SCC File No.: 40371

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

BETWEEN

SOCIÉTÉ RADIO-CANADA / CANADIAN BROADCASTING CORPORATION, LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉPENDANTE (CN21), CANADIAN PRESS ENTERPRISES INC., MEDIAQMI INC., and GROUPE TVA INC.

APPELLANTS

and

HIS MAJESTY THE KING and NAMED PERSON

RESPONDENTS

(continued)

MOTION FOR LEAVE TO INTERVENE
(CENTRE FOR FREE EXPRESSION, PROPOSED INTERVENER)
(Pursuant to Rules 47, 55 to 59 of the *Rules of the Supreme Court of Canada*)

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AND BETWEEN

ATTORNEY GENERAL OF QUÉBEC

APPELLANT

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INTERVENERS

NOTICE OF MOTION
(CENTRE FOR FREE EXPRESSION, PROPOSED INTERVENER)
(Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that the Centre for Free Expression ("**CFE**") hereby applies to a Judge pursuant to Rules 47 and 55- 59 of the *Rules of the Supreme Court of Canada*, for an Order:

1. Granting the CFE leave to intervene in the Appeal bearing SCC File Number 40371;

2. Permitting the CFE to file a factum not exceeding 10 pages with respect to the Appeal bearing SCC File Number 40371;

2. Permitting the CFE to present oral argument at the hearing of the Appeal;

3. Permitting the CFE not to be granted costs, nor have costs be ordered against it; and

4. Such further or other Order that this Honourable Court may deem appropriate.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

1. Pursuant to Rule 55 of the *Rules of the Supreme Court of Canada*, this Honourable Court has the jurisdiction to allow any interested person to intervene before this Honourable Court in regard to a matter in an appeal;

2. The applicant for leave to intervene, the CFE, is a non-partisan research, public education and advocacy centre based in the Creative School at Toronto Metropolitan University. The objects of the CFE include serving as a hub for public education, research and advocacy on free expression and the public's right to seek, receive and share information. It works collaboratively with other academic and national and provincial organizations to promote better understandings of the importance of freedom of expression in a democratic society and to advance expressive freedom rights in Canada and internationally;

3. The CFE has participated in a variety of proceedings, including a number before this Honourable Court, to which it has contributed its considerable expertise in freedom of expression and the public's right to seek, receive and share information under the Canadian *Charter of Rights and Freedoms*;

4. Of particular relevance to this Appeal are the CFE's numerous interventions in cases involving the open court principle;

5. Also of particular relevance to this Appeal is the CFE's extensive experience and expertise in the right to know, including its work around access to information;

6. The CFE has considerable experience in promoting free expression in Canada through other forums, including by making presentations to various levels of government, legislation committees, boards, commissions of inquiry and a variety of public bodies;

7. The CFE proposes to present an additional and unique perspective on the open court principle and right to information, with reference to how it functions in the context of the police informer privilege and freedom of expression. The Appellants are a coalition of media organizations, and as such have a specific focus on the impact that media access to court proceedings and materials has on freedom of expression and, in particular, the public's right to know. The CFE's approach to this issue is distinct. By virtue of being housed within an academic institution, the CFE has particular expertise on how the open court principle is essential to other forms of free expression, including academic freedom. Academics studying the justice system frequently rely on open courts to conduct their research. Academic publications and teachings form part of the broad spectrum of public expression, discussion and scrutiny that enhance transparency and accountability within the justice system;

8. Furthermore, the CFE's perspective on this issue is also informed by its knowledge of other forms of public monitoring of the judicial system, including grassroots witnessing projects whereby communities organize to record and report on what is happening in the judicial system;

9. An outline of the CFE's proposed submissions is set out in the Affidavit of James L. Turk filed as part of the complete motion;

10. The CFE will provide this Honourable Court with submissions that will assist the Court and differ from those of the parties;

11. The effect of this Court's ruling in the Appeal will have an impact beyond the interests of the immediate parties to the Appeal;

12. Granting leave to the CFE will not prejudice any party;

13. The CFE will abide by any schedule set by this Honourable Court in respect of this Appeal;

14. The CFE will not seek to supplement the record or expand the issues;

15. The CFE will abide by any terms and conditions this Honourable Court may set in granting leave to intervene;

16. The CFE will work with the parties and any other interveners in order to avoid duplicative submissions and ensure an efficient presentation of each intervener's position to this Honourable Court;

17. The CFE does not seek costs in the proposed intervention and respectfully requests that none be awarded against it;

18. Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*; and

19. Such further grounds as counsel may advise and this Honourable Court may permit.

Dated at Toronto, Ontario this 7th day of July, 2023.

SIGNED BY:

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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion.

SCC File No.: 40371

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INTERVENERS

AFFIDAVIT

I, JAMES L. TURK, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am Director of the Centre for Free Expression at Toronto Metropolitan University ("**CFE**"), and, as such, have personal knowledge of the matters to which I hereinafter depose, except where the same are stated to be on information and belief, in which case I verily believe them to be true.

2. I make this affidavit in support of the CFE's motion for leave to intervene in this proceeding.

A. Background on the expertise and experience of the CFE

3. The CFE is a non-partisan research, public education and advocacy centre based in the Creative School at Toronto Metropolitan University. The objects of the CFE include serving as a hub for public education, research and advocacy on free expression and the public's right to seek, receive and share information. It works collaboratively with other academic and national and provincial organizations to promote better understandings of the importance of freedom of expression in a democratic society and to advance expressive freedom rights in Canada and internationally.

4. The CFE is guided by an Advisory Board made up of fifteen prominent Canadians: **Faisal Bhabha**, Associate Professor, Osgoode Hall Law School, and Legal Advisor to the National Council of Canadian Muslims; **Jamie Cameron**, Professor Emerita of Constitutional Law, Osgoode Hall Law School; **Andrew Clement**, Professor Emeritus & Co-Founder, Identity Privacy and Security Institute, Faculty of Information, University of Toronto; **Brendan De Caires**, Executive Director, PEN Canada; **Ryder Gilliland**, Founding Partner, DMG Advocates LLP; **David Hughes**, Executive Director and Managing Editor of Content, CTV National News; **Peter Jacobsen**, Partner, WeirFoulds LLP; **Meghan McDermott**, Policy Director, British Columbia Civil Liberties Association; **Shelagh Paterson**, Executive Director, Ontario Library Association; **Toni Samek**, Professor, School of Library and Information Studies, University of Alberta; **Robin Sokoloski**, Director of Organizational Development, Mass Culture/Mobilisation Culturelle; **Laura Tribe**, Executive Director, OpenMedia; **David Walmsley**, Editor-in-Chief, The Globe and Mail; and **Vershawn Young**, Professor, Black Studies, Communication Arts and English, University of Waterloo; and **Cara Zwibel**, Past Director, Fundamental Freedoms Program, Canadian Civil Liberties Association.

B. The CFE's interest in the issues raised by this Appeal

5. The CFE's focus on freedom of expression reflects its founders' recognition of the importance of the underlying societal values and goals served by free expression, including democratic accountability, institutional transparency and accountability, thorough public discussion as it pertains to academic inquiry research and discussion, and the general pursuit of truth.

6. The CFE thus has a significant interest in protecting freedom of expression as it relates to the judicial system. This includes ensuring a strong interpretation and application of the open court principle and the public's right to receive information. The CFE considers a vigorous interpretation and application of these two fundamental tenets of the right to free expression to be critical tools in ensuring the transparency and accountability of the justice system.

7. This Appeal raises significant issues that directly touch on the presence and influence of the open court principle and right to receive information, including: the modern interpretation and application of the open court principle in light of evolving technology; the appropriate scope of police informer privilege and its interaction with the open court principle; and a consideration of what procedural steps need to be in place to ensure an appropriate reconciliation of rights and interests in cases where the open court principle, freedom of expression, and the interests protected by police informer privilege come into conflict.

8. The issues raised by this Appeal engage these interests directly. That is why CFE seeks to be involved as an intervener before this Court.

C. The CFE's expertise and experience in relation to open courts, publication bans, and the public's right to know

9. One of the CFE's longstanding priorities has been to help ensure expression and the public's access to the courts is not inappropriately restricted by publication bans. More generally, the CFE has been a strong supporter of the open court principle and right to receive information, both in Ontario and across the country, and has spent considerable resources following, explaining, and discussing their importance. Recent examples of the CFE's work in this area include:

- A virtual forum titled "Publication Bans vs. Press Freedom & Open Courts" in which, among other issues, experts discussed the scant argument/evidence required for publication bans to be successful and their impact on the public's right to know;

- An intervention before the Supreme Court of Canada in the recent judicial publication ban case of *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33;

- A CFE opinion piece published on its website titled "Even in the Age of COVID-19, Justice Requires Open Courts"; and

- Numerous presentations to and discussions with students and the broader public regarding the importance of the open court principle and the challenges of current practices and statutory obligations regarding publication bans.

10. The CFE has also been actively engaged with broader issues concerning the promotion of free expression as it pertains to access to information and the public's right to know. Examples of this work include:

- An intervention before the Ontario Divisional Court in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2022 ONCA 74, dealing with whether the current provincial government's mandate letters are exempt from disclosure under Ontario's access to information legislation;
- Providing a number of freely accessible resources to educate the public on various issues related to access to information, including the CFE's submissions to the government calling for reforms to the processes associated with access to information requests;

- Organizing, administering, and chairing "Right to Information Alliance Canada", which is a network of organizations dedicated to advocating for a stronger public right to information and greater government and corporate transparency; and

- A public conference titled "Flying Blind – Limits on the Public's Ability to Know" in which a dozen experts addressed interference with the creation of information, limitations on access to information, restrictions on the dissemination of information, and what can be done to enhance the public's right to know. The speakers included the Information Commissioner of Canada, the former Chief Statistician of Canada, several of Canada's top

investigative journalists and one of Canada's leading media lawyers, as well as myself.

D. The CFE's expertise and experience in freedom of expression issues more generally

11. In addition to its specific work in relation to the open court principle and the right to know, the CFE has undertaken a broad range of work related to other free expression concerns. For example, the CFE:

a) Has intervened on numerous high-level court cases pertaining to freedom of expression including interventions:

   i. Before the Supreme Court of Canada in the recent case of *Hansman v. Neufeld*, 2023 SCC 14, advocating for a more balanced approach to the application of the "chilling effect" step in anti-SLAPP proceedings;

   ii. Before the Supreme Court of Canada in the recent case of *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27, advocating for greater protections for public standing as a fundamental tenet of free expression;

   iii. Before the Supreme Court of Canada in the recent freedom of expression and democratic participation case of *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34;

   iv. Before the Supreme Court of Canada in the "anti-SLAPP" case of 1704604 *Ontario Limited v. Pointes Protection Association*, et al., 2020 SCC 22; and

   v. Before the Supreme Court of Canada in the press freedom case of *R v Vice Media Canada Inc*., 2018 SCC 53;

b) Oversees and awards the "Peter Bryce Prize for Whistleblowing" to recognize and honour individuals who serve the greater good by courageously speaking up about wrongdoing and abuses of public trust;

c) Undertook and published in November 2016 a national survey of writers and journalists on the impact of mass surveillance on their work;

d) Has hosted dozens of public events to promote a more informed understanding of free expression and importance. These events have included, among others:

i. A public discussion on the increased challenges faced by Canadian writers and journalists at the hands of authoritarian governments attempting to intimidate and silence their reporting through digital platforms. The panelists were Siena Anstis, Chris Tenove, Kiran Nazish, and Sheng Xue. The moderator was Julian Sher.

ii. A public talk about the rise of antisemitism and the ways in which it can be challenged. The conversation was led by Philip Slayton and Samir Gandesha.

iii. A public panel discussion on the introduction of Bill-36 and whether this new legislation is suitable to properly counter and reduce hate speech in Canada. The panelists were Faisal Bhabha, Ena Chadha, and Richard Moon, with Cara Zwibel as the moderator.

iv. A public talk on the growing demands for censorship directed at libraries and universities, and these demands' implications for freedom of expression globally. The guests were Emily Knox and Toni Samek.

v. A public panel discussion on the inefficacy of Canadian federal whistleblower laws in protecting whistleblowers. The panelists were Ian Bron, David Hutton and Anna Myers. Karyn Pugliese served as the moderator.

vi. A public panel discussion regarding the lack of protections for student journalists and university newspapers in Canada. The panelists were Spencer Izen and Jessica Kim. Danielle S. McLaughlin was featured as a discussant, and I served as the moderator.

vii. A public panel discussion on the state of press freedom in Kashmir. The panelists were Aakash Hassan, Kunal Majumder, Raqib Hameed Naik, and Geeta Seshu. Julian Sher served as the moderator.

viii. A public panel discussion examining the issue of making public reports of investigations of police behaviour and how competing interests in transparency, accountability, privacy and confidentiality should be dealt with. The panelists were

Pascale Diverlus, Julian Falconer, David Goodis, and Joanne Mulcahy. Mark Kelley served as moderator.

ix. A public panel discussion on the pressure felt by long-term care staff, warehouse employees, and other workers in high-risk jobs amid the pandemic to remain silent about their working conditions. The panelists were Kit Andres, Syed Hussan, Gagandeep Kaur, and Deena Ladd. Myer Siemiatycki served as the moderator.

x. A public panel discussion on the risks that non-disclosure agreements pose to preventing the public's access to information and perpetuating injustice. The panelists were Julie Macfarlane, Dan Michaluk, Ifeoma Ozoma, and Emma Phillips. Anna Myers served as the moderator.

xi. A public panel discussion on the effects of "cancel culture" and its potential impacts on freedom of expression in universities, public libraries, arts and media. The panelists were Piers Benn, Christina de Castell, Inaya Folarin Iman, and Eric Lybeck. I served as the moderator.

xii. A public panel discussion on the implications of Alberta's and Ontario's "Ag-Gag" laws on whistleblowers' and undercover journalists' abilities to report on public and private dangers. The panelists were Robert Cribb, Jodi Lazare, and Richard Moon. Cara Zwibel served as the moderator.

xiii. A public panel discussion on the awareness COVID-19 brought to the need for greater legal protections for whistleblowers in Canada. The panelists were Ian Bron, Tom Devine, and Anna Myers. David Hutton served as the moderator.

xiv. A live teleconference with Edward Snowden, moderated by Anna Maria Tremonti, followed by a panel discussion of journalists on free expression in the era of mass surveillance.

xv. A showing and public discussion of the film, "Guantanamo's Child: Omar Khadr" led by journalist Michelle Shephard and moderated by Bernie Lucht focusing on issues of free expression in an era of terrorism.

xvi. A public panel discussion on the censorship in the arts. Panelists were Tim Edler,

Anielika Sykes, and Hooley McLaughlin, and it was moderated by Paul Kennedy and broadcast subsequently on CBC Ideas.

xvii. A public panel discussion on how to deal with the distortions of social media. The panelists were Matt Bailey, Brendan de Caires, and Petra Molnar. I was the moderator.

xviii. A public talk by Ken Rubin on access to information rights, the barriers journalists and the public face, and how to overcome them.

E. Overview of the CFE's proposed submissions

12. If granted leave to intervene, the CFE's submissions would, in substance, be as follows:

a) Over the past few decades there has been an increasing need for courts to carefully and sensitively reconcile the presumption of openness with other important societal interests and values.

i. The open court principle and right to receive information are central tenets of the Canadian *Charter of Rights and Freedoms* right to free expression. Both work in tandem to provide the public with the right to observe the court process and access court records. As hallmarks of a democratic society, they ensure accountability of the judicial system by permitting public scrutiny of court proceedings and are thus necessary to achieve justice.

ii. The importance of the open court principle and right to receive information go well beyond ensuring the media's ability to report on court proceedings. A range of other public actors and entities, including academics and communities, rely on the open court principle to remain informed about the justice system, analyze trends, and call attention to the practices of courts, prosecutors, police, and a range of other justice actors. Court openness is also directly linked to the administration of justice and public confidence in the justice system.

iii. This Court has reiterated its strong support for a robust open court principle in numerous judgments, emphasizing the need for sufficient evidence to justify

displacing the presumption of openness. *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 held that deficient arguments to seal documents in order to protect the identity of confidential police informers would be "doomed to failure by more than two decades of unwavering decisions." To accept them without scrutinization would undermine the open court principle that is "inextricably incorporated into the core values" of Section 2(b).

iv. However, this same body of jurisprudence also reflects increasing societal concerns about the impact of the open court principle on a broad range of rights and interests. Over the past two decades, this Court has given numerous reasons in favour of sealing court proceedings and permitting anonymity, including the protection of confidential police informers, the fragile emotional state of court participants under media scrutiny, and the increased publicity of judicial participants by virtue of online access.

v. The CFE, if granted leave to intervene, would argue these developments collectively demonstrate the need for an increasingly nuanced approach to the protection of the open court principle in a contemporary court of law. Increased and more explicit procedural protections are required to ensure the consequences of inhibiting the open court principle and right to receive information are both intended and warranted.

vi. Not all requests for a publication ban or a sealing order are the same, and the likely impact on Section 2(b) of the *Charter* and the administration of justice will vary. The scope of the applicable procedural protections should be responsive to the legal claims being made and the impact they may have on the public's right to know.

b) The scope of police informer privilege's is unique in its impact on the open court principle and right to receive information.

i. The police informer privilege – in its effort to encourage the free flow of information pertinent to criminal investigations – holds the unique potential to limit the open court principle and right to information in a number of ways. For example, as summarized by the Court of Appeal in this case:

i) When found to exist, the police informer privilege trumps all other interests in a near-absolute way – public or otherwise. It cannot be reduced or balanced against other concerns about the administration of justice. Furthermore, the privilege permits only one exception; where the accused's innocence is found to be "at stake", identifying information may be necessarily disclosed.

ii) The privilege does not only apply when it is raised by an alleged informer and found by the judge to exist. Given it is not subject to any formality, if no party to the case invokes the privilege, a judge is still required to impose it of his or her own motion.

iii) The amount and nature of the information subject to the privilege is expansive. Even the most minute information that the judge determines could possibly identify the informer must be sealed. Thus, it is not limited to information that would likely reveal the informer's identity. Furthermore, where it cannot be determined with confidence whether the information is likely to identify the informer, it cannot be disclosed whatsoever.

ii. Additionally, the Canadian approach to the police informer privilege renders it a significantly stronger and more far-reaching power than that found within other comparable jurisdictions. As such, a more explicit and flexible procedure is needed to establish the extent of the privilege after the determination stage. This procedure should delineate how a closed proceeding may take place whilst respecting the essential role of adversarial debate within the Canadian legal tradition.

c) If the current strict approach to the police informer privilege is maintained, a process must be established to ensure robust adversarial debate.

i. The adversarial system is a foundational pillar of the Canadian justice system. By permitting two opposing sides equal opportunity to demonstrate an accused's guilt or innocence, all relevant evidence will be gathered and presented to the independent arbitrator so that they make as informed a decision as is possible. It is

therefore the parties who have the task of revealing the truth, as the judge is not permitted to redefine the factual or legal debate, nor to examine arguments that have not already been raised. The stakes can be particularly high in the criminal justice context, where adversarial debate works to protect the presumption of innocence, hinders potential abuse from government, and checks potential biases in the courtroom.

ii. Wherever possible, adversarial debate should be facilitated through the fully informed participation of interested parties. The CFE, if granted leave to intervene, would submit that ensuring robust adversarial debate is particularly essential in the second stage of the procedure when determining the scope of police informer privilege, as set out in *Named Person v. Vancouver Sun*, 2007 SCC 43. Notice should be given to allow interested parties to participate at this stage if they choose.

iii. Adversarial debate typically occurs through the participation of interested parties. The Appellants have suggested a mechanism whereby interested parties would be granted standing and provided some information to enable meaningful debate at the second stage of the inquiry. However, because information given to interested parties outside of the circle of privilege will still be limited, there may be circumstances in which interested parties simply do not have enough information to permit a fully informed and effective adversarial debate. There may also be cases where interested parties cannot or choose not to become involved. In these circumstances, given the privilege's impact, it should be <u>mandatory</u> that the court appoint an advocate with access to the sensitive information who can represent the public interest and thereby ensure there is a meaningful debate regarding what information should be sealed.

iv. There are a range of other situations in which courts appoint advocates to ensure adversarial debate still takes place where parties may not be present due to confidentiality or other reasons, ranging from the national security regime to family law. Additionally, both Canadian and foreign jurisdictions have demonstrated movement towards finding a more equitable balance between the police informer privilege and free expression.

v. The appointment of an advocate would encourage greater faith in the justice system. Even if the ultimate decision was that a complete *in camera* proceeding was necessary, both the public and the media could take solace in knowing the decision was made with their constitutional rights in mind.

13. These submissions will be prepared from the perspective of an organization focused on protecting and fostering Section 2(b) of the *Charter*, particularly as it pertains to the public's and academics' right to access court proceedings.

F. The CFE will make unique and useful submissions

14. CFE is well positioned to provide this Court with a unique perspective on the issues raised in this case. The Appellants are a coalition of media organizations, and as such have a particular focus on the impact that media access to court proceedings and materials has on freedom of expression and, in particular, the public's right to know. The CFE's approach to this issue is distinct. By virtue of being housed within an academic institution, the CFE has particular expertise on how the open court principle is essential to other forms of free expression, including academic freedom. Academics studying the justice system frequently rely on open courts to conduct their research. Academic publications and teachings form part of the broad spectrum of public expression, discussion and scrutiny that enhance transparency and accountability within the justice system.

15. The CFE's perspective on this issue is also informed by its knowledge of other forms of public monitoring of the judicial system, including grassroots witnessing projects whereby communities organize to record and report on what is happening in the judicial system.

16. The CFE also has a unique perspective on this case due to its nuanced and sensitive approach to freedom of expression. For example, as part of the CFE's general mandate to ensure institutional transparency and accountability, the organization focuses on the need to protect the identities of whistleblowers. The CFE recognizes that, at times, full transparency and publicity can impair other important societal goals and values. Thus, carefully reconciling freedom of expression – including the open court principle – with other societal values and goals is an important part of its mandate.

17. The CFE seeks to provide the Court with a substantive, impartial, and useful analysis on the legal issues before the Court. It arrives at its position by its own reasoning and will not adopt all of the parties' arguments.

18. I am advised by Alexi Wood and Abby Deshman, counsel to the CFE, that they have already spoken with counsel to another potential intervener in an effort to coordinate proposed submissions and avoid duplication. If granted leave to intervene, the CFE will continue to work with counsel for the parties and counsel for the other interveners to ensure that our respective submissions are not duplicative.

19. The CFE does not seek leave to file any new evidence and would rely entirely on the record as it has been created by the parties.

20. The CFE would seek no costs and would ask that no costs be awarded against it.

21. The CFE has consistently endeavoured to provide this Court (and others) with helpful and distinct submissions when granted intervenor status in the past. This affidavit is made in support of a motion by the CFE for leave to intervene in this Appeal and to file written submissions and present oral argument through counsel at the hearing of this Appeal.

AFFIRMED before me at the City of Toronto, in the Province of on July 7, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A Commissioner of Oaths

ABBY DESHMAN
LSO number: 56757T