

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE QUÉBEC COURT OF APPEAL)**

**BETWEEN:**

**CANADIAN BROADCASTING CORPORATION, LA PRESSE INC., COOPÉRATIVE  
NATIONALE DE L'INFORMATION INDÉPENDANTE (CN2I), CANADIAN PRESS  
ENTERPRISES INC., MEDIAQMI INC., GROUPE TVA INC.**

**APPELLANTS  
(Applicants)**

-and-

**HIS MAJESTY THE KING and NAMED PERSON**

**RESPONDENTS  
(Respondents)**

-and-

**LUCIE RONDEAU, in her capacity as Chief Justice of the Court of Quebec**

**INTERVENER  
(Applicant)**

**AND BETWEEN:**

**ATTORNEY GENERAL OF QUÉBEC**

**APPELLANT  
(Applicant)**

-and-

**NAMED PERSON and HIS MAJESTY THE KING**

**RESPONDENTS  
(Respondents)**

-and-

**CANADIAN BROADCASTING CORPORATION  
LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉPENDANTE  
(CN2i), LA PRESSE CANADIENNE, and LUCIE RONDEAU, in her capacity as Chief Justice of  
the Court of Quebec**

**INTERVENERS  
(Applicants)**

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**MOTION RECORD FOR INTERVENTION  
ATTORNEY GENERAL OF BRITISH COLUMBIA, APPLICANT  
PURSUANT TO RULES 47 & 55 OF THE *RULES OF THE SUPREME COURT OF CANADA***

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-and-

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-and-

**LUCIE RONDEAU, in her capacity as Chief Justice of the Court of Quebec**

**INTERVENER  
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**ATTORNEY GENERAL OF QUÉBEC**

**APPELLANT  
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(CN2i), LA PRESSE CANADIENNE, and LUCIE RONDEAU, in her capacity as Chief Justice of  
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**NOTICE OF MOTION FOR INTERVENTION  
ATTORNEY GENERAL OF BRITISH COLUMBIA, APPLICANT  
PURSUANT TO RULES 47 & 55 OF THE *RULES OF THE SUPREME COURT OF CANADA***

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TAKE NOTICE that an application will be made on behalf of the proposed intervener, Attorney General of British Columbia, before the presiding Rota Judge for an Order pursuant to Rule 55 of the *Rules of the Supreme Court of Canada* granting leave to the Attorney General of British Columbia to intervene

in this appeal through filing a factum not exceeding 10 pages. The applicant seeks to make oral submissions of five (5) minutes.

AND FURTHER TAKE NOTICE that in support of this application will be read the Affidavit of David Layton, K.C. affirmed the 6<sup>th</sup> day of July, 2023.

DATED at Vancouver, British Columbia this 6<sup>th</sup> day of July, 2023.

SIGNED BY:



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Corporation, La Presse inc., Coopérative nationale de l'information indépendante (CN21), Canadian Press Enterprises inc., and MediaQMI Inc., Groupe TVA Inc.

Broadcasting Corporation, La Presse inc., Coopérative nationale de l'information indépendante (CN21), Canadian Press Enterprises inc., and MediaQMI Inc., Groupe TVA Inc.

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her capacity as Chief Justice of the Court of  
Québec

**NOTICE TO THE RESPONDING PARTIES TO THE MOTION:** A response to the motion shall be filed by July 21, 2023 pursuant to the Order of the Court April 26, 2023. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

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INDÉPENDANTE (CN2I), LA PRESSE CANADIENNE, and LUCIE RONDEAU, in her  
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**INTERVENERS  
(Applicants)**

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**AFFIDAVIT OF DAVID LAYTON, K.C.**

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I, David Layton, K.C., Barrister and Solicitor, of Vancouver, in the Province of British Columbia, SOLEMNLY AFFIRM AND SAY AS FOLLOWS:



1. I am employed as the Deputy Director of Criminal Appeals, in the Criminal Appeals and Special Prosecutions (CASP) unit, in the British Columbia Prosecution Service (BCPS), Ministry of Attorney General. As such, I have personal knowledge of the matters hereinafter deposed to, save and except those stated to be based on information and belief and where so stated, I believe them to be true.
2. If this application is granted, Lesley Ruzicka, K.C. and Liliane Bantourakis, both Crown Counsel with CASP, will have conduct of this intervention on behalf of the Attorney General of British Columbia (AGBC).
3. The mandate of the BCPS, on behalf of the AGBC, is to approve and conduct prosecutions of both regulatory and criminal offences in British Columbia. The BCPS also has responsibility to initiate and conduct appeals and other proceedings in respect of these same prosecutions.
4. The specific responsibilities of CASP include representing the AGBC on indictable appeals in the Court of Appeal for British Columbia and the Supreme Court of Canada. Crown Counsel with CASP provide legal advice to prosecutors throughout British Columbia and, from time to time, are asked to comment on the development of criminal law policy on behalf of the Province of British Columbia. Crown Counsel with CASP also make recommendations to the Assistant Deputy Attorney General, who is charged with the administration of the BCPS, on potential intervention applications in matters before the Supreme Court of Canada that may be of relevance to the function of the BCPS, Crown Counsel and/or criminal law and process.

#### **BACKGROUND TO THE APPLICATION**

5. On March 16, 2023, the appellants were granted leave to appeal from the judgment of the Quebec Court of Appeal (QCCA) in *Re Personne désignée c. R.*, 2022 QCCA 984 [*“Named Person (QCCA)”*].
6. The appellants’ factums were filed on June 12, 2023.
7. The appellant Attorney General of Quebec raises the following issue in its factum: did the QCCA err in refusing to partially unseal its file on the basis that it appeared impracticable?

8. The media appellants, for their part, raise the following issues:

1. Can a trial judge proceed outside the justice system, wholly *in camera*, and without constituting a file or revealing even the existence of a court proceeding, contrary to the open court principle protected by s. 2(b) of the *Charter*?
2. Even though confidential informer privilege is absolute, can its unbounded interpretation override the open court principle as suggested by the Court of Appeal?
3. Other than the informer's identity and a list of certain information that would automatically identify the informer, which are absolutely protected, what test and framework should apply to allow an adversarial debate on what other information might tend to identify the informer?
4. In determining which facts may be disclosed while still protecting the identity of the informer, should the judge hearing the application order that interested third parties be notified and given an opportunity to be heard?

9. The AGBC seeks leave to intervene on the procedural and substantive issues arising from all four grounds of appeal advanced by the media appellants. If granted leave to intervene, the AGBC would address the diversity of ways in which confidential informer privilege issues may arise throughout the course of criminal proceedings, and the resulting importance of preserving flexibility for judges in crafting appropriate measures to protect the privilege in any given case at any stage of the proceedings. The AGBC would also address the media appellants' submission that certain categories of information could be released to their counsel on undertakings of confidentiality. The AGBC would submit that undertakings of confidentiality are not appropriate in cases involving confidential informer privilege and information cannot be disclosed to media or other counsel outside the circle of privilege.

10. I am informed by Ms. Ruzicka and Ms. Bantourakis that they have been unable to contact counsel for the respondents due to the confidentiality measures in effect in this case. However, Ms. Ruzicka and Ms. Bantourakis have reviewed publicly available filings and have communicated with other Attorneys General who are considering filing an application for leave to intervene. On the basis of these communications, the AGBC has drafted its expected position to avoid duplication of other submissions and to provide unique arguments or perspectives at the hearing of the appeal. Ms. Ruzicka and Ms. Bantourakis further inform me that, due to their inability to consult with

respondents' counsel, they intend to review the respondents' publicly available factums once filed, again with a view to avoiding duplication and maintaining a unique perspective.

### **BRITISH COLUMBIA'S INTEREST AS INTERVENER**

11. This Court's assessment of the process adopted to protect informer privilege both at trial and on appeal in this case could potentially have a significant effect on how informer privilege is dealt with at all stages of proceedings and the prosecution of certain criminal offences in British Columbia. Informer privilege issues arise with regularity in this province as evidenced, among other things, by the fact that several of this Court's leading decisions on informer privilege originated in British Columbia: see for example, *R. v. Brassington*, 2018 SCC 37; *R. v. Basi*, 2009 SCC 52; *Named Person v. Vancouver Sun*, 2007 SCC 43; *R. v. Leipert*, [1997] 1 S.C.R. 281. Portions of proceedings were also conducted *in camera* throughout the course of the *Haevischer* trial and appeals, including in this Court: *R. v. Haevischer*, 2023 SCC 11. The media appellants also contrast the process adopted at the trial level in the present case with the process discussed in *R. v. Bacon*, 2020 BCCA 140, at paras. 68-70.

12. The AGBC has a strong interest in maintaining the protections afforded to confidential informers and the flexibility of judges to implement the measures necessary to do so at all stages of the proceedings. The issues being raised on this appeal will potentially impact all proceedings in British Columbia involving confidential informer privilege and will inform Crown counsel decision-making in that context.

13. Further, this Court's assessment of the media appellants' submission that certain information should be disclosed to their counsel subject to undertakings of confidentiality could also have a significant impact in British Columbia, and the media appellants rely on another British Columbia case in support of their submissions in that regard (i.e. *Postmedia Network Inc v. HMTQ*, 2019 BCSC 929 – see *Media Appellants' Factum*, para. 94).

14. This Court's analysis in the instant appeal may therefore have a material impact on the manner in which the BCPS carries out its mandate, on behalf of the AGBC, to conduct and approve prosecutions and appeals in relation to criminal offences in the province of British Columbia.

## **OVERVIEW OF BRITISH COLUMBIA'S PROPOSED SUBMISSIONS**

15. In this case, Named Person, a confidential informer, disclosed information to police implicating themselves in a criminal offence. They were subsequently charged and, because of their status as a confidential informer, the trial was held *in camera* and entirely in secret, off the docket. In allowing Named Person's subsequent conviction appeal, the QCCA was critical of the degree to which the trial proceedings had been kept secret, including that the very existence of any proceedings had been unknown to anyone other than its participants. However, the QCCA was also careful not to divulge any information that could identify the informer, redacting its reasons and sealing its own file: see *Personne désignée c. R.*, 2022 QCCA 406, paras. 7–18.

16. On a subsequent application by the media appellants, which is the subject of this appeal, the QCCA held that its file should remain entirely sealed and that the nature of the privilege in this case was such that even the name of the trial judge, judicial district, counsel involved on behalf of Named Person and the prosecuting authority could not be disclosed as they could identify the informer. In its view, even a partial unsealing of the QCCA file was not practicable without compromising the privilege: *Named Person (QCCA)*, paras. 101-141. The QCCA also rejected the media appellants' argument that certain types of potentially privileged information should be disclosed to their counsel on undertakings of confidentiality, to facilitate submissions on how to protect informer privilege while at the same time promoting the open court principle: *Named Person (QCCA)*, paras. 33, 76 – 81, 96.

17. If granted leave to intervene, the AGBC intends to provide additional perspective to inform this Court's analysis by addressing practical circumstances in which confidential informer privilege may arise throughout the course of criminal proceedings, and the diversity of ways in which that may affect the measures that must be taken to protect the privilege. The purpose of the AGBC's submission will be to illustrate the importance of preserving judges' flexibility to craft appropriate measures to protect the privilege in any given case, and that no bright line rules should be endorsed that could limit that flexibility. While the instant appeal presents a specific scenario arising from the laying of criminal charges against a confidential informer, this Court's decision can be expected to have consequences in any situation where informer privilege is claimed in legal proceedings, criminal or civil. For example, *Postmedia Network Inc. v. Named Persons*, 2022 BCCA 431 involved a civil proceeding that was conducted in near total secrecy, where revealing the very nature of the interests


at stake would risk disclosing them. Accordingly, submissions addressing the different ways the privilege can arise and the need for a variety of fact and context-specific protective measures, will be of assistance to the Court.

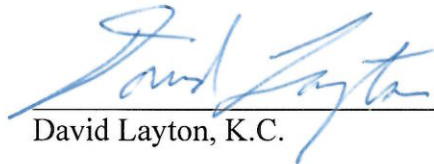
18. If granted leave to intervene, the AGBC also intends to address the media appellants' submissions regarding the use of undertakings of confidentiality. In particular, the media appellants suggest that once the informer's name and certain core identifying information (such as family and friendship ties, their image, date of birth, physical attributes, or address) is redacted, information may be disclosed to media counsel on undertakings of confidentiality to allow media counsel to make submissions on the intersection between informer privilege and the open court principle: *Media Appellants' Factum*, paras. 92–98. The use of undertakings of confidentiality has recently been litigated in British Columbia: see, for example, *Capital City News Group Ltd. v Her Majesty the Queen in Right of the Province of British Columbia*, 2021 BCSC 479. The AGBC is thus well placed to assist the Court with submissions on when such undertakings may appropriately be used.

19. The AGBC will submit that it is not appropriate to disclose information that may be privileged, even on undertakings of confidentiality, before the party asserting privilege has had the opportunity to establish that claim. Further, once the claim is established, there is no latitude to disclose privileged information – regardless of any undertaking of confidentiality.

20. In the case of informer privilege in particular, the use of undertakings of confidentiality is not supported where doing so could expand the circle of privilege or where, due either to the mosaic effect or the fact that the informer is anonymous, it is impossible to identify what information will identify the informer. Where undertakings of confidentiality have been employed in the litigation of various confidentiality and privilege claims, the circumstances have been distinguishable from what the media appellants are proposing here. For example, they have been employed where the Crown consented to their use (see, for example, *Postmedia Network Inc v. HMTQ*, 2019 BCSC 929); where the undertakings were attached to vetted documents and materials, rather than disclosing the protected information itself (*R. v. Esseghaier*, 2013 ONSC 5779); where the media were seeking to quash production orders directed at them (see e.g. *Edmonton Journal v. Canada (Justice)*, 2013 ABPC 356); and/or, in some cases, they have been employed without any substantive analysis of the issue.

21. If granted leave to intervene, the AGBC will take no position on the facts or outcome of this appeal and will attempt, with its submissions, to assist this Court in resolving the legal issues raised. The AGBC will also review the respondents' factums and coordinate with any other Attorney General interveners with a view to avoiding duplication and advancing a unique perspective.

AFFIRMED BEFORE ME at the )  
City of Vancouver, )  
in the Province of British Columbia, )  
the 6<sup>th</sup> day of July, 2023. )  
 )  
Liliane Bantourakis )  
A Commissioner for the taking of )  
Affidavits in British Columbia )

  
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David Layton, K.C.