37. An accused in a future case could put forth “compelling reasons” to depart from the Court’s problematic obiter in Basi on the grounds that forcing informer privilege claims through section 37 is unworkable and disregards the statutory text and Parliament’s intent. Because cases in which the Crown resorts to section 37 to litigate informer privilege do not often arise, jurists may not yet have had the time and experience they need to become alive to the difficulties surrounding this practice.

Even if the Supreme Court were to backpedal from Basi, the Crown would maintain its concerns about the safety of presumed informers where informer privilege was denied at common law and it would still want access to judicial review. Section 37 partially codifies the common law of public interest immunity and complements it with generous mechanisms for oversight. The Crown may legitimately want a provision like section 37 for informer privilege—one which would partially codify the current approach and complement it with mechanisms for review.

While “yearnings are not law”, they may point the way to reasonable legislative reform and codification. Parliament ought to enact a provision separate and apart from section 37 to govern informer privilege claims, or at least provide for their review. This would signal Parliament’s understanding that informer privilege claims deserve some interlocutory review, given the public interests at stake. Parliament has seen fit to provide appeal mechanisms for public interest immunity claims, and consistency militates for a similar provision for informer privilege. If court resources are to be used efficiently, however, statutory review of informer privilege rulings should be streamlined to avoid duplicate effort. A separate, appropriately tailored provision for review of informer privilege rulings would also halt the stretching of section 37 beyond its intended role of protecting public interest immunity. Such a provision would encourage clear thinking about the similarities and differences between the doctrines of privilege and public interest immunity.

146. See Henry, supra note 24 at para 44.
147. Ibid at para 45.
149. I thank Anil Kapoor for help on this point.