S.C.C. File No. 40371

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

B E T W E E N :

CANADIAN BROADCASTING CORPORATION
LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉEPDANTE (CN21), CANADIAN PRESS ENTERPRISES INC.
MEDIA QMI INC., GROUPE TVA INC.

APPELLANTS

- and -

HIS MAJESTY THE KING
NAMED PERSON

RESPONDENTS

[*Style of cause continued on next page*]

MOTION RECORD OF THE PROPOSED INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

McCARTHY TÉTRAULT LLP
Suite 5300, TD Bank Tower
Toronto, ON M5K 1E6

Adam Goldenberg (agoldenberg@mccarthy.ca)
Simon Bouthillier (sbouthillier@mccarthy.ca)

Tel.: (416) 601-7821
Fax: (416) 868-0673

Counsel for the Proposed Intervener,
Canadian Civil Liberties Association

[*Style of cause continued*]

A N D B E T W E E N :

ATTORNEY GENERAL OF QUEBEC

APPELLANT

- and -

HIS MAJESTY THE KING
NAMED PERSON

RESPONDENTS

- and –

CANADIAN BROADCASTING CORPORATION
LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉEPDANTE (CN21), CANADIAN PRESS ENTERPRISES INC.
LUCIE RONDEAU, in her capacity as Chief Justice of the Court of Quebec

INTERVENERS

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

BERNARD, ROY (JUSTICE-QUÉBEC)
Suite 8.00
1, rue Notre-Dame Est
Montréal (Québec)
H2Y 1B6

Me Pierre-Luc Beauchesne
Tel : 514 393-2336, #51564
Fax : 514 873-7074
pierre-luc.beauchesne@justice.gouv.qc.ca

Counsel for the Appellant,
Attorney General of Quebec

NOËL & ASSOCIÉS
2e étage
225, montée Paiement
Gatineau (Québec)
J8P 6M7

Me Pierre Landry
Tel : 819 771-7393
Fax : 819 771-5397
p.landry@noelassocies.com

Ottawa Agent for the Appellant,
Attorney General of Quebec

FASKEN MARTINEAU DUMOULIN
S.E.N.C.R.L., S.R.L.
Suite 3500
800, rue du Square-Victoria
Montréal (Québec)
H4Z 1E9

Me Isabelle Kalar
Me Christian Leblanc
Me Patricia Hénault
Tel : 514 397-7400
Fax : 514 397-7600
ikalar@fasken.com
cleblanc@fasken.com
phenault@fasken.com

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

FASKEN MARTINEAU DUMOULIN
S.E.N.C.R.L., S.R.L.
Suite 1300
55, rue Metcalfe
Ottawa (Ontario)
K1P 6L5

Me Sophie Arseneault
Tel : 613 236-3882
Fax : 613 230-6423
sarseneault@fasken.com

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

ROY & CHARBONNEAU AVOCATS
Suite 395
Complexe Jules-Dallaire, Tour 2
2828, boul. Laurier
Québec (Québec)
G1V 0B9

Me Maxime Roy
Me Ariane Gagnon-Rocque
Tel : 418 694-3003
Fax : 418 694-3008
mroy@rcavocats.ca

Counsel for the Intervener,
Lucie Rondeau, in her role as the Chief Justice
of the Court of Quebec

TABLE OF CONTENTS

S.C.C. File No. 40371

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

B E T W E E N :

CANADIAN BROADCASTING CORPORATION
LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉEPDANTE (CN21), CANADIAN PRESS ENTERPRISES INC.
MEDIA QMI INC., GROUPE TVA INC.

Appellants

- and -

HIS MAJESTY THE KING
NAMED PERSON

Respondents

A N D B E T W E E N :

ATTORNEY GENERAL OF QUEBEC

Appellant

- and -

HIS MAJESTY THE KING
NAMED PERSON

Respondents

- and -

CANADIAN BROADCASTING CORPORATION
LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉEPDANTE (CN21), CANADIAN PRESS ENTERPRISES INC.
LUCIE RONDEAU, in her capacity as Chief Justice of the Court of Quebec

Interveners

NOTICE OF MOTION OF THE PROPOSED INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that the Canadian Civil Liberties Association ("**CCLA**") hereby applies to a judge of this Honourable Court, pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156, for:

1. an Order granting the CCLA leave to intervene in this appeal on the following terms and conditions:

   (a) the CCLA shall serve and file a factum;

   (b) the CCLA shall be permitted to make oral submissions at the hearing of the appeal; and

   (c) no costs shall be ordered for or against the CCLA on this motion or on the appeal itself; and

2. any further or other Order that the judge may deem appropriate.

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

3. As discussed in the CCLA's Memorandum of Argument and the Affidavit of Noa Mendelsohn Aviv, the CCLA has an interest in this appeal and the CCLA will make submissions that are relevant, useful, and different from those of the parties.

4. The CCLA has a genuine and direct interest in this appeal. The CCLA is an independent, national, non-governmental organization. Its mission is to fight for the civil liberties, human rights and democratic freedoms of people across Canada. The CCLA does this by, among other things, advocating for the open court principle. As one of Canada's leading voices on the openness of the courts, the CCLA is uniquely positioned to help this Court understand the potential impacts of its decision, including on the CCLA's ability to make submissions on requests for confidentiality orders in lower courts across Canada in future cases.

5. Based on its demonstrated expertise, the CCLA is well positioned to make distinct and important contributions to this appeal. If granted leave to intervene, the CCLA would make the following two submissions:

i. **Statutory courts must consider the scope of their own jurisdiction in considering the appropriateness and scope of confidentiality orders.** The implied jurisdiction of statutory courts — like the Court of Québec — is constrained by the Constitution. Though statutory courts' implicit jurisdiction affords them supervisory powers over the court record, those powers do not extend to the administration of criminal evidence and the application of criminal procedure, both of which fall under federal jurisdiction. Therefore, when a statutory court judge is seized with a criminal matter that requires them to conceal the identity of an individual or individuals protected by informer privilege, they must draw their jurisdiction from the *Criminal Code*. The Criminal Code does not contain provisions that would allow a court to elect to not use a file number or to order the non-disclosure of the date of the trial, the court, the district, or the identity of the judge and counsel, or indeed to take measures to shield the entire proceeding including perhaps its very existence from public scrutiny. Quite the contrary, the *Criminal Code* mandates recordkeeping and open courts. These principles should inform not only whether a confidentiality order should be granted, but also whether, and the extent to which, third parties should have the opportunity to make submissions.

ii. **The Court should clarify the role of non-media organizations in proceedings concerning confidentiality orders** including where informer privilege is asserted. In *Vancouver Sun*, this Court held that, when a tribunal notifies organizations and individuals to allow them to make submissions on the confidentiality measures that should be in place in order to conceal the identity of an individual protected by informer privilege, it must do so fairly and publicly. The CCLA would submit that, for hearings concerning confidentiality order requests to be fair, courts should generally provide non-media organizations with the opportunity to make submissions. Such an approach would be consistent with this Court's position on the appropriately generous and liberal approach that should be taken to the issue of

standing when *Charter*-protected interests are engaged, as they are whenever the openness of courts is curtailed. The CCLA would argue that, despite this Court's instructions, opportunities for non-media organizations to partake in judicial debates on confidentiality orders remain rare and vary greatly from province to province. The CCLA would also submit that the framework for determining non-media organizations' participatory rights in these proceedings should involve a weighing of the non-media organizations' interest in the proceedings, their ability to make meaningful contributions, and concerns regarding the security of the confidential information, among other factors.

6. The CCLA would not raise any new issues or otherwise expand the scope of the appeal. Like the parties, the CCLA would make submissions on the scope of the courts' constitutional powers to grant confidentiality orders and their duty to guarantee open courts, as well as with the modalities of the process through which these orders may or must be granted.

7. The CCLA's submissions would be different from those of the parties. The Attorney General of Québec focuses on the scope of the courts' powers to grant confidentiality orders and on the duty to guarantee the openness of the courts. By contrast, the CCLA would address how the scope of the courts' jurisdiction should guide this Court in delineating these powers and duties. Moreover, the media appellants focus on the media's contributions to the assessment of potential confidentiality measures, while the CCLA would describe what non-media organizations can bring to that process and why they should be allowed to participate in it.

8. The CCLA's proposed intervention will not cause any injustice or prejudice to the parties. If granted leave to intervene, the CCLA:

(a) will not file any additional evidence or add to the appeal record;

(b) will not raise new issues;

(c) will not seek costs;

(d) will serve and file its factum by the deadline set by the Court for all interveners granted leave, and will not unreasonably delay or lengthen the hearing;

(e) will work with the parties and any other interveners to avoid duplicative submissions and ensure an efficient presentation of each intervener's position to the court; and

(f) will comply with any terms and conditions imposed.

9. The CCLA relies on Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156.

10. **AND FURTHER TAKE NOTICE** that in support of this motion will be read:

(a) the Affidavit of Noa Mendelsohn Aviv, affirmed July 7, 2023;

(b) the CCLA's Memorandum of Argument; and

(c) such further and other materials as counsel may advise and this Honourable Court may permit.

Dated at the City of Toronto, in the Province of Ontario, this 10th day of July, 2023.

SIGNED BY:

Adam Goldenberg

McCARTHY TÉTRAULT LLP
Suite 5300, TD Bank Tower
Toronto, ON M5K 1E6

Tel.: (416) 601-8357
Fax: (416) 868-0673

Adam Goldenberg (agoldenberg@mccarthy.ca)
Simon Bouthillier (sbouthillier@mccarthy.ca)

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

BERNARD, ROY (JUSTICE-QUÉBEC)
Suite 8.00
1, rue Notre-Dame Est
Montréal (Québec)
H2Y 1B6

Me Pierre-Luc Beauchesne
Tel : 514 393-2336, #51564
Fax : 514 873-7074
pierre-luc.beauchesne@justice.gouv.qc.ca

Counsel for the Appellant,
Attorney General of Quebec

NOËL & ASSOCIÉS
2e étage
225, montée Paiement
Gatineau (Québec)
J8P 6M7

Me Pierre Landry
Tel : 819 771-7393
Fax : 819 771-5397
p.landry@noelassocies.com

Ottawa Agent for the Appellant,
Attorney General of Quebec

FASKEN MARTINEAU DUMOULIN
S.E.N.C.R.L., S.R.L.
Suite 3500
800, rue du Square-Victoria
Montréal (Québec)
H4Z 1E9

Me Isabelle Kalar
Me Christian Leblanc
Me Patricia Hénault
Tel : 514 397-7400
Fax : 514 397-7600
ikalar@fasken.com
cleblanc@fasken.com
phenault@fasken.com

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

FASKEN MARTINEAU DUMOULIN
S.E.N.C.R.L., S.R.L.
Suite 1300
55, rue Metcalfe
Ottawa (Ontario)
K1P 6L5

Me Sophie Arseneault
Tel : 613 236-3882
Fax : 613 230-6423
sarseneault@fasken.com

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

ROY & CHARBONNEAU AVOCATS
Suite 395
Complexe Jules-Dallaire, Tour 2
2828, boul. Laurier
Québec (Québec)
G1V 0B9

Me Maxime Roy
Me Ariane Gagnon-Rocque
Tel : 418 694-3003
Fax : 418 694-3008
mroy@rcavocats.ca

Counsel for the Intervener,
Lucie Rondeau, in her role as the Chief Justice
of the Court of Quebec

NOTICE TO THE RESPONDENTS 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. 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.

S.C.C. File No. 40371

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

B E T W E E N :

CANADIAN BROADCASTING CORPORATION
LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉEPDANTE (CN21), CANADIAN PRESS ENTERPRISES INC.
MEDIA QMI INC., GROUPE TVA INC.

Appellants

- and -

HIS MAJESTY THE KING
NAMED PERSON

Respondents

A N D B E T W E E N :

ATTORNEY GENERAL OF QUEBEC

Appellant

- and -

HIS MAJESTY THE KING
NAMED PERSON

Respondents

- and –

CANADIAN BROADCASTING CORPORATION
LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉEPDANTE (CN21), CANADIAN PRESS ENTERPRISES INC.
LUCIE RONDEAU, in her capacity as Chief Justice of the Court of Quebec

Interveners

AFFIDAVIT OF NOA MENDELSOHN AVIV
(affirmed July 7, 2023)

I, **Noa Mendelsohn Aviv**, of the City of Toronto, in the Province of Ontario, **AFFIRM**:

1. I am the Executive Director and General Counsel of the CCLA. As such, I have knowledge of the matters described in this affidavit, except where this knowledge is based on information received from others, in which case I believe such information to be true.

2. I make this affidavit to support the CCLA's motion for leave to intervene in this appeal and for no other purpose.

A. THE CCLA

3. The CCLA was founded in 1964. It is a national organization dedicated to furthering civil liberties, rights and freedoms in Canada through public education, communication, research, and litigation.

4. The CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster the recognition of those rights and liberties. Among the CCLA's major objectives is the promotion and legal protection of individual freedom and dignity from unreasonable and unjustifiable intrusion by public authority and ensuring that such violations are effectively remedied.

5. A wide variety of persons, occupations, and interests are represented among CCLA's supporters from across Canada.

6. The CCLA maintains a website, www.ccla.org, through which it engages with its supporters and the broader public on contemporary issues and developments in the law. **Exhibit "A"** is a screenshot of the "About Us" page of the CCLA's website.

7. As noted above, and as elaborated below, the CCLA frequently furthers its mandate through litigation. The CCLA's previous interventions in Canadian court cases reflect the CCLA's commitment to defending constitutional rights and freedoms in courts of law. In total, the CCLA has been involved in more than 250 cases in which it has sought to uphold the constitutional rights and freedoms of Canadians.

B. RELEVANT EXPERIENCE AND EXPERTISE

8. The CCLA has a national presence and has a documented and longstanding role as an advocate for civil liberties and constitutional rights.

9. The CCLA also has considerable experience as a public interest intervener in matters related to freedom of the press and the open court principle. Over the past decades, the Supreme Court of Canada has granted the CCLA leave to intervene in numerous appeals pertaining to these matters, including:

(a) ***Sherman Estate v. Donovan*, 2021 SCC 25**, in which the CCLA argued that privacy interests alone should not be used to limit access to open courts except in exceptional cases. **Exhibit "B**" is a copy of the factum filed by the CCLA in that case.

(b) ***Marie-Maude Denis v. Marc-Yvan Cote*, 2019 SCC 44**, in which the CCLA highlighted the interpretative factors that courts should take into account when applying s. 39.1 of the Canada Evidence Act. **Exhibit "C"** is a copy of the factum filed by the CCLA in that case.

(c) ***R. v. Vice Media Canada Inc.*, 2018 SCC 53**, in which the CCLA argued that an indefinite publication ban is not an appropriate substitute for a sealing order and must be justified on its own merits in light of the open court principle. **Exhibit "D"** is a copy of the factum filed by the CCLA in that case.

(d) ***Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41**, which related to objections raised by a media organisation to orders that would have required it to reveal a journalist's confidential source.

10. Additionally, the Supreme Court of Canada has granted the CCLA leave to intervene in numerous appeals pertaining to the confidentiality of the identity of police informers, including:

(e) ***R. v. Barros*, 2011 SCC 51**, in which the CCLA argued that defendants in criminal proceedings should not be prohibited from investigating the identity of police informants implicated in the proceedings against them. **Exhibit "E"** is a copy of the factum filed by the CCLA in that case.

(f) ***Solicitor General of Canada, et al. v. Royal Commission (Health Records),*** **[1981] 2 S.C.R. 494**, which related to whether informer privilege prevents the disclosure of the identity of medical professionals who provide medical information to the police without the consent of the patient.

(g) ***A.G. (Nova Scotia) v. MacIntyre,*** **[1982] 1 S.C.R. 175**, which related to an investigative journalist's request to access search warrants and supporting material that could possibly reveal the identity of police informants and that had been put under a sealing order by a judge.

C. THE CCLA'S GENUINE INTEREST IN THE APPEAL

11. The CCLA has a genuine interest in this appeal. The open court principle, which underpins the issues before the Court, is a key issue at the core of the CCLA's mandate. The CCLA has advocated for open courts for many years, in this Court and elsewhere. This is part and parcel of the CCLA's commitment to advancing the *Charter* rights and civil liberties of people in Canada, including the right to access court proceedings and to seek to vindicate rights and freedoms in open court.

12. Moreover, the CCLA has a genuine interest in the procedure by which courts will adjudicate future requests for confidentiality orders. This is an issue that the media appellants have put in play. The CCLA, as a non-media organization committed to upholding the *Charter* rights of Canadians – including by advocating for scrupulous adherence to the open court principle – has not only a keen public interest concern but also a direct stake in the confidentiality of court proceedings and may wish to make submissions on proposed confidentiality orders in future cases. The outcome of the appeal stands directly to affect the CCLA and other similar organizations' ability to make submissions on requests for confidentiality orders in lower courts across Canada, and thereby to pursue their mission.

D. ASSISTANCE TO BE PROVIDED BY THE CCLA

13. The CCLA seeks leave to intervene to assist the Court by bringing its unique perspective to bear on issues that the parties have or will put in play. As one of Canada's leading advocates for civil liberties, rights and freedoms, the CCLA is uniquely positioned to help the Court understand the potential impacts of its decision on non-media organizations, including public interest groups that vindicate the *Charter* rights of Canadians.

14. Specifically, the CCLA proposes to make the following two submissions:

(a) **Statutory courts must consider the scope of their own jurisdiction in considering the appropriateness and scope of confidentiality orders**. The implied jurisdiction of statutory courts — like the Court of Québec — is constrained by the Constitution. Though statutory courts' implicit jurisdiction affords them supervisory powers over the court record, those powers do not extend to the administration of criminal evidence and the application of criminal procedure, both of which fall under federal jurisdiction. Therefore, when a statutory court judge is seized with a criminal matter that requires them to conceal the identity of an individual or individuals protected by informer privilege, they must draw their jurisdiction from the Criminal Code. The Criminal Code contains no provisions that permit a judge to keep confidential the date of the trial, the court, the district, or the identity of the judge and counsel, or not to assign a file number to a matter. Quite the contrary, the Criminal Code mandates recordkeeping and open courts. These principles should inform not only whether a confidentiality order should be granted, but also whether, and the extent to which, third parties should have the opportunity to make submissions.

(b) **The Court should clarify the role of non-media organizations in proceedings concerning confidentiality orders**. In *Vancouver Sun*, this Court held that, when a tribunal notifies organizations and individuals to allow them to make submissions on the confidentiality measures that should be in place in order to conceal the identity of an individual protected by informer privilege, it must do so fairly and publicly. The CCLA would submit that, for hearings concerning confidentiality order requests to be fair, courts should provide non-media organizations with the opportunity to make submissions. Such an approach would be consistent with this Court's position on the generous and liberal approach that should be taken to the issue of standing when *Charter*-protected interests are engaged, as they are whenever the openness of courts is curtailed. The CCLA would argue that, despite this Court's instructions, opportunities for non-media organizations to partake in judicial debates on confidentiality orders remain rare and vary greatly from province to province. The CCLA would also submit that the framework for determining non-media organizations' participatory rights in these proceedings

should involve a weighing of the non-media organizations' interest in the proceedings, their ability to make meaningful contributions, and concerns regarding the security of the confidential information, among other factors.

15. I believe that, if the CCLA is denied leave to intervene, these submissions will not otherwise be made.

16. The CCLA's submissions will be different to those of the parties. The Attorney General of Québec focuses on the scope of the courts' powers to grant confidentiality orders and on the duty to guarantee the openness of the courts. By contrast, the CCLA would address how the scope of the courts' jurisdiction should guide this Court in delineating these powers and duties. Moreover, the media appellants focus on the media's contributions to the assessment of potential confidentiality measures, while the CCLA would describe what *non*-media organizations can bring to that process and under which circumstances they should be allowed to participate in it.

17. The CCLA would not raise any new issue or otherwise expand the scope of the appeal. Like the parties, the CCLA would make submissions on the scope of the courts' constitutional powers to grant confidentiality orders and their duty to guarantee open courts, as well as with the modalities of the process through which these orders may or must be granted.

18. I have reviewed the memorandum of argument included in the CCLA's motion record and confirm that it is an accurate general outline of the submissions the CCLA proposes to make if granted leave to intervene in this appeal.

19. I do not believe that the CCLA's proposed intervention will cause any injustice or prejudice to the parties because the CCLA:

(a) will not file any additional evidence or add to the appeal record;

(b) will not raise new issues;

(c) will not seek costs;

(d) will not unreasonably delay or lengthen the hearing;

(e) 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 the Court; and

(f) will comply with any terms and conditions imposed.

20. I make this affidavit in good faith and for no improper purpose.

SWORN BEFORE ME remotely by Pierre-Gabriel Grégoire in the City of Toronto, in the Province of Ontario, before me in the City of Toronto, in the Province of Ontario this 7th day of July 2023.

A Commissioner for Taking Affidavits

Noa Mendelsohn Aviv

This is **Exhibit "A"** referred to in the
affidavit of **NOA MENDELSOHN AVIV**
affirmed before me, this
7th day of July, 2023

PIERRE-GABRIEL GRÉGOIRE LS# 82231N
Commissioned virtually and signed electronically in the
City of Toronto in accordance with O. Reg 431/20

https://ccla.org/about-us/

Home » About Us

CCLA is a human rights organization committed to defending the rights, dignity, safety, and freedoms of all people in Canada. As was established in the organization's founding principles, CCLA is the pre-eminent voice advocating for the rights and freedoms of all Canadians and all persons living in Canada. We are a leader in protecting rights and have earned widespread respect for our principled stand on such issues as national security, censorship, capital punishment, and police and state accountability —with a fearless voice on civil liberties, human rights and democratic freedoms.

Committed to Rights and Freedoms. Dedicated to Advocacy and Education.

Our Mission

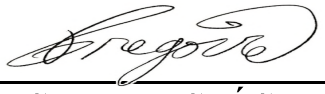
CCLA fights for the civil liberties human rights and democratic freedoms of all people across Canada. Founded in 1964, we are an independent, national, nongovernmental organization, working in the courts, before legislative committees, in the classrooms, and in the streets, protecting the dignity and rights of people in Canada.

Our Vision

CCLA believes that every person in Canada should be entitled to basic rights, freedoms, dignity and respect. We have a long history of defending Canadians and we believe it is imperative to take a stand against injustice and oppression. We work locally in partnership with pro-bono lawyers to actively fight unjust laws to ensure that our legal system works for the people, not against them.

English (Canada)

This is **Exhibit "B"** referred to in the
affidavit of **NOA MENDELSOHN AVIV**
affirmed before me, this
7th day of July, 2023



PIERRE-GABRIEL GRÉGOIRE LS# 82231N
Commissioned virtually and signed electronically in the
City of Toronto in accordance with O. Reg 431/20

Court File No: 38695

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

THE ESTATE OF BERNARD SHERMAN AND THE TRUSTEES OF THE ESTATE, and THE ESTATE OF HONEY SHERMAN AND THE TRUSTEES OF THE ESTATE

APPELLANTS
(Appellants)

- and -

KEVIN DONOVAN

RESPONDENT
(Respondent)

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA, CANADIAN CIVIL LIBERTIES ASSOCIATION, INCOME INSECURITY ADVOCACY CENTRE, AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, POSTMEDIA NETOWRK INC., CTV, A DIVISION OF BELL MEDIA INC., GLOBAL NEWS, A DIVISION OF CORUS TELEVISION LIMITED PARTERSHIP, THE GLOBE AND MAIL INC. AND CITYTV, A DIVISION OF ROGERS MEDIA INC., BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, HIV & AIDS LEGAL CLINIC ONTARIO, HIV LEGAL NETWORK AND MENTAL HEALTH LEGAL COMMITTEE

INTERVENERS

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

DMG ADVOCATES LLP
155 University Avenue, Suite 1230
Toronto, ON M5H 3B7
Fax: 647-689-3062

Ryder Gilliland
Tel: 416-238-7537
rgilliland@dmgadvocates.com

Agatha Wong
Tel: 416-238-1630
awong@dmgadvocates.com

Counsel for the Intervener,
the Canadian Civil Liberties Association

GOWLING WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener,
the Canadian Civil Liberties Association

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPY TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**
155 Wellington Street West
Toronto ON M5V 3J7

Timothy Youdan
Chantelle Cseh
Elie Roth
Rui Gao
Tel: 416-863-0900
Fax: 416-863-0871
tyoudan@dwpv.com
ccseh@dwpv.com
eroth@dwpv.com
rgao@dwpv.com

Counsel for the Appellants

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, Ontario K2P 0R3

Marie-France Major
Tel: 613-695-8855
Fax: 613-695-8580
mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the
Appellants

AND TO: **BLAKES CASSELS & GRAYDON LLP**
199 Bay Street, Suite 4000
Commerce Court West
Toronto, ON M5L 1A9

Iris Fischer
Skye A. Sepp
Tel: 416-863-2408
Fax: 416- 863-2653
Email: iris.fischer@blakes.com

Counsel for the Respondent

BLAKES CASSELS & GRAYDON LLP
340 Albert Street, Suite 1750
Constitution Square, Tower 3
Ottawa, ON K1R 7Y6

Ricksen Tam
Tel: 613-788-2226
Fax: 613-788-2247
Email: Ricksen.Tam@blakes.com

Ottawa Agent for Counsel for the Respondent

AND TO: **ATTORNEY GENERAL OF ONTARIO**
Civil Law Division
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Peter Scrutton
Tel: 416-326-4582
Fax: 416-326-4015
Email: peter.scrutton@ontario.ca

Counsel for the Intervener Attorney General of Ontario

BORDEN LADNER GERVAIS LLP
1300-100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Tel: 613-369-4795
Fax: 613-230-8842
Email: kperron@blg.com

Ottawa Agent for Counsel for the Intervener Attorney General of Ontario

AND TO: **ATTORNEY GENERAL OF BRITISH COLUMBIA**
1301 – 865 Hornby Street
Vancouver, BC V6Z 2G3

Jacqueline Hughes
Katherine Webber
Tel: 604-660-4602
Fax: 604-660-6797
Email: jacqueline.hughes@gov.bc.ca
katie.webber@gov.bc.ca

GIB VAN ERT LAW
148 Third Avenue
Ottawa, ON K1S 2K1

Gib van Ert
Tel: 613-408-4297
Fax: 613-651-0304
Email: gib@gibvanertlaw.com

Counsel for the Intervener Attorney General of British Columbia

Ottawa Agent for Counsel for the Intervener Attorney General of British Columbia

AND TO: **BORDEN LADNER GERVAIS LLP**
Bay Adelaide Centre, East Tower
3400-22 Adelaide St. W.
Toronto, ON M5H 4E3

Ewa Krajewska
Teagan Markin
Mannu Chowdhury
Tel: (416) 367-6244
Fax: (416) 367-6749
Email: ekrajewska@blg.com

Counsel for the Intervener, Income Security Advocacy Centre

BORDEN LADNER GERVAIS LLP
1300-100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Tel: (613) 369-4795
Fax: (613) 230-8842
Email: kperron@blg.com

Ottawa Agent for Counsel for the Intervener, Income Security Advocacy Centre

AND TO: **FARRIS LLP**
700 W Georgia St.
25th Floor
Vancouver, B.C. V7Y 1B3

Robert S. Anderson, Q.C.
Ludmila B. Herbst, Q.C.
Erica C. Miller
Tel: (604) 661-9372
Fax: (604) 661-9349
Email: randerson@farris.com

Counsel for the Intervener, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Jeffrey W. Beedell
Tel: (613) 786-0171
Fax: (613) 788-3587
Email:
jeff.beedell@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

AND TO: **MCCARTHY TÉTRAULT LLP**
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Adam Goldenberg
Kathryn Gullason
Tel: (416) 601-8357
Fax: (416) 868-0673
Email: agoldenberg@mccarthy.ca

Counsel for the Intervener, British Columbia Civil Liberties Association

JURISTES POWER
130, rue Albert
bureau 1103
Ottawa, ON K1P 5G4

Darius Bossé
Tel: (613) 702-5566
Fax: (613) 702-5566
Email: DBosse@juristespower.ca

Ottawa Agent for Counsel for the Intervener, British Columbia Civil Liberties Association

AND TO: **HIV & AIDS LEGAL CLINIC ONTARIO (HALCO)**
1400-55 University Avenue
Toronto, ON M5J 2H7

Khalid Janmohamed
Ryan Peck
Tel: (416) 340-7790 Ext: 4045
Fax: (416) 340-7248
Email: janmohak@lao.on.ca

Counsel for the Intervener, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee

SUPREME ADVOCACY
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee

TABLE OF CONTENTS

PART I – OVERVIEW

1. Although court proceedings often involve private affairs, they are presumptively public. It has been well understood for centuries that personal privacy interests must, with rare exception, accede to the broader public interest in open courts. If privacy interests, without more, trumped open courts, secrecy, not openness, would be the norm. This would cause great harm to democratic values that underpin the open court principle.

2. This case presents the Court with an opportunity to make clear that privacy interests alone cannot satisfy the first branch of the *Sierra Club* test. It is imperative that it do so. Otherwise, the vital public interest in open proceedings will routinely be subordinated to individual privacy interests.

3. The fact that privacy rights are an increasing concern in the digital age creates an even greater need for clear guidance on the necessarily limited circumstances in which privacy rights will rise to the level of justifying a restriction on access to presumptively open proceedings. As technology evolves, there are times where the Court will address the need to re-balance privacy rights with other compelling interests, but such rebalancing is not called for in relation to the open court principle.

4. This Court has developed a workable analytical framework for evaluating when privacy interests rise to the level of necessitating a restriction on freedom of expression. The Court's reasoning in *A.B. v. Bragg* allows that privacy interests can trump open courts where they represent not just individual privacy interests but also communal or societal interests in privacy. In such circumstances, certain privacy interests may, in exceptional circumstances, rise to the level of an "important public interest" under the first stage of the *Sierra Club* test. The analysis is analogous

to that used to determine whether commercial interests can trump open courts; they can, where the commercial interest is not merely specific to the individual and represents a broader commercial interest.

5. This Court has recognized victims of sexual assault and child victims of sexualized cyberbullying as having interests sufficiently important to necessitate a restriction on the open court principle. In each case, the court has recognized the societal interest in protecting the vulnerable and in encouraging victims to come forward. It is conceivable that other similar or analogous interests will emerge, but the threshold for interfering with the presumptive right to access open proceedings is high. Even where the threshold is met, it is well-established that the interference should be as limited as possible (privacy interests of sexual assault complainants are protected through publication bans, not sealing orders).

6. This Court should reject the suggestion that the open court principle is of lesser, if any, significance in the context of fundamentally administrative matters, such as non-contentious applications for probate. As this Court recognized in *Toronto Star v. Ontario*, openness principles protected by the *Dagenais/Mentuck* test (or the *Sierra Club* test in civil proceedings) apply "to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings".[1] There is no exception for non-adversarial proceedings.

7. The *Sierra Club* test must be applied in a contextual and flexible manner. This does not mean, however, that courts get to decide whether there is a public interest in the matter itself that is before them. Openness is intended to allow for scrutiny of the court itself. The court cannot therefore be the arbiter of whether the proceeding is of public interest. As this Court's decision in

[1] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 [2005] 2 SCR 188 at para. 7.

Toronto Star makes clear, all judicial proceedings are of public interest. It is for Parliament, subject to constitutional constraints, to determine if there is a category of judicial decisions to which the openness principle ought not to apply.

PART II – QUESTIONS AT ISSUE

8. The CCLA's positions are as follows:

(a) Privacy interests alone cannot trump the open court principle, but in exceptional circumstances where a privacy interest is of a communal nature, such as protecting the privacy interests of the inherently vulnerable, it may rise to the level of making a restriction on access to open courts necessary. In such cases, any such restriction should be as limited as possible.

(b) Although the *Sierra Club* test must be applied contextually, the openness analysis cannot include an assessment of the public interest in the proceedings. All judicial proceedings are of public interest. If a class of judicial proceedings are to be excluded from public scrutiny, it should be for Parliament to make this determination, subject to constitutional constraints.

PART III –ARGUMENT

(a) Privacy Interests Alone Do Not Trump Open Courts

9. Although the digital era has increased concern for protecting privacy interests, the tension between individual privacy interests and the open court principle is not new. Litigants have long sought – usually unsuccessfully – to shield their private affairs from public scrutiny in the courts.

Indeed, much of the leading openness jurisprudence arises in the context of matrimonial cases where parties sought to protect their privacy.

10. The seminal case of *Scott v. Scott* involved a petition for a declaration that a marriage was void due to the husband's impotence. On order of the court, the petition was heard *in camera*. The petitioner and her counsel were subsequently cited in contempt for circulating a transcript of the *in camera* hearing. The House of Lords unanimously overturned the contempt ruling, finding that the petition should not have been heard *in camera*. In so finding, Lord Halsbury found (in 1913) that "every Court of justice is open to every subject of the King…" and that "this has been the rule… for some centuries". Although admitting to exceptions where necessary to secure justice, Lord Halsbury noted that "[a] mere desire to consider feelings of delicacy or to exclude from publicity details which it would be desirable not to publish is not, I repeat, enough…"[2]

11. In his concurring judgment, Lord Atkinson noted that "the hearing of a case in public may be, and often is, no doubt, painful, humiliating or deterrent both to parties and witnesses… but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect".[3]

12. In *McPherson v. McPherson,* the Privy Council condemned the practice that had developed in Alberta of hearing uncontested divorce cases in chambers or in the courthouse library with Lord Blanesburgh noting that having these cases tried in open court was important precisely because

[2] *Scott v. Scott*, [1913] AC 417 at 439, 440.
[3] *Ibid* at 17 [emphasis added].

"…there is no class of case in which the desire of the parties to avoid publicity is more widespread".[4]

13. Commenting on this dictum in *Edmonton Journal v. Alberta (Attorney General)*, Justice Wilson noted that "Lord Blanesburgh's remarks, in my view, provide a stern reminder of the importance of not allowing one's compassion for that limited group of people who are of particular interest to the public (because of who they are or what they have done) to undermine a principle which is fundamentally sound in its general application."[5]

14. These cases highlight not only that personal privacy interests must in the normal course accede to the broader interest in open courts, but also that the natural inclination to protect personal privacy interests, particularly in uncontested and personal matters, makes safeguarding the openness principle more important.

15. That privacy is a quasi-constitutional right and of significant importance in Canadian law is beyond dispute. This alone is not a basis for secrecy in court proceedings to protect privacy interests. Although individuals involved in divorce proceedings (as an example) would often prefer that their personal affairs be shielded from public scrutiny, the broad interest in open courts requires that litigants proceed in public even where doing so is painful and humiliating. Individual harm of this nature cannot outweigh the public benefit openness affords. If it did, secrecy would be the norm.

---

[4] *McPherson v. McPherson*, [1936] 1 DLR 321 at 328 [emphasis added].
[5] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at para. 30.

(b) Broader Communal Privacy Interests May Trump Open Courts

16. The openness principle is not absolute, but to outweigh the public interest in open courts, the countervailing interest must not be specific to the party making the request. Justice Iacobucci made this clear in *Sierra Club*, in the context of business interests where he noted that "[i]n order to qualify as 'an important commercial interest', the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality."[6]

17. Like commercial interests, privacy interests can rise to the level of being expressed in terms of a public interest that outweighs the countervailing public interest in openness. This is what occurred in *A. B. v. Bragg,* where this Court found that a victim of sexualized online cyberbullying could bring a defamation claim anonymously.

18. The Court made clear throughout its reasons in *Bragg* that it was not the fact of a privacy interest alone that justified anonymity. As Justice Abella wrote: "[t]he girl's interests in this case are tied both to her age and to the nature of the victimization she seeks protection from. It is not merely a question of her privacy, but of her privacy from the relentlessly intrusive humiliation of sexualized online bullying".[7]

19. As the Court found, the privacy of a child victim of sexualized online bullying is analogous to that of a victim of sexual assault. In both cases the victims are inherently vulnerable and there is a strong public interest in complainants in either case not being prevented from coming forward by privacy concerns.

---

[6] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 55.
[7] *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 at para. 14 [emphasis added].

20. Although the result in *Bragg* was driven by the fact that the privacy interest in question could be expressed in terms of a public interest, the Court did not explicitly state that privacy interests alone would not suffice to outweigh openness. This case presents an opportunity for it to do so.

21. This Court should make clear that just as a commercial interest specific to a party is not sufficient to justify limiting openness, neither is a privacy interest specific to a party. Absent such a finding, it is fair to expect that privacy interests will whittle down the open court principle.

22. Big data and the commercialization of personal information are real issues that make protecting personal privacy a pressing modern concern. Similarly, the expansion of the global information ecosystem, which facilitates increasingly easy access to formerly local or obscure information once it is posted online, unarguably increases the social tension between free expression and privacy. However, courts ought not focus on the affordances of evolving technologies to the detriment of fundamental principles. When it comes to striking the correct, principle-based weighting between privacy and open courts, such weighting has been successfully established by past jurisprudence. As Justice Wilson noted in *Edmonton Journal,* echoing Lord Blanesburgh's reasons decades before, concern over individuals cannot override a fundamentally sound principle of general application.

(c) The Openness Principle Applies to All Judicial Proceedings

23. This Court has stated on many occasions that the *Dagenais/Mentuck* test is flexible. By extension, so is its civil variant, the *Sierra Club* test. The flexibility in the test is intended to allow for the fact that it is applied in all judicial contexts and that evidence of harm can be harder to muster at early stages of proceedings.

24. The flexibility in the test is not intended to, and cannot, allow for a judge to determine that openness is not important in a particular class of proceeding. This court has repeatedly stated the exact opposite – openness principles apply to "all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings" and "at every stage of proceedings".[8]

25. The danger of allowing a judge to determine that openness is not important in a particular context is that it allows the judge an easy way to side-step the analytical and constitutional rigour that the *Sierra Club* test provides. This would be highly problematic.

26. A core purpose of openness is to allow for public scrutiny of the judiciary itself. As Justice Dickson stated in *MacIntyre*, there is "a strong public policy in favour of 'openness' in respect of judicial acts", noting that centuries before, Bentham had expressed a key rationale for openness as that "[w]here there is no publicity there is not justice. Publicity is the very soul of justice…[i]t keeps the judge himself while trying under trial."[9]

27. The policy objective of ensuring judicial accountability is undermined if the judge can make a discretionary determination that openness is not important because of the nature of the proceedings before him or her. This is particularly problematic where, in the criminal context at least, the discretionary decision is often only reviewable on obtaining leave to this Court.

28. It is also problematic because the determination of whether a proceeding is of an administrative or procedural nature is not easy. Indeed, in the administrative context, this Court

---

[8] *Toronto Star Newspapers Ltd. v Ontario*, 2005 SCC 41at para. 30; *Vancouver Sun (Re)*, 2004 SCC 43 at paras. 23-27.
[9] *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175 at para. 53 [emphasis added].

abandoned the distinctions because "the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least".[10] The classification of functions is no easier in the judicial context.

29. The practice of hearing uncontested divorce applications in private, which the Privy Council condemned in *McPherson*, developed precisely because it was thought to be harmless. Faced with sensitive personal information and no apparent dispute of substance, judges saw no harm in excluding the public. As the Privy Council noted in its reasons, this is precisely the kind of complacence that must be guarded against.

30. If this Court were to find that openness principles do not apply to certain probate proceedings, it will have carved the thin edge of the wedge. It will have paved the way for an unknowable number of cases to be heard in private on judicial determination that the nature of the proceedings made secrecy acceptable. This would be inconsistent with the law as it has developed today and harmful to open court principles and their underlying democratic values.

31. If there is a class of proceedings to which the open court principle ought not apply, it should be for Parliament or the Legislature to decide, which decision can ultimately be reviewed by the courts for constitutional compliance. This will ensure that the constitutional protection and analytical rigour afforded by the *Sierra Club* test is protected.

---

[10] *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 S.C.R. 311, at para. 23.

(d) Conclusion

32. Since *Dagenais*, this Court has diligently protected the open court principle. It has resisted calls to have the test not apply in particular judicial contexts such as investigative hearings and search warrant applications. In doing so, it has consistently recognized the central importance of openness in allowing for public oversight of the judiciary and, by extension, protecting democratic values. It would be a grave error for the Court to allow individual privacy concerns to undo this. Privacy concerns that rise to the level of outweighing the public interest in open courts can be protected using the existing analytical framework. As they have for centuries, individual privacy interests must continue to cede to the broader public interest in openness.

33. The safeguards developed to protect open courts would also be greatly undermined if courts were empowered to classify particular proceedings or classes or proceedings as not worthy of openness. For good reason, the law has never allowed openness to be so easily side-stepped. It should not now.

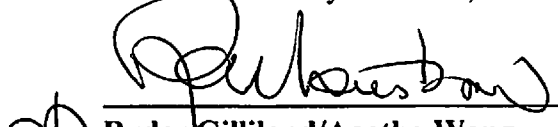
PART IV – SUBMISSION ON COSTS

34. The CCLA does not seek costs in this matter and asks that no award of costs be made against it.

PART V – ORDER SOUGHT

35. The CCLA takes no position on the merits of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of March, 2020.



Ryder Gilliland/Agatha Wong
Counsel for the Canadian Civil Liberties Association

PART VI: TABLE OF AUTHORITIES	
Authority	**Paragraph Reference in Memorandum of Argument**
CASE	
A.B. v. Bragg Communications Inc., 2012 SCC 46	4, 17, 18, 20
A.G. (Nova Scotia) v. MacIntyre, [1982] 1 S.C.R. 175	26
Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326	13, 22
McPherson v. McPherson, [1936] 1 DLR 321	12, 29
Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police, [1979] 1 S.C.R. 311	28
Scott v. Scott, [1913] AC 417	10, 11
Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41	16
Toronto Star Newspapers Ltd. v Ontario, 2005 SCC 41	6, 7, 24
Vancouver Sun (Re), 2004 SCC 43	24

This is **Exhibit "C"** referred to in the
affidavit of **NOA MENDELSOHN AVIV**
affirmed before me, this
7th day of July, 2023

PIERRE-GABRIEL GRÉGOIRE LS# 82231N
Commissioned virtually and signed electronically in the
City of Toronto in accordance with O. Reg 431/20

Court File No. 38114

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

BETWEEN:

MARIE-MAUDE DENIS

Appellant
(Appellant)

– and –

MARC-YVAN COTÉ

Respondent
(Respondent)

– and –

HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF QUÉBEC, FEDERATION PROFESSIONNELLE DES JOURNALISTES DU QUEBEC, CANADIAN ASSOCIATION OF JOURNALISTS FOR FREEDOM OF EXPRESSION, REPORTERS WITHOUT BORDERS, LA PRESSE (2018) INC., CANADIAN CIVIL LIBERTIES ASSOCIATION, AND AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, CTV, A DIVISION OF BELL MEDIA INC., GLOBAL NEWS, A DIVISION OF CORUS TELEVISION LIMITED PARTNERSHIP, GLOBE AND MAIL INC., POSTMEDIA NETWORK INC., VICE STUDIO CANADA INC.

Interveners
(Interveners)

FACTUM OF THE INTERVENER,
CANADIAN CIVIL LIBERTIES ASSOCIATION ("CCLA")
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Borden Ladner Gervais LLP
3400 - 22 Adelaide Street West
Toronto, ON M5H 4E3

Christopher D. Bredt | Pierre N. Gemson
Tel: 416.367.6165
Fax: 416.367.6749
Email: cbredt@blg.com

Osgoode Hall Law School
York University
4700 Keele Street
North York, ON M3J 1P3

Jamie Cameron
Tel.: 416.294.1512
Fax.: 416.736.5736
Email: jcameron@osgoode.yorku.ca

Counsel for the Intervener,
Canadian Civil Liberties Association

Borden Ladner Gervais LLP
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Tel.: 613.369-4795
Fax.: 613.230.8842
Email: kperron@blg.com

Ottawa Agent for the Intervener,
Canadian Civil Liberties Association

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPY TO:

Fasken Martineau Dumoulin LLP
Bureau 3700, C.P. 242
800, Place Victoria
Montréal, QC H4Z 1E9

Christian Leblanc | Patricia Hénault
Tel: 514.397.7545
Fax: 514.397.7600
Email: cleblanc@fasken.com

Counsel for the Appellant,
Marie-Maude Denis

Fasken Martineau Dumoulin LLP
1300 - 55 rue Metcalfe
Ottawa, ON K1P 6L5

Sophie Arseneault
Tel: 613.236.3882
Fax: 613.230.6423
Email: sarseneault@fasken.com

Ottawa Agent for the Appellant,
Marie-Maude Denis

Jacques Larochelle Avocat Inc.
75, rue Saint-Jean Ouest
Québec, QC G1R 1N4

Jacques Larochelle | Olivier Desjardins
Tel: 418.529.5881
Fax: 418.529.1656
Email: larochelle.avocat@bellnet.ca

Counsel for the Respondent,
Marc-Yvan Côté

Directeur des Poursuites Criminelles et Pénales du Québec
393, rue St-Jacques
Tour Sud, Bureau 600
Montréal, QC H2Y 1N9

Robert Rouleau
Tel: 514.873.3856 Ext 53308
Fax: 514.904.4130
Email: robert.rouleau@dpcp.gouv.qc.ca

Counsel for the Intervener,
Her Majesty the Queen

Directeur des Poursuites Criminelles et Pénales du Québec
Palais de Justice
17, rue Laurier, Bureau 1.230
Gatineau, QC J8X 4C1

Emily K. Moreau
Tel: 819.776.8111 Ext: 60412
Fax: 819.772.3986
E-mail:emily-k.moreau@dpcp.gouv.qc.ca

Ottawa Agent for the Intervener,
Her Majesty the Queen

Procureur Général du Québec
1, rue Notre-Dame Est, Bureau 8.00
Montréal, QC H2Y 1B6

Michel Déom
Tel: 514.393.2336 Ext: 51498
Fax: 514.873.7074
Email: michel.deom@justice.gouv.qc.ca

Counsel for the Intervener,
Attorney General of Québec

Noël & Associés
111 rue Champlain
Gatineau, QC J8X 3R1

Sylvie Labbé
Tel: 819.771.7393
Fax: 819.771.5397
Email: s.labbe@noelassocies.com

Agent for the Intervener,
Attorney General of Québec

Gowling WLG (Canada) LLP
1, Place Ville Marie, Bureau 3700
Montréal, QC H3B 3P4

Mark Bantey
Tel: 514.392.9501
Fax: 514.876.9501
E-mail:mark.bantey@gowlingwlg.com

Counsel for the Intervener,
Fédération Professionnelle des Journalistes du Québec, Canadian Association of Journalists, Canadian Journalists for Freedom of Expression et Reporters Without Borders

Chenette, Boutique de Litige Inc.
388, rue Saint-Jacques, Bureau 400
Montréal, QC H2Y 1S1

Sébastien Pierre-Roy
Tel: 514.877.4228 Ext: 227
Fax: 514.397.4064
E-mail:sebastien.pierre-roy@chenette.ca

Counsel for the Intervener,
La Presse (2018) Inc.

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Guy Régimbald
Tel: 613.786.0197
Fax: 613.563.9869
E-mail:guy.regimbald@gowlingwlg.com

Ottawa Agent for the Intervener,
La Presse (2018) Inc.

Borden Ladner Gervais LLP
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC V7X 1T2

David A. Crerar | Iain A.C. MacKinnon
Tel: 604.640.4181
Fax: 604.622.5000
E-mail:dcrerar@blg.com

Counsel for the Intervener,
AD IDEM/Canadian Media Lawyers Association, CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, Globe and Mail Inc. Postmedia Network Inc., Vice Studio Canada Inc.

Borden Ladner Gervais LLP
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Tel.: 613.237.5160
Fax.: 613.230.8842
Email: kperron@blg.com

Ottawa Agent for the Proposed Intervener,
AD IDEM/Canadian Media Lawyers Association, CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, Globe and Mail Inc. Postmedia Network Inc., Vice Studio Canada Inc.

TABLE OF CONTENTS

Page

PART I - OVERVIEW

1. In 2017, Parliament enacted the *Journalistic Sources Protection Act*[1] (the "*JSPA*") to augment existing protections against compelled disclosure of journalistic sources recognized in this Court's foundational decisions in *R v. National Post*[2] and *Globe and Mail v. Canada*.[3]

2. Mindful that "the protection of anonymity of sources" is "a pillar of our democracy"[4] — without which "scandalous stories that undermine the integrity of our democratic institutions… and good governance may never come to light"[5] — Parliament added robust new safeguards for journalists and their confidential sources to the *Criminal Code*[6] and the *Canada Evidence Act*[7] (the "*CEA*"), to ensure that "inadequate protection for sources"[8] would not impede the flow of information from confidential sources to journalists, and to the public.[9]

3. In this appeal, this Court will determine for the first time an application for disclosure of information falling within the protection of the *JSPA*'s amendments to the *CEA* — an exercise that involves not only the adjudication of new statutory rights, but also engages rights protected by the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[10]

4. The *JSPA* represents a fundamental shift in the legal status of confidential journalistic source information. Specifically, the *JSPA* creates a statutory framework that (1) creates a presumption of protection, or non-disclosure, of confidential information; and (2) imposes a burden upon any party seeking disclosure to satisfy the conditions set out in s. 39.1(7) of the *CEA*. This appeal presents an early opportunity for this Court to address this fundamental shift. The CCLA has intervened in this appeal to highlight the interpretative factors that courts should take

---

[1] S.C. 2017, c. 22.
[2] *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477 [*National Post*].
[3] *Globe and Mail v. Canada (A.G.)*, 2010 SCC 41, [2010] 2 S.C.R. 592 [*Globe and Mail*].
[4] *Debates of the Senate*, 42nd Parl., 1st Sess., No. 82 (5 December 2016) at 1948 (Hon. Claude Carignan).
[5] *Ibid* at 1949 (Hon. Claude Carignan).
[6] See, R.S.C., 1985, c. C-46 at s. 488.01 – 488.02.
[7] See, R.S.C., 1985, c. C-5 at s. 39.1 ["*CEA*"].
[8] *Supra* note 4 at 1949 (Hon. Claude Carignan).
[9] *Ibid* (Hon. Claude Carignan).
[10] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11; see also, *Globe and Mail*, *supra* note 3 at para. 48.

into account when applying s. 39.1 of the *CEA*, and takes no position on the facts or the outcome of this appeal.

PART II - QUESTIONS AT ISSUE

5. The CCLA's submissions bear upon the following issues raised in this appeal, as framed by the appellant:[11]

(a) What was Parliament's legislative intent with regard to s. 39.1 of the *CEA* introduced by the *JSPA*?

(b) What is the scope of the reversal of the burden of proof contemplated by s. 39.1(9) of the *CEA*, and the implications thereof?

(c) What factors should be taken into account in conducting the balancing process contemplated by s. 39.1(7)(b) of the *CEA*?

PART III - ARGUMENT

A. The *JSPA* creates a presumption that protects the non-disclosure of confidential journalistic source information

6. The *JSPA* replaces and extends the protections available at common law for confidential journalistic source information. Both at common law, and under the *JSPA*, this protection is linked to s. 2(b) of the *Charter* and its guarantee of freedom of expression and of the media. As this Court has stated, "freedom of the press and other media is vital to a free society".[12] Section 2(b)'s guarantee "comprises the right to disseminate news, information and beliefs", and "would be of little value if the freedom . . . did not also encompass the right to gather news and other information without undue governmental interference."[13] In *National Post*, this Court took the "further step" of recognizing that newsgathering includes the "ability of the media to make use of confidential sources",[14] acknowledging that:

> unless the media can offer anonymity in situations where sources would otherwise dry-up, freedom of expression in debate on matters of public interest would be

---

[11] See, Appellant's Factum at para. 28.
[12] *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421 at 429 [*Lessard*].
[13] *Ibid* at 429-30 (*per* La Forest J.); *Canadian Broadcasting Corporation v. New Brunswick (A.G.)*, [1996] 3 S.C.R. 480 at 497.
[14] *National Post*, *supra* note 2 at para. 33.

> badly compromised. Important stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment.[15]

Because freedom of expression and the media "protects readers and listeners as well as writers and speakers", this Court situated "the legal position of the confidential source or whistleblower" within "the *public* right to knowledge about matters of public interest".[16] After acknowledging the public's interest in important information that may be conditional on a promise of confidentiality, Binnie J. stated that "democratic institutions and social justice" will suffer without a free flow of accurate and pertinent information.[17]

7. *National Post* applied the Wigmore criteria for a case-by-case privilege at common law to confidential journalistic sources.[18] Under Wigmore, confidential source information is shielded from disclosure only if the journalist establishes all four of its criteria. Significantly, this includes a showing that "the public interest served by protecting the identity of the informant [outweighs] the public interest in getting at the truth".[19] *National Post* applied Wigmore's presumption of disclosure to the question of confidential source information and placed "the risk of non-persuasion" at all four steps on the journalist seeking recognition of a privilege.[20]

8. The *JSPA* displaces the Wigmore test, reversing the common law presumption of disclosure and its burden of proof requiring a journalist to establish that confidential source information should be protected.

9. The *JSPA*'s framework has three key elements:[21] First, the statute's protection is triggered by a journalist's objection to the disclosure of information that identifies or is likely to identify a confidential source (*CEA* ss. 39.1(2) & (5)). Second, s. 39.1(9) of the *CEA* places the burden on the party seeking disclosure to establish that the statutory conditions for authorizing disclosure in

---

[15] *Ibid*.
[16] *National Post*, *supra* note 2 at para. 28, emphasis in original.
[17] *Ibid*.
[18] *National Post*, *supra* note 2 at para. 55.
[19] *Globe and Mail*, *supra* note 3 at para. 22, citing *National Post*, *supra* note 2 at para. 53.
[20] *National Post*, *supra* note 2 at para. 64.
[21] See generally, *Debates of the Senate*, 42nd Parl., 1st Sess., No. 86 (12 December 2016).

s. 39.1(7) have been met. Third, where disclosure is authorized, conditions to protect the identity of the source may be attached to any order (*CEA* s. 39.1(8)).

10. Section 39.1(1) of the *CEA* defines the terms "journalist" and "journalistic source". In so doing, Parliament has identified a class, consisting of professional journalists, who can invoke the statute's protection for confidential journalistic information. Once a journalist objects to the disclosure of a "journalistic source" the information is protected,[22] unless and until disclosure is ordered by a court.[23] In this way, the *JSPA* fundamentally departs from Wigmore by replacing its presumption in favour of disclosure[24] with a statutory presumption of non-disclosure.[25]

B. Section 39.1(7) of the *CEA* should be interpreted to maximize the *JSPA*'s protections and to ensure that any departures from those protections are minimally impairing of the interests recognized and entrenched by the *JSPA*

11. A shift in the burden of proof marks the *JSPA*'s second major departure from the common law Wigmore standard.

12. Section 39.1(7) of the *CEA* sets out the steps that must be followed in determining whether a court should order disclosure in any case. The requirements of s. 39.1(7) are cumulative, and on each branch the party seeking disclosure bears the burden of proof.

13. First, s. 39.1(7)(a) requires the party seeking disclosure to demonstrate that the information sought is not available "by any other reasonable means". Second, s. 39.1(7)(b) reverses the common law approach and requires the party seeking disclosure to establish that the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of

---

[22] *CEA*, *supra* note 7 at ss. 39.1(2), (5).

[23] *CEA*, *supra* note 7 at s. 39.1(2). The *CEA* refers to a "court, person or body" having the authority to compel disclosure. For ease of reference, these are referred to as a "court" throughout this factum.

[24] See *National Post*, *supra* note 2 at para. 60; *Globe and Mail*, *supra* note 3 at para. 24.

[25] Apart from the *JSPA*, the common law Wigmore standard governs the availability of a journalist source privilege on a case-to-case basis. It will be open to this Court, when and if appropriate, to consider whether and how the common law and statutory approaches to the protection of confidential journalistic information can be harmonized.

the journalistic source. The statute sets out three enumerated but non-exhaustive criteria for determining the public interest (*CEA* ss. 39.1(7)(b)(i)–(iii)).

14. Each factor enumerated in s. 39.1(7) must be applied rigorously. The *JSPA* imposes a burden of proof[26] — not of merely persuasion — on anyone who seeks access to a confidential journalistic source. The statute's presumption of non-disclosure can only be displaced by cogent evidence, at every stage of the analysis, from the party seeking disclosure of a confidential journalistic source.

15. At the threshold, before embarking upon the s. 39.1(7) analysis, the applicant must demonstrate that the information in question is *relevant*. As this Court stated in *Globe and Mail*, whether information is relevant in the proceedings is an antecedent question of evidence law.[27] There, Justice LeBel cautioned, specifically in the context of access to confidential information, that relevance "play[s] . . . an important gatekeeping role in the prevention of fishing expeditions", observing, that "it constitutes an added buffer against any unnecessary intrusion into aspects of the s. 2(b) newsgathering rights of the press."[28]

16. Once relevance has been shown, the requirements of ss. 39.1(7)(a) and (b) must be met.

a. Journalistic source information cannot be compelled unless the evidence is not otherwise available

17. Section 39.1(7)(a) requires the person seeking disclosure to establish that the information sought "cannot be produced in evidence by any other reasonable means". By requiring a showing that compelled disclosure *from a journalist* is *necessary* to obtain the information sought, Parliament has codified the "alternative sources principle"; according to *Globe & Mail*, "those avenues ought to be exhausted," and the breach of a confidential undertaking should only be ordered "as a last resort."[29] Moreover, the "mere administrative inconvenience" associated with obtaining the information from another source will not suffice.[30]

---

[26] *CEA*, *supra* note 7 at s. 39.1(9).
[27] *Globe and Mail*, *supra* note 3 at para. 56.
[28] *Ibid*.
[29] *Ibid* at paras. 62-63.
[30] *Globe and Mail*, *supra* note 3 at para. 62.

18. It follows that a failure to establish that the information is unavailable by any other reasonable means ends the inquiry. Under the *JSPA* framework, each condition prescribed by ss. 39.1(7)(a) and (b) must be met before disclosure can be ordered.

b. The party seeking disclosure must establish that the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source

19. A public interest analysis is only required where the applicant has established that the information is relevant and its disclosure from a journalist is necessary. Only then should a court consider whether the public interest favours disclosure or non-disclosure.[31]

20. Section 39.1(7)(b) of the *CEA* modifies the common law by placing the burden on the applicant to satisfy the public interest in ordering disclosure. Specifically, this sub-section requires the statute's presumption of non-disclosure to be affirmatively displaced. In other words, the party seeking access to a journalistic source must articulate and establish *how* the public interest in the administration of justice will be advanced by granting disclosure in a given case.

21. The first factor in the public interest analysis is "the importance of the information or document to a central issue in the proceeding" (*CEA* s. 39.1(7)(b)(i)). The *JSPA* sets a high bar in specifying the "importance" of the information or document and its relationship to a "central issue" in the proceeding. For that reason, this factor requires a persuasive showing that the information sought will be directly probative. Considerations applicable to this factor that weigh against disclosure are recognized in this Court's jurisprudence. For example, where information is sought at an early stage of the proceeding — such as discovery — the "procedural equities" should not "outweigh the freedom of the press", as recognized by well-established English common law "newspaper rule" which allows journalists to protect their sources at the discovery stage.[32] Similarly, relevance alone — even to a central question in the proceeding — is not determinative: disclosure should not be ordered where a fact is relevant but "peripheral to the actual legal and factual dispute between the parties".[33] Under s. 39.1(7)(a), courts should require the party seeking disclosure to establish — as closely and directly as possible — the relationship between the

---

[31] *CEA*, *supra* note 7 at s. 39.7(b).
[32] *Globe and Mail*, *supra* note 3 at para. 58.
[33] *Globe and Mail*, *supra* note 3 at para. 60.

information sought, its bearing upon an issue in the proceeding, and the importance and centrality of that issue to the overall proceeding.

22. The next factors a court must consider, under ss. 39.1(7)(b)(ii) and (iii), are freedom of the press and the impact of disclosure on journalistic source and the journalist.[34] The common law Wigmore test treated these issues as background considerations that could inform the public interest, but not mandatory parts of the analysis. Under the *JSPA*, Parliament has directed courts to explicitly consider the constitutional principles and values underpinning freedom of the media and freedom of expression, and to give them weight when considering whether the public interest favours disclosure. In doing so, the "courts should strive to uphold the special position of the media".[35]

23. It should be emphasized that neither the objecting journalist nor any interested party carries any onus under ss. 39.1(7)(b)(ii) or (iii). While the applicant must show that the public interest favours disclosure, the journalist and interested parties are entitled to participate in the hearing, lead evidence, and make submissions on this issue.[36]

24. In determining what the public interest requires, ss. 39.1(7)(b)(ii) and (iii) focus attention on the potential chilling effects of ordering disclosure of a journalistic source. The legislative history demonstrates that alleviating these effects was a significant pre-occupation of parliamentarians and motivated broad, all-party support for the bill.[37] As this Court recently recognized, the term "chilling effects" captures a broad set of concerns related to the "stifling or discouragement of the media's legitimate activities in gathering and disseminating the news *for*

---

[34] *CEA*, *supra* note 7 at s. 39.1(7)(b)(ii).
[35] *National Post*, *supra* note 2 at para. 3.
[36] *CEA*, supra note 7 at ss. 39.1(6) & (9).
[37] See, for example, Standing Committee on Public Safety and National Security, 42nd Parl., 1st Sess., No. 71 (19 June 2017) at 8, 11 & 15; and The Standing Senate Committee on Legal and Constitutional Affairs, 42nd Parl., 1st Sess. (15 February 2017) at 22:29, 22:51, 22:52, 22:55 & 22:61.

fear of legal repercussions such as compelled disclosure."[38] Manifestations of such effects include:

(a) confidential sources "drying up", resulting in "los[t] opportunities to receive and disseminate important information to the public";

(b) journalists avoiding keeping written records to prevent such records falling into third-party hands;

(c) "self-censor[ship]" by journalists by avoiding the disclosure of the existence of certain information; and

(d) public loss of faith in journalists, to the extent that compelled disclosure may cause the public to view the media as serving as an arm of the state.[39]

25. The *JSPA* addresses these concerns, in part, by defining and limiting the scope of protection for confidential sources. A "journalistic source" is only protected when information is confidentially disclosed to a journalist, on the journalist's undertaking not to divulge the identity of the source, and when "anonymity is essential to the relationship between the journalist and the source".[40] The *JSPA*'s definitions recognize that chilling effects are a risk whenever confidential source information is disclosed. That is why s. 39.1(9) requires the applicant to demonstrate that the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the source. It is important to emphasize, as noted above, that without being required to do so, any journalist or interested party may lead evidence or make submissions on freedom of the press (*CEA* s. 39.1(7)(b)(ii)) or the impact disclosure may have on the journalist and journalistic source (*CEA* s. 39.1(7)(b)(iii)). In the absence of cogent evidence displacing it, an unrebutted presumption of chill militates against disclosure.

26. In conclusion, the *JSPA*'s requirement that the public interest in disclosure must be proven is intended to, and will, protect journalists and their journalistic sources from compelled disclosure of confidential information. In some instances, information that is relevant and even important may not be compellable because the party seeking disclosure cannot meet its burden under the *JSPA*. That was Parliament's purpose and intent in conferring statutory protection on journalistic

---

[38] *R. v. Vice Media Canada Inc.*, 2018 SCC 53 at para. 26 ["*Vice Media*"], emphasis added.
[39] *Ibid*.
[40] *CEA*, *supra* note 7 at s. 39.1(1).

source information and establishing a rigorous process to determine when disclosure serves the public interest.

c. Where disclosure is warranted, conditions should be imposed to protect the identity of a journalistic source

27. Where the public interest tips in favour of disclosure, a court should consider whether conditions should be attached under s. 39.1(8) to protect the identity of a source. This is a statutory reflection of the minimal impairment principle,[41] and in this context takes the form of conditions ensuring that any disclosure impair "the public interest in preserving the confidentiality of the journalistic source" as little as possible.[42] Where the applicant has met the requirements of s. 39.1(7), the court should apply s. 39.1(8) to ensure that the disclosure authorized goes only so far as is necessary to satisfy the public interest justification for compelling disclosure.

28. The scope of any such conditions will vary on a case-by-case basis, requiring adjustment in proceedings as the nature of information becomes known and the appropriate use(s) of that information can be articulated. For example, a court might order disclosure only for *in camera* review to determine the utility of the information to the purpose for which it is sought. Section 39.1(8) is also broad enough to ground further conditions, such as orders imposing limits on the dissemination of the information or sealing orders preventing the protected information from entering the public record.

29. Whenever disclosure is authorized under the *CEA*, a court will be trenching upon a relationship of confidence which Parliament has chosen to cloak with robust new protections. This Court should endorse the use of s. 39.1(8) in all such cases to minimize the deleterious impact of disclosure and to ensure that the public interest in preserving the confidentiality of the journalistic source yields only so far as is necessary to advance the public interest in the administration of justice.

C. Conclusion

30. In this appeal, disclosure cannot be ordered unless the respondent (applicant) initially shows the relevance of the information sought; in addition, the respondent must demonstrate its

---

[41] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136-137.
[42] *CEA*, *supra* note 7 at s. 39.1(7)(b).

importance to a central issue on the stay of proceedings application and to state conduct that undermines the integrity of the judicial process.[43] Ordering disclosure, for purposes of a stay of proceedings, also requires a showing that the public interest in disclosure outweighs the public interest in protecting a confidential journalistic source.[44] Finally, if these burdens are discharged, a court should apply conditions necessary to ensure that the public interest in preserving the confidentiality of a journalistic source is impaired as little as possible by an authorization of disclosure.

31. In *National Post*, after noting developments in other countries, the Court observed that legislative proposals to protect journalistic sources had been introduced, federally and provincially, but not enacted. The *JSPA* has responded with legislation that mandates protection for sources, according to the statute's cornerstone provisions, which define journalists and journalistic sources; create a presumption of non-disclosure; impose the burden of proof on disclosure; and authorize conditions to minimize the interference with confidential sources. In doing so, Parliament's signal could hardly be clearer of its intention to transform the law in this area.

PART IV - SUBMISSIONS ON COSTS

32. The CCLA seeks no costs and asks that no costs be awarded against it.

PART V - REQUEST TO PRESENT ORAL ARGUMENT

33. By order dated February 18, 2019, the Court granted the CCLA permission to present oral argument not exceeding five minutes at the hearing of the appeal.

---

[43] *R. v. Babos*, [2014] 1 S.C.R. 309 at paras. 31-32.
[44] *CEA*, *supra* note 7 at s. 39.7(b).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th of March 2019

FOR

Jamie Cameron
Christopher D. Bredt
Pierre N. Gemson

Counsel for the Intervener,
Canadian Civil Liberties Association

PART VI - TABLE OF AUTHORITIES

AUTHORITY	CITED AT PARAGRAPH(S)
CASELAW	
Canadian Broadcasting Corporation v. Lessard, [1991] 3 S.C.R. 421	6
Canadian Broadcasting Corporation v. New Brunswick, [1996] 3 S.C.R. 480	6
Globe and Mail v. Canada, 2010 SCC 41, [2010] 2 S.C.R. 592	1, 7, 10, 15, 17, 21
R. v. Babos, [2014] 1 SCR 309	30
R. v. National Post, 2010 SCC 16, [2010] 1 S.C.R. 477	1, 6, 7, 10, 22
R. v. Oakes, [1986] 1 S.C.R. 103	27
R. v. Vice Media Canada Inc., 2018 SCC 53	24
SECONDARY SOURCES	
Debates of the Senate, 42nd Parl, 1st Sess, No 82 (5 December 2016)	2
Debates of the Senate, 42nd Parl, 1st Sess, No 86 (12 December 2016)	9
The Standing Senate Committee on Legal and Constitutional Affairs, 42nd Parl, 1st Sess (15 February 2017)	24
The Standing Committee on Public Safety and National Security, 42nd Parl, 1st Sess, No 71 (19 June 2017)	24

LEGISLATION	CITED AT PARAGRAPH(S)
Canada Evidence Act, R.S.C., 1985, c. C-5, s. 39.1 *Loi sur la preuve au Canada*, R.S.C., 1985, c. C-5, s. 39.1	2, 10, 14, 19, 22, 23, 25, 27, 30
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11 *Charte canadienne des droits et libertés, partie l de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R-U)*, 1982, c.11	3

LEGISLATION	CITED AT PARAGRAPH(S)
Criminal Code, R.S.C., 1985, c. C-46, s. 488.01 – 488.02 *Code criminel*, L.R.C., 1985, c. C-46, s. 488.01 – 488.02	2
Journalistic Sources Protection Act, S.C. 2017, c. 22 *Loi sur protection des sources journalistiques*, L.C. 2017, c. 22	1

This is **Exhibit "D"** referred to in the
affidavit of **NOA MENDELSOHN AVIV**
affirmed before me, this
7th day of July, 2023

PIERRE-GABRIEL GRÉGOIRE LS# 82231N
Commissioned virtually and signed electronically in the
City of Toronto in accordance with O. Reg 431/20

S.C.C. File No. 37574

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

VICE MEDIA CANADA INC. AND BEN MAKUCH

APPELLANTS
(Appellants)

- and –

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

- and –

ATTORNEY GENERAL OF ONTARIO, CANADIAN CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN MUSLIM LAWYERS ASSOCIATION, CANADIAN BROADCASTING CORPORATION, COALITION, INTERNATIONAL COALITION

INTERVENERS

FACTUM OF THE INTERVENER,
CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

LERNERS LLP
Lawyers
130 Adelaide Street West, Suite 2400
Toronto, ON M5H 3P5

Brian N. Radnoff
Tel: 416.601.2387
Fax: 416.867.2412
Email: bradnoff@lerners.ca
Rebecca Shoom
Tel: 416.601.2382
Fax: 416.601.4185
Email: rshoom@lerners.ca

Counsel for the Intervener, Canadian Civil Liberties Association

GOWLING WLG (CANADA) LLP
160 Elgin St.
Suite 2600
Ottawa, ON K1P 1C3

Jeff Beedell
Tel: 613.786.0171
Fax: 613.788.3587
E-mail: jeff.beedell@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Canadian Civil Liberties Association

ORIGINAL TO:

THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

ST. LAWRENCE BARRISTERS LLP
144 King Street
Toronto, ON M5C 1G8

Philip Tunley
Email: phil.tunley@stlbarristers.ca

Jennifer P. Saville
Tel: 647.245.8284
Fax: 647.245.8285
Email: Jennifer.saville@stlbarristers.ca

LINDEN & ASSOCIATES PC
Royal Bank Plaza, P.O. Box 10
2010 – 200 Bay Street, North Tower
Toronto, ON M5J 2J1

Iain A.C. MacKinnon
Tel: 416.861.9338, ext. 231
Fax: 416.861.9973
Email: imackinnon@lindenlex.com

Counsel for the Appellants

CONWAY BAXTER LLP
400 – 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Colin Baxter
Tel: 613.288.0149
Fax: 613.688.0271
Email: cbaxter@conway.pro

Ottawa Agent for Counsel for the Appellants

PUBLIC PROSECUTION SERVICE OF CANADA
3400 – 130 King Street West, Box 36
Toronto, ON M5K 1K6

Croft Michaelson Q.C.
Email: croft.michaelson@ppsc-sppc.gc.ca
Sarah Shaikh
Email: sshaikh@ppsc-sppc.gc.ca

Tel: 416.954.7261
Fax: 416.973.8253

Counsel for the Respondent

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA
160 Elgin Street
12th Floor
Ottawa, ON K1A 0H8

Françoise Lacasse
Email: francois.lacasse@ppsc-sppc.gc.ca

Tel: 613.957.4770
Fax: 613.941.7865

Ottawa Agent for Counsel for the Respondent

ATTORNEY GENERAL OF ONTARIO
720 Bay Street
10th Floor
Toronto, ON M7A 2S9

Deborah Krick
Tel: 416.326.4600
Fax: 416.326.4656
Email: Deborah.krick@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: 613.237.5160
Fax: 613.230.8842
Email: neffendi@blg.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Ontario

CANADIAN BROADCASTING CORPORATION
250 Front Street West
Legal Services
Toronto, ON M5V 3G7

Sean A. Moreman
Tel: 416.205.6494
Fax: 416.205.2723
Email: sean.moreman@cbc.ca

Counsel for the Intervener, Canadian Broadcasting Corporation

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin St.
Box 466 Station D
Ottawa, ON K1P 1C3

Guy Régimbald
Tel: 613.786.0197
Fax: 613.563.9869
Email: guy.regimbald@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Canadian Broadcasting Corporation

FAISAL MIRZA
545 Village Centre Place, #301
Mississauga, ON L4Z 1V9

Faisal Mirza
Tel: 905.897.5600
Fax: 905.897.5657
Email: fm@mirzakwok.com

Counsel for the Intervener, Canadian Muslim Lawyers Association

HAMEED LAW
43 Florence Street
Ottawa, ON K2P 0W6

Yavar Hameed
Tel: 613.232.2688, ext. 200
Fax: 613.232.2680
Email: yhameed@hf-law.ca

Ottawa Agent for Counsel for the Intervener, Canadian Muslim Lawyers Association

STOCKWOODS LLP
TD North Tower, Suite 4130
77 King Street West, P.O. Box 140
Toronto, ON M5K 1H1

Justin Safayeni
Tel: 416.593.7200
Fax: 416.593.9345
E-mail: justins@stockwoods.ca

Counsel for the Intervener members of the Coalition

POWER LAW
130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: 613.702.5561
Fax: 613.702.5561
E-mail: mvincelette@powerlaw.ca

Ottawa Agent for Counsel for the Intervener members of the Coalition

BLAKE, CASSELS & GRAYDON LLP
4000 - 199 Bay Street
Commerce Court West
Toronto, ON M5L 1A9

Paul Schabas
Tel: 416.863.4274
Fax: 416.863.2653
E-mail: paul.schabas@blakes.com

Kaley Pulfer
Tel: 416.863.2756
Fax: 416.863.2653
Email: kaley.pulfer@blakes.com

Counsel for the Intervener members of the International Coalition

GOWLING WLG (CANADA) LLP
160 Elgin St.
Suite 2600
Ottawa, ON K1P 1C3

Jeff Beedell
Tel: 613.786.0171
Fax: 613.788.3587
E-mail: jeff.beedell@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener members of the International Coalition

BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
33 Yonge Street, Suite 201
Toronto, ON M5E 1G4

Tae Mee Park
Andrew W. MacDonald
Abbas A. Kassam

Tel: 416.982.3813
Fax: 416.982.3801
E-mail: tpark@lexcanada.com

Counsel for the Intervener, British Columbia Civil Liberties Association

GOLDBLATT PARTNERS LLP
500-30 Metcalfe St.
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: 613.482.2463
Fax: 613.235.3041
E-mail: cbauman@goldblattpartners.com

Ottawa Agent for Counsel for the Intervener, British Columbia Civil Liberties Association

TABLE OF CONTENTS

PART I - OVERVIEW

A. Overview

1. When is an indefinite publication ban appropriate and is it a less restrictive substitute for a sealing order? How is such a restriction consistent with the open court principle and freedom of expression? To the extent such a ban is appropriate, in what limited circumstances is it available and what evidence is required to justify its imposition? This appeal deals with these important questions.

2. The Canadian Civil Liberties Association ("**CCLA**") submits that an indefinite publication ban is not an appropriate substitute for a sealing order when banned material has already had wide publication, is in the public domain and is easily accessible. In this context, the public's, including the accused's, interest in the open court principle far outweighs any detriment to the accused's fair trial rights.

3. Further, a sealing order must be justified with supporting evidence and reasons detailed enough to allow for meaningful appellate review. Bald allegations do not meet this threshold and cannot outweigh the public's interest in the open court principle.

B. The Facts

4. The CCLA relies on the following uncontested facts.

5. The accused, Farah Shirdon ("**Shirdon**"), left Canada in March, 2014, and travelled to Syria.[1]

6. In April, 2014, the National Post published an article about an Islamic State video featuring Shirdon, who made threats against the West and ripped up his passport (the "**Passport Video**"). As a result, the RCMP began investigating Shirdon.[2] Ben Makuch ("**Makuch**"), a journalist with Vice Media Inc. ("**Vice Media**"), also began investigating

---

[1] Appellants' Record ("**Vice AR**"), tab 11, p. 145, Redacted Information to Obtain ("**Redacted ITO**") at para 7.

[2] Vice AR, tab 11, p. 145, Redacted ITO at para 8.

Shirdon's social media accounts. In May, 2014, he began communicating with Shirdon through KIK messenger, an online messaging service.[3]

7. In June, 2014, the CBC broadcast and published stories identifying Shirdon as the individual in the Passport Video.[4] Thereafter, numerous newspaper articles were written about Shirdon, including articles authored by Makuch based on conversations he had with Shirdon through KIK messenger.[5]

8. In August, 2014, Makuch authored an article about Shirdon entitled "The Islamic State's Internet-Famous Canadian Is Likely Dead".[6] Shirdon was not dead. In September, 2014, he agreed to a Skype interview with one of the founders of Vice Media, Shane Smith.[7] That interview, among others, remains available online.

9. Existing media coverage relating to Shirdon made it unquestionably clear that Shirdon had joined a terrorist organization, the Islamic State, as a jihadist and was fully committed to its cause.[8]

10. On September 24, 2015, the RCMP charged Shirdon *in absentia* with six different terrorism related offences under the *Criminal Code*. Parts of its press release stated that Shirdon had left Canada to "allegedly join and fight with the Islamic State" and that he "served in a combat role" as well as "recruiting, fundraising, encouraging others to commit violence, and spreading propaganda".[9] Shirdon has not been arrested and his precise whereabouts remain unknown. He may be dead. It appears unlikely that his prosecution will ever occur.

---

[3] Vice AR, tab 9, p. 85, Affidavit of Ben Makuch sworn December 22, 2015 ("**Makuch Affidavit**") at paras 6-8.
[4] Vice AR, tab 9, p. 86, Makuch Affidavit at para 9 and Exhibit A at p. 91.
[5] Vice AR, tab 9, p. 86, Makuch Affidavit at paras 9-10.
[6] Vice AR, tab 9, Makuch Affidavit, Exhibit D at p. 107.
[7] Vice AR, tab 9, p. 86, Makuch Affidavit at para 11.
[8] See, for example, Vice AR, tab 9, Makuch Affidavit, Exhibit C at p. 104, Exhibit D at p. 110, Exhibit E at p. 119, Exhibit F at pp. 126, 133.
[9] Vice AR, tab 9, Makuch Affidavit, Exhibit G, pp. 136-137.

PART II - CCLA'S POSITION ON THE ISSUES

11. This appeal concerns a production order and sealing order granted by the Ontario Court of Justice on February 13, 2015 (the "**Production Order**" and the "**Sealing Order**"),[10] and a publication ban issued by the Ontario Superior Court of Justice on March 29, 2016 (the "**Publication Ban**").[11] The CCLA only makes submissions in respect of the Publication Ban and the Sealing Order.

12. The CCLA makes the following submissions:

(a) Consistent with the open court principle and freedom of expression, a publication ban is not a substitute for a sealing order and must be justified on its own merits; and

(b) An information to obtain ("ITO") must be made public when the evidence is insufficient to justify a sealing order and when the reasons for a sealing order are not detailed enough to allow for meaningful appellate review.

PART III - ARGUMENT

A. The Open Court Principle

13. The open court principle is entrenched as a fundamental aspect of our judicial system and the fabric of democracy.[12] Public access to the courts and the principle of openness guarantee the integrity of judicial processes and maintain the independence and impartiality of courts. It inspires confidence in, and public understanding of, the justice system and the administration of justice. It "is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of the courts."[13]

14. The open court principle is also "inextricably linked to the freedom of expression protected by s. 2(b) of the *Charter* and advances the core values therein" insofar as it

---

[10] Vice AR, tab 1, p. 5, Production and Sealing Order of Justice Nadelle dated February 13, 2015 at para 8.
[11] Vice AR, tab 3, pp. 9-43, *R v Vice Media Canada Inc.*, 2016 ONSC 1961 ("***R v Vice***").
[12] *Vancouver Sun Re*, 2004 SCC 43 at paras 23-27 ("***Vancouver Sun***").
[13] *Vancouver Sun* at para 25.

protects both the "freedom of the press to report on judicial proceedings" and "the right of the public to receive information."[14] Consequently, the Supreme Court has observed that "the open court principle, to put it mildly, is not to be lightly interfered with."[15]

15. This principle applies at every stage of proceedings, including pre-trial proceedings.[16] Therefore it applies at the "pre-charge or 'investigative stage' of criminal proceedings", including in relation to warrant application materials.[17]

16. Moreover, the Supreme Court has repeatedly stressed that "the press plays a fundamentally important role" in upholding the open court principle because, as a practical matter, court information can only be obtained through the media.[18] The role of the press is as important to pre-trial court documents as it is to trial proceedings.[19]

B. When a Publication Ban is Appropriate

(i) The Basis for the Publication Ban

17. The Publication Ban was ordered as a less restrictive alternative to a sealing order because wide dissemination of the allegations against Shirdon could stigmatize him, taint a jury and threaten his fair trial rights.[20]

18. In order to grant a discretionary publication ban to protect an accused's fair trial rights, the Crown must satisfy the test set out in *Dagenais v Canadian Broadcasting Corp.*, and modified by *R v Mentuck*, by demonstrating that:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

---

[14] *Vancouver Sun* at para 26.
[15] *Vancouver Sun* at para 26.
[16] *Vancouver Sun* at para 27.
[17] *Toronto Star Newspapers Ltd. v Ontario*, 2005 SCC 41 at paras 5, 7, 30.
[18] *Edmonton Journal v Alberta (Attorney General)*, 1989 CanLII 20 at paras 85, 86 (SCC) ("***Edmonton Journal***").
[19] *Edmonton Journal* at para 86 (SCC).
[20] Vice AR, tab 3, pp. 33-34, *R v Vice* at paras 97, 100.

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial and the efficacy of the administration of justice.21

19. In this case, the *Dagenais*/*Mentuck* test raises several considerations that ought to be examined when determining whether a publication ban is appropriate:

(a) a publication ban is ineffective if prejudicial information is already in the public domain;

(b) a publication ban is not a reasonable alternative, or less restrictive, measure to a sealing order;

(c) public scrutiny of an investigation is critical and enhances the accused's fair trial rights;

(d) other alternative measures exist that could sufficiently protect the accused's fair trial rights; and

(e) considering all of the above, the deleterious effects of a publication ban outweigh any salutary effects.

(ii) The Publication Ban Must Be Effective

20. Effectiveness informs every aspect of the *Dagenais*/*Mentuck* test.[22] The Court must consider whether the publication ban would be effective at preventing stigmatization and jury tainting. An ineffective ban does not meet the first stage of the *Dagenais*/*Mentuck* test and provides no salutary effect at the second stage.

21. In addition, a publication ban fails the *Dagenais*/*Mentuck* test when the material that is subject to the ban is widely available online. In this case, the Publication Ban was ordered to prevent dissemination of allegations that Shirdon had left Canada to join, and

---

[21] *Dagenais v Canadian Broadcasting Corp.*, 1994 CanLII 39 at paras 77, 102(c) (SCC) ("***Dagenais***"); *R v Mentuck*, 2001 SCC 76 at paras 32, 33 ("***Mentuck***"); collectively referred to as the *Dagenais*/*Mentuck* test.
[22] *Dagenais* at para 94, see also para 95.

his involvement with, the Islamic State.[23] However, the RCMP's own news release stated that it had charged Shirdon and detailed these allegations against him.[24] The RCMP broadcast the very allegations that the Publication Ban was intended to prevent being made public. In such circumstances, the genie is out of the bottle and the potential for prejudice that the publication ban was intended to prevent already exists.[25]

22. The permanent and recallable nature of anything online means information is as available today as it was when originally published. In 1994, the Supreme Court recognized the illusory effectiveness of publication bans in a "global electronic age" and noted "the actual effect of bans on jury impartiality is substantially diminishing".[26] These concerns have only been exacerbated in the subsequent 24 years.[27]

23. A publication ban that seeks to prevent dissemination of information that has already been widely disseminated is ineffective and should not be ordered.

(iii) A Publication Ban Is Not a Reasonable Alternative Measure

24. A publication ban must be justified on its own merits. It should not be considered reasonable or justified simply because permitting access to court materials, while prohibiting publication, is less intrusive than a sealing order. For the reasons set out in Nordheimer J.'s decision in *Canadian Broadcasting Corp. v Canada* ("***CBC***"), the prior existence of a sealing order cannot make an otherwise unjustified or unconstitutional publication ban a reasonable alternative.[28]

25. In *CBC*, the accused faced widely-publicized drug and extortion charges. The accused argued that a publication ban over "the contents of non-consensual intercepted private communication" in an ITO was necessary to protect his right to a fair trial.[29]

---

[23] Vice AR, tab 3, p. 33, *R v Vice* at para 97.
[24] Vice AR, tab 9, Makuch Affidavit, Exhibit G, pp. 136-137.
[25] See, e.g., *Ottawa Citizen (The) v R*, 2007 CarswellOnt 6502 at para 27 (Sup Ct) ("***Ottawa Citizen***").
[26] *Dagenais* at para 93 (SCC).
[27] *R v S (J)*, 2008 CanLII 54303 at para 60 (Sup Ct) ("***S (J)***").
[28] *Canadian Broadcasting Corp. v Canada*, 2013 CanLII 75897 at paras 56-65 (Ont SC) ("***CBC***").
[29] *CBC* at paras 1-5, 34.

Nordheimer J. rejected the contention that mere access to the information, without allowing publication of it, would achieve the objective of public scrutiny. Therefore, it would not be a reasonable alternative measure because it defeated the core purpose for which the information was given.[30]

26. The Ontario Court of Appeal found that *CBC* was wrongly decided and followed a line of authority pre-dating *CBC* in which access to the information was permitted but a publication ban was ordered.[31] The CCLA submits that the Court of Appeal erred, and that *CBC* was correctly decided.

27. The Court of Appeal's decision detracts from the open court principle. It also calls into question subsequent cases that followed and were decided on the basis of Nordheimer J.'s decision in *CBC*.[32] Nordheimer J.'s reasoning in *CBC* appropriately balances the competing interests that come into play when police seek access to a journalist's work product. It accords with the freedom of the press to report on judicial proceedings, the right of the public to receive information and the open court principle. *CBC* should be adopted and followed by this Court.

(iv) Public Scrutiny of Investigations Is Critical

28. That the open court principle preserves the integrity of the judicial system benefits the accused as well as the public. As stated by Iacobucci J. in *R v Mentuck*:

> This public scrutiny is to the advantage of the accused ..., it ensures that the judicial system remains in the business of conducting fair trials, not mere show trials or proceedings in which conviction is a foregone conclusion. The supervision of the public ensures that the state does not abuse the public's right to be presumed innocent, and does not institute unfair procedures.[33]

---

[30] *CBC* at para 65, see also paras 56-64; Vice AR, tab 3, pp. 34-35, *R v Vice* at para 104, citing to *CBC*.

[31] For example: *Ottawa Citizen Group Inc. v Ontario*, 2005 CanLII 18835 (Ont CA) ("***Ottawa Citizen Group***"); *R v Flahiff*, 1998 CanLII 13149 (QC CA). See Vice AR, tab 7, pp. 76-77, *R v Vice Media Canada Inc.*, 2017 ONCA 231 at para 51.

[32] *Toronto Star Newspapers Ltd. v Ontario*, 2014 ONSC 2131 at paras 9, 34; *R v Cabero*, 2016 ONSC 3844 at para 51 ("***Cabero***").

[33] *Mentuck* at para 53; see also *Dagenais* at para 86.

29. This case involves an issue of significant public notoriety and interest. Charging Canadians abroad, for alleged terrorist acts, that may have no effect on Canada or Canadians, is an issue deserving of scrutiny and media attention. How to combat terrorism, and how to balance that important goal while protecting democratic principles, is a current Canadian dilemma.

30. The court must not automatically revert to secrecy because of an alleged connection to terrorism. The public's confidence in its institutions is not satisfied by simply being asked to trust that the police are exercising good judgment and are not engaging in fishing expeditions or laying charges for political purposes.

31. The rationale behind allegations in an ITO is not so shocking or surprising as to deserve secrecy. Allegations on their own may actually be more prejudicial to the accused as the public is left to speculate as to their foundation. Publication of an ITO in these circumstances allows the public to scrutinize for itself whether the allegations are adequately supported.[34]

32. Publication of the details in an ITO also informs the appropriateness of any judicial decisions rendered. The public will not be able to evaluate the reasons allowing or quashing the Production Order without seeing the ITO made in support of that order.[35]

(v) Reasonable Alternative Measures Need to Be Considered

33. Other measures, such as the rules on admissibility of evidence, the challenge-for-cause system and jury instruction, need to be considered before finding that a publication ban is necessary.[36] Such measures can mitigate the concerns that justify a publication ban. For example, jurors are routinely asked to disregard inadmissible

---

[34] *Ottawa Citizen* at para 27.
[35] *S (J)* at para 66.
[36] *Dagenais* at para 102(d); *S (J)* at paras 45, 68, 69; *Cabero* at para 51.

evidence to which they have been exposed, or are asked to consider evidence for one purpose but not for another, all without impairing the fair trial rights of the accused.[37]

(vi) The Salutary Effects Cannot be Outweighed by the Deleterious Effects

34. The overall effects of a proposed publication ban must be carefully scrutinized. The salutary effects of a publication ban evaporate when the proposed ban is ineffective. Moreover, the deleterious effects are enhanced when a lack of public scrutiny detracts from an accused's fair trial rights and when alternative measures exist that could protect those rights without offending the open court principle.

35. The length of the proposed ban is also a factor to be weighed at this final stage of the *Dagenais*/*Mentuck* test. Where an accused is not in Canada and is unlikely to ever face charges, an indefinite publication ban, or a temporary publication ban pending trial, is effectively a permanent ban. A judge ordering that the publication ban can be addressed after a lengthy time does not resolve this problem, as it presumes that someone with standing is willing to undergo the time and expense of re-challenging the ban in the future.

C. When an Order Should Be Sealed

36. The Sealing Order was not appropriate in the circumstances. Contrary to paragraph 122 of the Respondent's Factum, the CCLA made submissions on both specific portions of the ITO and in general in the Court of Appeal.

(i) Bald Allegations Are Insufficient Reasons for a Sealing Order

37. A judge must provide reasons for upholding a sealing order sufficiently detailed to enable meaningful appellate review.[38] A bald allegation regarding national security or public safety is insufficient reason to justify a sealing order. As a sealing order offends the constitutional presumption of open courts, there is an onus to give some indication as to why national security or public safety is invoked in the first place. Otherwise, one

---

[37] *S (J)* at para 40.
[38] *R v Canadian Broadcasting Corp.*, 2008 ONCA 397 at para 56.

cannot make submissions in response and parties and the public cannot know why the order was made.

(ii) Proposed Investigative Steps

38. Proposed investigative steps must be assessed on their own merits under the *Dagenais/Mentuck* test. There is no rule that they be automatically sealed.[39]

39. Proposed investigative steps do not warrant any secrecy when they are neither novel nor surprising and when they merely mimic past police operations, the details of which are already public. Revealing investigative steps that, for example, involve no more than monitoring public reports and social media cannot, in this day and age, be considered secret or create risks to police operations.

(iii) Witness's Identity

40. Failure to consider alternative measures to the sealing of a witness's identity is an error of law.[40]

PART IV - SUBMISSIONS REGARDING COSTS

41. The CCLA does not seek costs and asks that no costs be awarded against it.

PART V - ORDER REQUESTED

42. The CCLA makes no submissions on the merits of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7TH DAY OF MAY, 2018

Brian N. Radnoff / Rebecca Shoom
Lerners LLP
Counsel for the Intervener, Canadian Civil Liberties Association

---

[39] *Mentuck* at paras 43, 45.
[40] *Ottawa Citizen Group* at para 48.

PART VI - TABLE OF AUTHORITIES

TAB NO. **PARAS:**

This is **Exhibit "E"** referred to in the
affidavit of **NOA MENDELSOHN AVIV**
affirmed before me, this
7th day of July, 2023

PIERRE-GABRIEL GRÉGOIRE LS# 82231N
Commissioned virtually and signed electronically in the
City of Toronto in accordance with O. Reg 431/20

Court File No. 33727

IN THE SUPREME COURT OF CANADA
(On Appeal from the Alberta Court of Appeal)

B E T W E E N:

ROSS BARROS

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

- and -

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENER

- and -

THE CANADIAN ASSOCIATION OF CHIEFS OF POLICE

INTERVENER

- and -

THE ATTORNEY GENERAL OF ONTARIO

INTERVENER

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

INTERVENER

- and -

THE CANADIAN CRIME STOPPERS ASSOCIATION

INTERVENER

- and -

THE CRIMINAL LAWYERS' ASSOCIATION

INTERVENER

FACTUM OF THE INTERVENER
The Canadian Civil Liberties Association

ANIL K. KAPOOR and
SENEM OZKIN
KAPOOR BARRISTERS
20 Adelaide Street East
Suite 210
Toronto, Ontario
M5C 2T6

416-363-2700
416-368-6811 – Fax

Counsel for the Intervener, Canadian Civil Liberties Association

LAWRENCE GREENSPON
GREENSPON, BROWN & ASSOCIATES
470 Somerset Street West
Ottawa, Ontario
K1R 5J8

613-288-2890
613-288-2896 – Fax

Ottawa Agents for the Intervener, Canadian Civil Liberties Association

***TO*:** **Registrar of this Court**
The Supreme Court of Canada
The Supreme Court Building
310 Wellington Street
Ottawa, Ontario
K1A 0J1

AND TO:

HERSH WOLCH, Q.C.
WOLCH, HURSH, deWIT, SILBERGERG
& WATTS
633 – 6 Avenue S.W.
Calgary, Alberta
T2P 2Y5

403-265-6500
403-263-1111 - Fax

Counsel to Appellant

ROBERT E. HOUSTON, Q.C.
BURKE-ROBERTSON
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

613-566-2058
613-235-4430 - Fax
rhouston@burkerobertson.com - Email

Ottawa Agent for Appellant

AND TO:

JAMES C. ROBB, Q.C.
ATTORNEY GENERAL OF ALBERTA
9833 – 109 Street N.W.
Edmonton, Alberta
T5K 2E8

780-422-5402
780-422-1106 – Fax
james.robb@gov.ab.ca - Email

Counsel for the Respondent

HENRY S. BROWN, Q.C.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, Ontario
K1P 1C3

613-233-1781
613-788-3433 – Fax
henry.brown@gowlings.com - Email

Ottawa Agents for the Respondent

AND TO:

GREG PRESTON
EDMONTON POLICE SERVICE
Legal Advisors' Section
9620 – 103A Avenue
Edmonton, Alberta
T5H 0H7

780-421-2633
780-421-2867 – Fax
greg.preston@edmontonpolice.ca

Counsel for the Intervener,
Canadian Association of Chiefs of Police

LYNDA A. BORDELEAU
PERLEY-ROBERTSON, HILL &
McDOUGALL
1400 – 340 Albert Street
Ottawa, Ontario
K1R 0A5

613-238-2022
613-238-8775 – Fax

Ottawa Agent for the Intervener,
Canadian Association of Chiefs of Police

AND TO:

PAUL S. LINDSAY
ATTORNEY GENERAL OF ONTARIO
720 Bay Street, 10th Floor
Toronto, Ontario
M5G 2K1

416-326-8248
416-326-4656 – Fax

Counsel for the Intervener,
Attorney General of Ontario

ROBERT E. HOUSTON, Q.C.
BURKE-ROBERTSON
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

613-566-2058
613-235-4430 – Fax
rhouston@burkerobertson.com

Ottawa Agent for the Intervener,
Attorney General of Ontario

AND TO:

ROBERT S. GILL
CLAY & COMPANY
Main Floor, 837 Burdett Avenue
Victoria, British Columbia
V8W 1B3

250-386-2261
250-389-1336 – Fax

Counsel for the Intervener,
Canadian Crime Stoppers Association

CHARLES A. MURPHY
HEWITT, HEWITT, NESBITT, REID, LLP
604 – 75 Albert Street
Ottawa, Ontario
K1P 5E7

613-563-0202
613-563-0445 – Fax

Ottawa Agent for the Intervener,
Canadian Crime Stoppers Association

AND TO:

NANCY L. IRVING
PUBLIC PROSECUTION SERVICE OF CANADA
222 Queen Street, 11th Floor
Ottawa, Ontario
K1A 0H8

613-941-4079
613-941-8742 – Fax
nancy.irving@ppsc-sppc.gc.ca

Counsel for the Intervener, Director of Public Prosecutions

FRANCOIS LACASSE
DIRECTOR - PUBLIC PROSECUTIONS OF CANADA
284 Wellington Street, 2nd Floor
Ottawa, Ontario
K1A 0H8

613-957-4770
613-941-7865 – Fax
flacasse@ppsc-sppc.gc.ca

Ottawa Agent for the Intervener, Director of Public Prosecutions

AND TO:

SUSAN M. CHAPMAN
GREEN & CHERCOVER
30 St. Clair Avenue West, 10th Floor
Toronto, Ontario
M4V 3A1

416-326-8248
416-326-4656 – Fax
schapman@greenchercover.ca

Counsel for the Intervener, Criminal Lawyers' Association

ROBERT E. HOUSTON, Q.C.
BURKE-ROBERTSON
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

613-566-2058
613-235-4430 – Fax
rhouston@burkerobertson.com

Ottawa Agent for the Intervener, Criminal Lawyers' Association

TABLE OF CONTENTS

Court File No. 33727

IN THE SUPREME COURT OF CANADA
(On Appeal from the Alberta Court of Appeal)

B E T W E E N:

ROSS BARROS

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

- and -

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENER

- and -

THE CANADIAN ASSOCIATION OF CHIEFS OF POLICE

INTERVENER

- and -

THE ATTORNEY GENERAL OF ONTARIO

INTERVENER

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

INTERVENER

- and -

THE CANADIAN CRIME STOPPERS ASSOCIATION

INTERVENER

FACTUM OF THE INTERVENER
THE CANADIAN CIVIL LIBERTIES ASSOCIATION

PART I – STATEMENT OF FACTS

Overview

1. The CCLA accepts and relies on the facts as outlined in the Appellant's factum.

2. The issue on this appeal is whether informer privilege should extend to prohibit otherwise lawful investigative steps taken by the defence such that any such investigation may become the basis for an obstruct justice charge. The limits placed on defence investigations by the Court of Appeal may also increase the likelihood of wrongful convictions. Further, the outcome of this appeal will have a broader impact beyond determining an accused's ability to conduct investigations into his/her case; for example it may chill or limit the ability of reporters to conduct investigations for fear of learning the identity of a confidential informant[1].

3. The CCLA respectfully submits that the defence has the right to conduct an investigation to test the assertion of informer privilege, which might lead to a revelation of the identity of the informant. Further, the CCLA respectfully submits that while informer privilege applies to disclosure of informant information, it should not be extended to criminalize independent defence investigations undertaken with a view to preparing to defend the criminal allegation.

[1] This is the result of the broad ruling in the Alberta Court of Appeal.

PART II - QUESTIONS IN ISSUE

4. The CCLA intervenes with respect to the following questions raised by the Appellant:

i. Whether it is an error of law to determine that the scope of protection afforded to alleged confidential police informers extends to preclude otherwise lawful investigative steps by the defence;

ii. Whether it is an error of law to transform the prohibition against revelation of the identity of an alleged informer by the State to a prohibition against discovery by anyone; and

iii. Whether it is an error of law to foreclose legitimate investigation by defence counsel, or agent, to ascertain whether an alleged informer is in fact an agent of the state, a material witness, a fictional source fabricated for illegal purposes or whether there is evidence of a *Charter* breach.

5. The CCLA respectfully submits that the Alberta Court of Appeal's ruling in the present case extends informer privilege beyond prohibiting disclosure to the accused's ability to make full answer and defence (in breach of his/her section 7 *Charter* rights) and may lead to other potential breaches of *Charter* rights.

6. The judgment on Appeal also has the effect of limiting the ability of the press to investigate and report on any given case lest the identity of the informer is uncovered. With respect, this takes protection of the privilege too far. Limiting defence investigations is not necessary to provide adequate protection to informers. The virtually ironclad

prohibition against disclosure by the prosecuting authority is sufficiently adequate and robust to achieve the goal of incentivizing those who wish to inform, for it is not often that the defence will want to learn the identity of the informer.

7. The majority ruling also undermines any effective review of the police/Crown assertion that the asset supplying the information is an informant as opposed to a police agent. Accordingly, the defence must be permitted to conduct investigations to assist it in determining whether the asset should be protected under the privilege.

8. The CCLA takes no position on the adjudicative facts of the appeal.

PART III – STATEMENT OF ARGUMENT

9. The judgment of the majority in this case essentially makes it impossible for the defence to conduct any independent investigation of the police characterization of a human asset as an informant, lest the asset's identity be known. This ruling eviscerates the ability of the defence to effectively challenge the police/Crown assertion that the asset is an informer as opposed to an agent (whose identity cannot be protected by, or subject to, privilege) by prohibiting the defence from investigating the claim of informer privilege lest the identity of the informer is discovered. As a practical matter, this leaves the trial judge to consider the assertion of privilege by the police and Crown without the benefit of an effective adversarial challenge. Judges are institutionally incapable of mounting the kind of investigation needed to supply meaningful scrutiny to the privilege claim. This limitation was recognized by this Honourable Court in *Charkaoui*[2], albeit in the context of a national security privilege claim.

10. This is not a mere theoretical concern, as both the majority and minority in the present case agree it is not uncommon for a police informer to actually be an "agent" to whom the privilege does not apply.[3] The defence must therefore be permitted to conduct investigations to assist it in formulating a position on whether to challenge the assertion of privilege. Moreover, this may be the sole means of unearthing evidence of a *Charter*

---

[2] *Charkaoui v. Canada* (Citizenship and Immigration), [2007] 1 S.C.R. 350 at para. 51 (S.C.C.).

[3] *R. v. Barros*, [2010] A.J. No. 387 at paras. 56, 123 and 127. This was also considered by the Ontario Court of Appeal in *R. v. Babes* (2000), 146 C.C.C. (3d) 465 (Ont. C.A.) and *R. v. Davies* (1983), 1 C.C.C. (3d) 299 (Ont. C.A.).

breach[4] or of ascertaining a "sound evidentiary basis" to advance the notion that the asset is in fact a police agent.

11. The majority judgment on appeal, by prohibiting an investigation by the defence which may reveal the identity of an informant, unfairly extends the privilege beyond disclosure, thereby constraining an accused's right to prepare his/her case (in breach of his/her section 7 *Charter* rights) and potentially resulting in additional breaches of his/her *Charter* rights, including the possibility of wrongful conviction.

12. The judgment on appeal is also excessively broad as it enjoins all persons from determining the identity of the informant. This would prohibit the press form conducting investigations where there is a risk that the identity of the informant would be known and it would also prohibit a person from reporting information to the defence to assist the defence in resisting the claim of privilege.[5] The CCLA submits such an extension of the scope of informer privilege is not in the public interest. Such constraints, limits and prohibitions would run afoul of our fundamental conceptions of, and constitutionally guaranteed rights to, life, liberty, security of the person, freedom of expression and a fair trial.

---

[4] For example, an investigation may reveal that the police failed to make full, fair and frank disclosure of the asset's antecedents in contravention of the *Charter* or that the asset failed to advise the police of his/her conduct which, properly considered, renders the asset an agent as opposed to an informant.

[5] For example, in a criminal organization there may be many people who know who an informer is or suspect the same and may wish to pass that information on to the defence to assist in resisting the privilege claim, all with a view to mounting a defence to the charge.

13. The need to apply a thoughtful, rigorous analysis is particularly important in considering whether to extent the reach of informer privilege. For the privilege is found to exist, there is no balancing between the public interest in disclosure versus secrecy as there is with public interest immunity (section 37, *Canada Evidence Act*) or national security privilege (section 38, *Canada Evidence Act*), and therefore no ability to relieve against unintended unfair consequences resulting from the application of the privilege. Therefore, a consideration of an extension of the operation of the privilege must take into account the impact or consequences flowing from the proposed extension beyond the interests of the accused and the Crown.

14. In extending the reach of the privilege to proscribe defence investigation, the majority judgment erroneously conflates the narrow innocence at stake exception with the right of the defence to independent investigation to test the assertion of privilege, as described above. That is to say that one cannot rely on the prohibition against disclosure of allegedly privileged information to prevent a defence investigation that may yield information which will result in the rejection of the privilege claim. It is in this way that the extension of the privilege as contemplated by the majority judgment unfairly restricts the defence and starves the process of an effective check on police/Crown claims of privilege.

PART IV – SUBMISSIONS ON COSTS

15. The CCLA does not seek costs on this Appeal and asks that no costs be awarded against it.

PART V - ORDERS SOUGHT

16. The CCLA respectfully seeks leave to present oral argument at the hearing of the appeal and that the appeal be allowed.

ALL OF WHICH is respectfully submitted.

Dated at Toronto, Ontario this 5th day of January, 2011.

ANIL K. KAPOOR

SENEM OZKIN

Counsel for the Intervener
The Canadian Civil Liberties Association

PART VI - TABLE OF AUTHORITIES

PART VII - STATUTORY PROVISIONS

PARA #

S.C.C. File No. 40371

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

B E T W E E N :

CANADIAN BROADCASTING CORPORATION
LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉEPDANTE (CN21), CANADIAN PRESS ENTERPRISES INC.
MEDIA QMI INC., GROUPE TVA INC.

Appellants

- and -

HIS MAJESTY THE KING
NAMED PERSON

Respondents

[*Style of cause continued next page*]

MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*)

MCCARTHY TÉTRAULT LLP
Suite 5300, TD Bank Tower
Toronto, ON M5K 1E6

Adam Goldenberg (agoldenberg@mccarthy.ca)
Simon Bouthillier (sbouthillier@mccarthy.ca)
Tel.: (416) 601-8357
Fax: (416) 868-0673

Counsel for the Proposed Intervener,
Canadian Civil Liberties Association

[*Style of cause continued*]

A N D B E T W E E N :

ATTORNEY GENERAL OF QUEBEC

Appellant

- and -

HIS MAJESTY THE KING
NAMED PERSON

Respondents

- and –

CANADIAN BROADCASTING CORPORATION
LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉEPDANTE (CN21), CANADIAN PRESS ENTERPRISES INC.
LUCIE RONDEAU, in her capacity as Chief Justice of the Court of Quebec

Interveners

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

BERNARD, ROY (JUSTICE-QUÉBEC)
Suite 8.00
1, rue Notre-Dame Est
Montréal (Québec)
H2Y 1B6

Me Pierre-Luc Beauchesne
Tel : 514 393-2336, #51564
Fax : 514 873-7074
pierre-luc.beauchesne@justice.gouv.qc.ca

Counsel for the Appellant,
Attorney General of Quebec

NOËL & ASSOCIÉS
2e étage
225, montée Paiement
Gatineau (Québec)
J8P 6M7

Me Pierre Landry
Tel : 819 771-7393
Fax : 819 771-5397
p.landry@noelassocies.com

Ottawa Agent for the Appellant,
Attorney General of Quebec

FASKEN MARTINEAU DUMOULIN
S.E.N.C.R.L., S.R.L.
Suite 3500
800, rue du Square-Victoria
Montréal (Québec)
H4Z 1E9

Me Isabelle Kalar
Me Christian Leblanc
Me Patricia Hénault
Tel : 514 397-7400
Fax : 514 397-7600
ikalar@fasken.com
cleblanc@fasken.com
phenault@fasken.com

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

FASKEN MARTINEAU DUMOULIN
S.E.N.C.R.L., S.R.L.
Suite 1300
55, rue Metcalfe
Ottawa (Ontario)
K1P 6L5

Me Sophie Arseneault
Tel : 613 236-3882
Fax : 613 230-6423
sarseneault@fasken.com

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

ROY & CHARBONNEAU AVOCATS
Suite 395
Complexe Jules-Dallaire, Tour 2
2828, boul. Laurier
Québec (Québec)
G1V 0B9

Me Maxime Roy
Me Ariane Gagnon-Rocque
Tel : 418 694-3003
Fax : 418 694-3008
mroy@rcavocats.ca

Counsel for the Intervener,
Lucie Rondeau, in her role as the Chief Justice of the Court of Quebec

TABLE OF CONTENTS

Page

PART I — OVERVIEW

1. The Canadian Civil Liberties Association (the "**CCLA**") seeks leave to intervene in this appeal, which raises important questions about the courts' power to grant confidentiality orders and the process by which third parties are entitled to make submissions regarding these orders. Based on its experience and expertise, including decades of advocating for fundamental human rights — including in this Court — the CCLA intends to make useful and different submissions that reflect the CCLA's distinct perspective on the issues the parties have raised.

2. The CCLA has a genuine interest in this appeal. The CCLA is an independent, national, nongovernmental organization. Its mission is to fight for the civil liberties, human rights and democratic freedom of people across Canada. As one of Canada's leading voices on the openness of the courts, the CCLA is uniquely positioned to help this Court understand the potential impacts of its decision, including on the CCLA's ability to further its mission by advocating in favour of curial openness.

3. If granted leave to intervene, the CCLA will make two submissions:

   i. **Statutory courts must consider the scope of their own jurisdiction in considering the appropriateness and scope of confidentiality orders.**[1] The implied jurisdiction of statutory courts — like the Court of Quebec — is constrained by the Constitution. Though statutory courts' implicit jurisdiction affords them supervisory powers over the court record, those powers do not extend to the administration of criminal evidence and the application of criminal procedure, which both fall under federal jurisdiction. Therefore, when a statutory court judge is seized with a criminal matter that requires them to conceal the identity of an individual or individuals protected by informer privilege, they must draw their jurisdiction from the *Criminal Code*. The *Criminal Code* contains no provisions that permit a judge to keep confidential the date of the trial, the court, the district, or the identity of the judge and counsel, or not to assign a file number to a matter. Quite the contrary, the *Criminal Code* mandates recordkeeping and open

[1] This submission would address issues (a) and (b) raised by the media appellants and the only issue raised by the Attorney General of Québec.

courts. These principles should inform not only whether a confidentiality order should be granted, but also whether, and the extent to which, third parties should have the opportunity to make submissions.

ii. **The Court should clarify the role of non-media organizations in proceedings concerning confidentiality orders**, including where informer privilege is asserted.[2] In *Vancouver Sun*, this Court held that, when a tribunal notifies organizations and individuals to allow them to make submissions on the confidentiality measures that should be in place in order to conceal the identity of an individual protected by informer privilege, it must do so fairly and publicly. The CCLA would submit that, for hearings concerning confidentiality order requests to be fair, courts should generally provide non-media organizations with the opportunity to make submissions. Such an approach would be consistent with this Court's position on the appropriately generous and liberal approach that should be taken to the issue of standing when *Charter*-protected interests are engaged, as they are whenever the openness of courts is curtailed. The CCLA would argue that, despite this Court's instructions, opportunities for non-media organizations to partake in judicial debates on confidentiality orders remain rare and vary greatly from province to province. The CCLA would also submit that the framework for determining non-media organizations' participatory rights in these proceedings should involve a weighing of the non-media organizations' interest in the proceedings, their ability to make meaningful contributions, and concerns regarding the security of the confidential information, among other factors.

4. The CCLA has an interest in this appeal, and its submissions will be useful and different from those of the parties. The CCLA will not raise any new issues, and will not delay or expand the appeal in any way. Leave to intervene should be granted.

PART II — STATEMENT OF QUESTION IN ISSUE

5. The question in this motion is whether the CCLA satisfies the intervention test under Rule 57(2) — *i.e.*, whether the CCLA has an interest in the appeal and will make submissions that

---

[2] This submission would address issues (c) and (d) raised by the media appellants.

are useful and different from those of the parties.[3] It does and it will.

PART III — STATEMENT OF ARGUMENT

A. The CCLA has an interest in the appeal

6. The Court enjoys a wide discretion in deciding whether, and on what terms, to grant leave to intervene in an appeal.[4] Any interest in the appeal is sufficient, subject to a wide discretion.[5]

7. The CCLA has a genuine interest in this appeal. Founded in 1964, it is a national organization dedicated to furthering civil liberties in Canada through public education, communication, research, and litigation. The CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster the recognition of those rights and liberties. Among the CCLA's major objectives is the promotion and legal protection of individual freedom and dignity from unreasonable and unjustifiable intrusion by public authority and ensuring that such violations are effectively remedied. The CCLA also has considerable experience as an intervener in matters heard by the Supreme Court of Canada, related to freedom of the press and the open court principle, including in cases in which informer privilege was asserted.[6]

8. Furthermore, the CCLA has a genuine interest in this appeal because the outcome of this case is an important public interest matter, and it will directly affect the CCLA's ability to make submissions on requests for confidentiality orders made in lower courts across Canada and, therefore, to pursue its mission. Accordingly, the CCLA has a genuine public interest concern and a direct interest in the public law issue raised in this appeal.[7]

9. The CCLA would be a public interest intervener. As the Court has emphasized, "[p]ublic interest organizations are, as they should be, frequently granted intervener status. The views and

---

[3] *Rules of the Supreme Court of Canada*, S.O.R./2002-156, r. 57(2). See *Reference re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 SCR 335 (Chambers) [***Workers' Compensation***], at 339; *R. v. Finta*, [1993] 1 SCR 1138 (Chambers), at 1142.

[4] *Norcan Ltd. v. Lebrock*, [1969] SCR 665, at 666-667; *Workers' Compensation*, at 339.

[5] *Workers' Compensation*, at 339.

[6] *Affidavit of Noa Mendelsohn Aviv* affirmed July 7, 2023, at paras 8-10, Motion Record ("**MR**"), Tab 2.

[7] *Affidavit of Noa Mendelsohn Aviv*, at paras 11-12, MR Tab 2.

submissions advanced by interveners on issues of public importance frequently provide great assistance to the courts."[8] As a public interest organization committed to protecting *Charter* rights of people in Canada, including freedom of the press, the CCLA has an interest in the appeal.

B. The CCLA will make useful and different submissions

10. The second intervention criterion will be met if the proposed intervener "provide[s] the Court with fresh information or a fresh perspective on an important constitutional or public issue".[9] This requirement is "easily satisfied" by a proposed intervener who, like the CCLA, has "a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter".[10]

11. The CCLA meets this standard. Drawing on its experience and expertise in the defence of civil liberties, the CCLA will "present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal".[11] These submissions will make a distinct and important contribution to the appeal. As one of Canada's leading advocates for civil liberties, rights and freedoms, the CCLA is uniquely positioned to help the Court understand the potential impacts of its decision on non-media organizations, including public interest groups that vindicate the *Charter* rights of Canadians.

12. The CCLA would not raise any new issues or otherwise expand the scope of the appeal. Like the parties, the CCLA would make submissions on the scope of the courts' constitutional powers to grant confidentiality orders and their duty to guarantee open courts,[12] as well as with the modalities of the process through which these orders may or must be granted.[13]

13. The CCLA's submissions would be different from those of the parties. The Attorney General of Québec focuses on the scope of the courts' powers to grant confidentiality orders and on the duty to guarantee the openness of the courts. By contrast, the CCLA would address how the

---

8 *Canadian Council of Churches v. Canada*, [1992] 1 SCR 236, at 256.
9 *Workers' Compensation*, at 340.
10 *Workers' Compensation*, at 340.
11 *R. v. Morgentaler*, [1993] 1 SCR 462, at 463.
12 Issues (a) and (b) raised by the media appellants, also by the Attorney General of Québec.
13 Issues (c) and (d) raised by the media appellants.

scope of the courts' jurisdiction should guide this Court in delineating these powers and duties. Moreover, the media appellants focus on the media's contributions to the assessment of potential confidentiality measures, while the CCLA would describe what *non*-media organizations can bring to that process and why they should be allowed to participate in it.

14. Based on its demonstrated expertise, the CCLA is well positioned to make distinct and important contributions to this appeal. If granted leave to intervene, the CCLA would make the following two submissions, as follows.

1. Statutory courts' must consider the scope of their own jurisdiction when granting confidentiality orders and when assessing whether to do so

15. While superior courts draw their jurisdiction from s. 96 of the *Constitution Act, 1867*, provincial statutory courts draw their jurisdiction from their enabling statutes, which are enacted under s. 92(14) of the *Constitution Act, 1867*. Provincial statutory courts, like the Court of Quebec,[14] may exercise only the jurisdiction conferred on them by the legislature. They do not have the power to "craft remedies" – or confidentiality orders – unless that power can be found in legislation.[15] Their enabling statures confer on them powers expressly provided for under the statute and, by implication, powers "that are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature."[16]

16. However, a court's implied jurisdiction is constrained by the Constitution.[17] Indeed, it cannot be inferred that a court's enabling statute grants powers to that court that the legislature itself is not constitutionally empowered to confer on it. Therefore, the implicit jurisdiction of a provincial court is limited by s. 92(14) of the *Constitution Act, 1867* to "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

---

[14] *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, par. 14; *Courts of Justice Act*, CQLR c T-16, s. 82.
[15] *R. v. Raponi*, 2004 SCC 50, para. 34.
[16] *R. v Cunningham* 2010 SCC 10, par. 19; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, par. 51.
[17] *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, par. 69.

17. This Court has established that statutory courts' implicit jurisdiction provides them with supervisory powers over the openness of proceedings and the court record.[18] These powers permit courts to grant discretionary confidentiality orders under the *Dagenais/Mentuck* test. These powers, which are of an administrative nature, are similar to the powers contemplated at s. 482(3) and s. 482.1(1) of the *Criminal Code*, *i.e.*, powers that can assist the court in effective and efficient case management.[19]

18. However, when a court grants a confidentiality order in order to protect informer privilege, it is not exercising an administrative power. It is applying a rule of criminal evidence and does so by following criminal procedure. The exercise of this power is distinct from the administrative powers over access to the court record that this Court has considered in previous cases.[20] When a court is seized of a matter where it is established that an individual is protected by informer privilege, that court is *required* to enforce that privilege and to impose confidentiality measures to protect their identity.[21] It must do so, without regard to its own discretion, by prohibiting the disclosure of all information that could reveal the identity of the informer.[22]

19. Powers over criminal evidence and procedure cannot be inferred from provincial courts' enabling statutes, as the power over criminal procedure falls under the jurisdiction of Parliament under s. 91(27): "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters".[23] For the same reason, no provincial statute, regulation or rule of practice could grant provincial courts express powers over criminal evidence and procedure. Therefore, the *Criminal Code* and other federal statutes and regulations provide an exhaustive and comprehensive scheme of criminal procedure.[24]

20. In this case, the Court of Appeal of Quebec rightly concluded that it drew its jurisdiction to

---

[18] *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 [***CBC* v. *Manitoba***], par. 63.
[19] *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, para. 14.
[20] *CBC v. Manitoba*; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835; *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 SCR 175.
[21] *Named Person v. Vancouver Sun*, 2007 SCC 43 [***Vancouver Sun***], para. 37.
[22] *Vancouver Sun*, paras. 26, 30.
[23] *Constitution Act, 1867*, s. 91(27); *Knox Contracting Ltd. v. Canada*, [1990] 2 SCR 338, at 356; *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206, at 223.
[24] *Doyle v. R.*, [1977] 1 SCR 597, at 602; *Kourtessis v. M.N.R.*, [1993] 2 SCR 53, at 72.

grant the confidentiality orders from the *Criminal Code* and, therefore, that the *Criminal Code* constrained its capacity to grant such orders.[25] However, contrary to what the Court of Appeal implied, none of the provisions of the *Criminal Code* allowed the first instance judge to grant the impugned confidentiality orders.

21. While provisions of the *Criminal Code* expressly permit courts to order the exclusion of members of the public from the courtroom or to order that a witness testify without being seen by members of the public,[26] the *Criminal Code* does not contain provisions that would allow a court to elect to not use a file number or to order the non-disclosure of the date of the trial, the court, the district, or the identity of the judge and counsel, or indeed to take measures to shield the entire proceeding — including its very existence — from public scrutiny.

22. Moreover, the *Criminal Code* provides a *discretionary* power to grant confidentiality orders, while confidentiality measures taken to protect the identity of an informer are *mandatory*. The *Criminal Code* also allows for the identity of a *witness*, a *victim* or a *justice system participant* to remain confidential, but not the identity of the *accused*. Finally, there is a provision that prevents the disclosure of information when that information would compromise the identity of a confidential informant, but only to the extent that the information is related to a warrant.[27]

23. In fact, some provisions of the *Criminal Code* and its regulations expressly call for a file to be created and for pre-trial hearings and trials to be documented. For instance, an application for ministerial review for miscarriage of justice under the *Criminal Code* – which is usually filed several years after the trial takes place – must include among other things the name of the court, the number of the motions, the date of the trial, the names and addresses of all counsel involved in the trial, and a true copy of all trial transcripts.[28] These provisions are incompatible with the measures that were adopted by the first instance judge in this case. As the Court of Appeal put it, "*aucune trace de ce procès n'existe, sauf dans la mémoire des individus impliqués*."[29]

---

[25] *Personne désignée c. R.*, 2022 QCCA 406 [***Court of Appeal's decision***], para. 8.
[26] *Criminal Code*, s. 486, 486.31, 486.4, 486.5, 486.7.
[27] *Criminal Code*, s. 487.3.
[28] *Criminal Code*, s. 696.1 to 696.6; *Regulations Respecting Applications for Ministerial Review — Miscarriages of Justice*, SOR/2002-416, s. 2(1)(b)(ii), (iii), (c)(i), (ii), (iii), (iv), (2)(c).
[29] *Court of Appeal's decision*, par. 11.

24. Even if this Court were to conclude that statutory courts have some form of implicit jurisdiction allowing them to grant confidentiality orders to protect the identity of an accused, this power would have to be used in accordance with the common law. The CCLA will argue that the common law does not allow for "secret trials", which run afoul the open court principle as a matter of common (as well as constitutional) law.

25. This does not mean that statutory courts may not grant sealing orders, publication bans, or any other confidentiality order when they exercise *administrative powers*, only that they do not have the jurisdiction to do so when they *apply criminal procedure and administer criminal evidence.* Moreover, even when exercising such criminal law powers, statutory courts can be assisted by superior courts, which possess an inherent jurisdiction to enable inferior courts to administer justice fully and effectively.[30] It is not unusual for statutory courts to require the assistance of superior courts for imposing certain measures, including measures related to confidentiality.[31]

2. The Court should clarify the role of non-media organizations in proceedings concerning confidentiality orders

26. This Court has outlined a two-step process that must be followed when there is a claim of informer privilege. The tribunal must first determine whether the privilege is rightly asserted. If it is, then the tribunal must determine which confidentiality measures should be put in place to ensure that any information that would reveal the identity of the informer remains confidential, while the remaining information is made public.

27. At the second step, the tribunal has the discretion to "allow submissions from individuals or organizations other than the Attorney General and the informer."[32] While this Court recognized that "[m]ore often than not, of course, the individuals or organizations will be the media",[33] it did not preclude, as the media appellants point out, other organizations from being granted standing.[34]

28. In *Vancouver Sun*, the first instance judge had given notice to "certain known and respected

---

[30] *R. v. Caron*, 2011 SCC 5.
[31] *Canada Evidence Act*, R.S.C., 1985, c. C-5, s. 37(3).
[32] *Vancouver Sun*, para. 51.
[33] *Vancouver Sun*, para. 52.
[34] Media Appellants' Factum, paras. 32, 33, 51, 56, 85, 87, 89, 98, 101, 103.

lawyers for the various media outlets" [35] identified by the *amicus*. This Court stated that such practice could not be supported, "as it unfairly and arbitrarily privileged certain members of the media on the basis of the judge's or the amicus' views."[36] The Court added that the notice that advises third parties about the proposed confidentiality orders should be available publicly, stating that the notice would be "ideally in hard copy at the courthouse as well as in electronic form over the internet".[37]

29. Despite this Court's teachings, the opportunities for non-media organizations to participate in judicial debates on confidentiality orders remain unequal. In some provinces, there are regulations that allow third parties to be notified when a discretionary confidentiality order is sought. Some regulations allow for anyone to subscribe to the notifications;[38] however, others limit the notification to the media organizations,[39] or require that the request to subscribe to the notifications be approved by the court.[40] In Quebec, Newfoundland and Labrador, New Brunswick and Manitoba, there is no regulation or practice rule that requires the systematic notification of third parties. This Court should state clearly that this uneven *status quo* is unacceptable.

30. Non-media organizations could make contributions that are different from those of the parties and the media. First, non-media organizations could make submissions in cases in which there are significant legal issues at play, but that do not attract the media's attention. Second, since some non-media organizations might be less sensitive to public opinion than media organizations,

---

[35] *Vancouver Sun*, par. 64.
[36] *Vancouver Sun*, par. 64.
[37] *Vancouver Sun*, par. 52.
[38] British Columbia: *Supreme Court of British Colombia PD – 56 Practice Direction Notification of Publication Ban Applications* (Supreme Court).

[39] Saskatchewan: *General Application Practice Directive No. 3 Discretionary Orders Restricting Media Reporting Or Public Access* (Court of King's Bench); *Practice Directive XII Discretionary Orders Restricting Media Reporting Or Public Access* (Provincial Court); Prince Edward Island: *Practice Note 38 Notice To Media Re: Discretionary Publication Ban, Sealing Order, Restricted Access Order, Or Confidentiality Order* (Supreme Court); Nova Scotia: *Civil Procedure Rules of Nova Scotia*, rule 85.05.

[40] Ontario: *Consolidated Provincial Practice Direction*, s. 107-115 (Superior Court); Alberta: *Alberta Rules of Court*, s. 6.28-6.36 (Court of King's Bench and Court of Appeal); *Notice to the Profession Publication Bans (#2)* (Provincial Court); Prince Edward Island: *Practice Directions Prince Edward Island Court Of Appeal*, s. 13 (Court of Appeal).

they could take positions that may be unpopular or receive backlash, but that vindicate the rights of Canadians. Third, civil liberties groups are in a better position to make submissions on confidentiality orders that engage rights beyond freedom of the press, or that might impact the fairness of the trial itself. Fourth, public interest groups have specific expertise working with certain communities, including underprivileged groups, and could benefit from that expertise.

31. The CCLA would submit that non-media organizations should therefore generally be given the opportunity to participate in proceedings concerning confidentiality orders. To enable non-media organizations to make informed decisions concerning participation, they should benefit from the same notification measures as the media. They should then be allowed to apply for standing to make submissions. In considering such a request, a court should consider factors such as the non-media organization's composition and mandate, its asserted interest in the proceeding, and its history of involvement in court proceedings. If a non-media organization is permitted to participate, the court should begin with the presumption that the non-media organization should have the same access to the purportedly confidential information as the media. This presumption could be rebutted by (among other things) the nature of the information and the basis for the confidentiality order sought, or by the nature of the non-media organization's interest in the proceeding.

32. In *CBC v. Manitoba*, this Court recognized that "[c]ourt openness is understood as a public good, not an interest that belongs to a particular individual or entity."[41] The Court has also held that the open court principle is "a hallmark of democracy."[42] To uphold that principle, the CCLA would submit, non-media organizations should generally be given opportunities to participate fully in the process that leads to the granting of confidentiality orders.

PART IV — SUBMISSIONS CONCERNING COSTS

33. The CCLA asks that no costs be awarded for or against it.

PART V — ORDER SOUGHT

34. CCLA seeks leave to intervene on the terms set out in its Notice of Motion.

---

[41] *CBC v. Manitoba*, par. 46.
[42] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 SCR 480, par. 22.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of July, 2023.

Adam Goldenberg and Simon Bouthillier

PART VI — TABLE OF AUTHORITIES

AUTHORITIES	Paragraph(s) referenced in Memorandum of Argument
Case Law	
A.G. (Nova Scotia) v. MacIntyre, [1982] 1 SCR 175	18
ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), [2006] 1 SCR 140	15
Attorney General of Canada v. Canadian National Transportation, Ltd., [1983] 2 SCR 206	19
Canadian Broadcasting Corp. v. Manitoba, 2021 SCC 33	17, 18, 32
Canadian Broadcasting Corp. v. Canada (Attorney General), 2011 SCC 2	17
Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 SCR 480	32
Canadian Council of Churches v. Canada, [1992] 1 SCR 236	9
Dagenais v. Canadian Broadcasting Corp., [1994] 3 SCR 835	17, 18
Doyle v. R., [1977] 1 SCR 597	19
Knox Contracting Ltd. v. Canada, [1990] 2 SCR 338	19
Kourtessis v. M.N.R., [1993] 2 SCR 53	19
Named Person v. Vancouver Sun, 2007 SCC 43	3, 18, 27, 28
Norcan Ltd. v. Lebrock, [1969] SCR 665	6
Ontario v. Criminal Lawyers' Association of Ontario, 2013 SCC 43	16
Personne désignée c. R., 2022 QCCA 406	20
R. v. Caron, 2011 SCC 5	25
R. v. Cunningham, 2010 SCC 10	15
R. v. Finta, [1993] 1 SCR 1138	5
R. v. Morgentaler, [1993] 1 SCR 462	11
R. v. Raponi, 2004 SCC 50	15
Reference re Code of Civil Procedure (Que.), art. 35, 2021 SCC 27	15
Reference re Workers' Compensation Act 1983 (Nfld.), [1989] 2 SCR 335	5, 6, 10
Legislation	
Alberta Rules of Court, Alta Reg 124/2010, s. 6.28-6.36	29

AUTHORITIES	Paragraph(s) referenced in Memorandum of Argument
Canada Evidence Act, R.S.C., 1985, c. C-5, 37(3)	25
Civil Procedure Rules of Nova Scotia, Royal Gaz Nov 19, 2008, s. 85.05	29
Consolidated Provincial Practice Direction, Superior Court of Ontario, s. 107-115	29
Constitution Act, 1867, 30 & 31 Vict, c 3, s. 91(27)	15, 16
Courts of Justice Act, CQLR c T-16, s. 82	15
Criminal Code, RSC 1985, c C-46, ss. 486, 486.31, 486.4, 486.5, 486.7. 487.3, 696.1-696.6	3, 17, 19, 20, 21, 22, 23
General Application Practice Directive No. 3 Discretionary Orders Restricting Media Reporting Or Public Access, Saskatchewan Court of Kings Bench	29
Notice to the Profession Publication Bans (#2), Provincial Court of Alberta	29
Practice Directions Prince Edward Island Court Of Appeal, Prince Edward Island Court of Appeal	29
Practice Directive XII Discretionary Orders Restricting Media Reporting Or Public Access, Provincial Court of Saskatchewan	29
Practice Note 38 Notice To Media Re: Discretionary Publication Ban, Sealing Order, Restricted Access Order, Or Confidentiality Order, Supreme Court of Prince Edward Island	29
Regulations Respecting Applications for Ministerial Review — Miscarriages of Justice, SOR/2002-416, ss. 2(1)(b)(ii), (iii), (c)(i), (ii), (iii), (iv), (2)(c)	23
Rules of the Supreme Court of Canada, S.O.R./2002-156, s. 57(2)	5
Supreme Court of British Colombia PD – 56 Practice Direction Notification of Publication Ban Applications, Supreme Court of British Colombia	29