**SCC File No. 40371**

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

**BETWEEN:**

**CANADIAN BROADCASTING CORPORATION**
**LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉPENDANTE (CN21), CANADIAN PRESS ENTERPRISES INC.**
**MEDIAQMI INC., GROUPE TVA INC.**

Appellants
(Applicants)

**-and-**

**HIS MAJESTY THE KING**
**NAMED PERSON**

Respondents
(Respondents)

**AND BETWEEN:**

**ATTORNEY GENERAL OF QUEBEC**

Appellant
(Applicant)

**-and-**

**NAMED PERSON**
**HIS MAJESTY THE KING**

Respondents
(Respondents)

**-and-**

**CANADIAN BROADCASTING CORPORATION,**
**LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉPENDANTE (CN21), CANADIAN PRESS ENTERPRISES INC.,**
**LUCIE RONDEAU, IN HER CAPACITY AS CHIEF JUSTICE OF THE COURT OF QUEBEC**

Interveners

**-and-**

**ATTORNEY GENERAL OF ONTARIO**

Proposed Intervener

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# MOTION FOR LEAVE TO INTERVENE OF THE ATTORNEY GENERAL OF ONTARIO

**Pursuant to Rules 47, and 55-57 of the *Rules of the Supreme Court of Canada***

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**His Majesty the King**
Counsel: [Redacted]
Address : [Redacted]

***Pursuant to the Order dated April 26, 2023, this party is deemed served by posting the application material on the Supreme Court of Canada website.***

**Named Party**
Counsel: [Redacted]
Address : [Redacted]

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# NOTICE OF MOTION OF THE PROPOSED INTERVENER, ATTORNEY GENERAL OF ONTARIO

(Pursuant to Rule 55 of the *Rules of the Supreme Court of Canada*)

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**TAKE NOTICE** that the Attorney General of Ontario applies to a Judge or the Registrar, under

Rule 55 of the *Rules of the Supreme Court of Canada*, for an order granting leave to the Attorney General of Ontario to:

a) Intervene in this appeal;

b) File a factum not exceeding 10 pages in length;

c) Make oral argument of five minutes at the hearing of the appeal; and

d) Any further or other order that the Judge or Registrar may deem appropriate.

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

1) The Attorney General of Ontario has a real and substantial interest in the issues raised in this appeal, and will provide useful and different submissions than the parties;

2) Granting leave to intervene to the Attorney General of Ontario will not prejudice any party. The Attorney General of Ontario will not raise new issues, supplement the record, or seek costs against any party; and

3) Such further or other grounds as counsel may advise and as this Honourable Court may permit.

**AND FURTHER TAKE NOTICE** that the following documents will be referred to in support of the motion:

a) The Affidavit of Leslie Paine, dated and affirmed on July 10, 2023; and

b) Such further or other material as counsel may advise and the Judge or Registrar

may permit.

Dated at Toronto, Ontario, this 10th day of July, 2023.

SIGNED BY

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**His Majesty the King**
Counsel: [Redacted]
Address : [Redacted]

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**Named Party**
Counsel: [Redacted]
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# AFFIDAVIT OF LESLIE PAINE

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I, Leslie Paine, Barrister and Solicitor, of the City of Toronto, in the Toronto Region, in the Province of Ontario, make solemn affirmation and say as follows:

## A. INTRODUCTION

1. I am the Director of the Crown Law Office - Criminal of the Ministry of the Attorney

General of Ontario. Our office is comprised of over 100 counsel who practice exclusively in the area of criminal law. Our office represents the Attorney General of Ontario in all indictable appeals before the Court of Appeal for Ontario and this Honourable Court. The Crown Law Office – Criminal also prosecutes cases at all levels of court through three specialized trial practice groups: the justice prosecutions group, which prosecutes criminal allegations against justice system participants (*e.g.* police officers, lawyers, paralegals); the special prosecutions group, which prosecutes criminal allegations of heightened complexity or public interest (*e.g.* hate crime, cyber crime, commercial crime, and conflict matters referred by other Attorneys General); and the Serious Fraud Office, which prosecutes complex financial crimes. Our office frequently provides legal advice on a wide variety of topics to police and other prosecutors, in Ontario and elsewhere, and contributes significantly to the development of criminal law policy on behalf of the Province of Ontario.

2. In addition to representing the Attorney General of Ontario in criminal appeals to this Honourable Court that arise from Ontario, the Crown Law Office – Criminal has also intervened, by right or with leave, in many appeals originating from other provinces.

## B. ISSUES RAISED IN THIS APPEAL

3. This appeal from the decision of the Court of Appeal of Quebec raises important questions regarding the protection of informer privilege. The Appellants in this case are media entities that sought to vary sealing orders that were imposed by both the trial court and the Court of Appeal in order to protect informer privilege. The Appellants were granted leave to appeal to this Court on March 16, 2023. The Appellants' factum was filed June 12, 2023. I understand no other parties have filed their facta to date.

4. The Appellants argue that the lower courts erred in overly restricting access to information regarding the underlying proceedings. They ask that this Court institute mandatory notice procedures when a court is faced with an issue of restricting access to confidential informer privileged information, and to endorse the use of confidentiality undertakings to permit the disclosure of privileged information to media parties adjudicating access to information.

## C. ONTARIO'S INTEREST IN THIS APPEAL

5. The Attorney General of Ontario seeks leave to intervene to make submissions regarding the need to maintain the robust protections afforded informer privilege in the jurisprudence, to preserve flexibility in the tools available to the court to guard the privilege, and to reaffirm the ability of appellate courts to vary existing sealing orders as circumstances permit.

6. Ontario has a strong interest in this area of the law. Ontario is Canada's most populous province, with the greatest volume of activity in the criminal courts. The Attorney General of Ontario is responsible for all criminal prosecutions in the Province of Ontario, except for those under the authority of the Attorney General of Canada. The Applicant's interests, as the prosecutor in most criminal cases in Ontario, are strongly engaged by the issues in this case. Confidential informants are used throughout Ontario as a vital tool to investigate and eliminate criminal activity, in particular involving firearms or other violent activities. The efficacy of these prosecutions relies on the robust protection afforded to confidential informer privilege that is reflected in the current governing authorities.

7. Further, Ontario has significant experience and expertise litigating informer privilege issues. For instance, Ontario has provided the setting for the renaissance of Step 6 of *Garofoli*

wherein informer privilege issues are routinely litigated.[1] These proceedings often require creative and flexible solutions to accommodate the constitutional right to full answer and defence when it conflicts with confidential informer privilege. Given our experience with litigating confidential informer privilege issues, Ontario is a subject matter expert in this area of the law. Ontario has assisted this Court in the past in the leading cases considering confidential informer privilege.[2] Ontario has similar assistance to offer in the present case.[3]

8. The Attorney General of Ontario seeks to make submissions on three points: (1) the need to maintain the robust protections afforded informer privilege and to reject the dilutions requested by the Appellants; (2) the need to preserve flexibility for the presiding justice to fashion appropriate measures to satisfy the duty to safeguard informer privilege in a specific case; and, (3) the ability of appellate courts to vary sealing orders issued earlier in the proceedings.

9. The Attorney General of Ontario is particularly well-suited to provide an informed perspective on the general issues raised in this appeal. Informer privilege issues are regularly litigated in Ontario courts. Attorney General of Ontario counsel are involved in every step of protecting informer privilege in the files we prosecute: from providing pre-charge investigation advice, to editing disclosure materials, to litigating the existence of confidential informer privilege, to responding to applications, be it from the accused or other parties, for access to confidential

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[1] See e.g. *R. v. Learning*, 2010 ONSC 3816, *R. v. Rocha*, 2012 ONCA 707 (both of which revived the once dormant Step 6); *R. v. Crevier*, 2015 ONCA 61 (which refined the principles); *R. v. Gero*, 2021 ONCA 50*, R. v. Reid*, 2016 ONCA 524 (which dealt with challenges to the constitutionality of the procedure)

[2] Ontario has participated in many of the recent cases before this Court that involved informer privilege. See e.g. *Named Person v. Vancouver Sun*, 2007 SCC 43; *R. v. Basi*, 2009 SCC 52; *R. v. Barros*, 2011 SCC 51; *R. v. Named Person B*, 2013 SCC 9; *Canada (Citizenship and Immigration) v. Harkat,* 2014 SCC 37; *R. v. Durham Regional Crime Stoppers*, 2017 SCC 45; *R. v. Brassington*, 2018 SCC 37

[3] *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at para. 79

informer privileged information. Attorney General of Ontario counsel are also responsible for litigating issues regarding the imposition or variation of sealing orders that arise during appellate litigation. This variety of experience will be of assistance to the Court in evaluating the issues set out above.

## D. THE LEGAL ARGUMENTS LIKELY TO BE ADVANCED BY ONTARIO

10. I anticipate that should the Attorney General of Ontario be granted leave to intervene in this appeal, there may be overlap between the position of the Attorney General of Ontario and any other intervening Attorney General. However, if the Attorney General of Ontario is granted leave to intervene on this appeal, it will supplement rather than repeat the submissions advanced by the parties. The emphasis of the submissions of the Attorney General of Ontario would be on the need to preserve the present law on the duty to zealously guard information that may identify a confidential informer, to ensure courts have the flexibility necessary to fashion bespoke solutions to protect the privilege, and to affirm the ability of appellate courts to vary existing sealing orders.

11. In particular, I anticipate that the arguments advanced by counsel for the Attorney General of Ontario will include the following:

- **The present jurisprudence affords robust protection to informer privilege. The Appellants' calls to radically reduce that protection should be rejected.**

12. The significance and near absolute nature of confidential informer privilege have both been long recognized by this Court. For instance in *R. v. Leipert*, this Court reiterated the purpose of the informer privilege rule as follows:

> [I]nformer privilege is an ancient and hallowed protection which plays a vital role in law enforcement. It is premised on the duty of all citizens to aid in enforcing the law. The discharge of this duty carries with it the risk of retribution from those involved in crime. The rule of informer privilege was developed to protect citizens who assist in law enforcement and to encourage others to do the same. As Cory J.A. (as he then was) stated in *R. v. Hunter*

(1987), 57 C.R. (3d) 1, at pp. 5-6, 34 C.C.C. (3d) 14 (Ont. C.A.):

> The rule against the non-disclosure of information which might identify an informer is one of long standing. It developed from an acceptance of the importance of the role of informers in the solution of crimes and the apprehension of criminals. It was recognized that citizens have a duty to divulge to the police any information that they may have pertaining to the commission of a crime. It was also obvious to the courts from very early times that the identity of an informer would have to be concealed, both for his or her own protection and to encourage others to divulge to the authorities any information pertaining to crimes. It was in order to achieve these goals that the rule was developed.[4]

13. The privilege is concerned not just with a particular informer. But rather all potential informers. Past, present and future. Protecting a particular informer's identity "sends a signal to all potential informers that their identity, too, will be protected."[5]

14. This Court's jurisprudence also makes clear that once informer privilege is established, it must be protected. A "complete and total bar on any disclosure of the informer's identity applies." The court has the same ongoing duty to protect the informer's identity as the police and Crown. There is no discretion. The mandatory nature of the privilege flows from its fundamental purposes. The only exception to informer privilege is where an accused establishes that the privileged information must be disclosed on the innocence at stake standard.[6]

15. The Appellants' submissions would dilute the protections afforded by informer privilege in at least three important ways. First, their submissions would expand the circle of privilege to include third parties, including media, on a mere promise of confidentiality. This position directly conflicts with this Court's repeated directions that informer privilege may only be breached when

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[4] *R. v. Leipert*, [1997] 1 S.C.R. 281; *R. v. Durham Regional Crime Stoppers Inc.*, [2017] 2 S.C.R. 157 at para. 1

[5] *Named Person v. Vancouver Sun*, 2007 SCC 43 at para. 18

[6] *R. v. Leipert*, [1997] 1 S.C.R. 281 at paras. 28-29; *Named Person v. Vancouver Sun*, 2007 SCC 43 at paras. 19, 21-23, 27-28, 30, 39-40; *R. v. McClure*, [2001] 1 S.C.R. 445 at para. 47

an accused establishes that his or her innocence is at stake. This expansion would cripple the effectiveness of informer privilege. Class privileges, such as solicitor-client privilege and informer privilege, derive their utility from privilege holders knowing up-front that their privileged information will not be disclosed outside of the circle of privilege. The possibility of disclosure outside the traditional circle of privilege to the very entities that have the greatest ability to disseminate information – the media – undermines the certainty upon which the privilege depends. This Court has rejected previous calls to expand the circle of privilege to additional persons on undertakings. It should do so again here. A promise of confidentiality from any media party does not repair the fatal damage done to the confidential informer privilege by expanding the circle of privilege to include additional parties.[7]

16. Secondly, the Appellants' submissions regarding the need to balance confidentiality concerns with other important countervailing considerations, like the open court principle, ignores the true nature of confidential informer privilege. Information regarding a confidential informer is not merely confidential. It is privileged. When a near-absolute privilege of this nature conflicts with other principles, this Court's jurisprudence makes clear this privilege is not balanced against other considerations. Once the privilege is established, it must be protected. For instance, an accused's right to disclosure to ensure their ability to make full answer and defence must yield to the protection of a class privilege like informer privilege. So too must concerns regarding public access to that same privileged information.[8]

17. In the criminal disclosure context, this Court has held that *ex parte* and *in camera* hearings

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[7] *R. v. Brassington*, 2018 SCC 37 at paras. 41-42; *R. v. Basi*, 2009 SCC 52

[8] *R. v. Basi*, 2009 SCC 52 at paras. 22-23, 37; *R. v. Reid*, 2016 ONCA 524 at paras. 78-83

may be not only permissible but required to ensure the protection of confidential informer privilege. Judicially approved summaries of the undisclosed information to the defence commonly compensate for the editing done in the absence of the accused. Such summaries do not disclose any privileged material, but provide enough information that the defence may still meaningfully challenge e.g. a search authorization that relied on confidential informer privileged information.[9]

18. Finally, the Appellants' submissions too narrowly construe the scope of information that must be protected to guard confidential informer privilege. The Appellants' submissions underestimate the broad scope of information that may be captured by confidential informer privilege. This Court's jurisprudence makes clear that the duty to protect informer privilege demands that any information that may, directly or indirectly, identify the informer be protected. This is not limited to information that "immediately" identifies the informer. Information that may "narrow the pool" must also be protected. The smallest of details (or their redaction) may tend to reveal an informant's identity. In practice it can be extremely difficult to delineate details that may identify an informer from other more innocuous details. The difficulty in identifying this information regarding unknown informers is obvious. But difficulties also arise regarding known informers. As Hubbard notes in the Law of Privilege:

> Even where an informer is known, it is difficult to predict what circumstances may reveal the informer's identity. In most instances, it will be impossible for the court to discern what information may give the informer away. Where it is impossible to know, clearly, the informer must benefit; given the absolute nature of the class privilege, if a court cannot say what information can be revealed safely, no information should be revealed.[10]

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[9] See e.g. *R. v. Thompson*,2015 ONSC 250; *R. v. Reid*, 2016 ONCA 524; *R. v. Crevier*, 2015 ONCA 619 at paras. 71-72, 83-84, 96-98, 103

[10] Robert Hubbard et al., Law of Privilege in Canada (Toronto, Thomson Reuters, 2023), section 2:1 at p. 2-7, 2-8; section 2:6 at p. 2-42 - 2-43; See also *R. v. Sheriffe*, 2015 ONCA 880 at para. 135; *R. v. Y.(X.)*, 2011 ONCA 259 at paras. 1-2, 15; *R. v. Omar*, 2007 ONCA 117 at para. 44; *R. v. Leipert*, [1997] 1 S.C.R. 281; *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3 at para. 53; *Named Person v. Vancouver Sun*, 2007 SCC 43 at para. 26

19. In asking this Court to adopt procedures that are utilized when litigating publication bans or sealing orders imposed for reasons other than confidential informer privilege, the Appellants' submissions ignore the unique features of and obligations that flow from the privilege itself. It is vital for the continued viability of confidential informer privilege, and the use of confidential informers to investigate crime, that the protections afforded by the privilege not be diluted in the ways requested by the Appellants.

- **The spectrum of procedures available to protect informer privilege must be flexible**

20. Once the privilege applies – the police, Crown and Court are all duty bound to protect it. How to protect the privilege will be directed by the circumstances. One size fits all practices or requirements are unworkable in this area. This Court has recognized that the different circumstances in which confidential informer issues arise demand the use of a variety of steps to meet the obligation to protect the privilege. Distinct concerns arise when the Court is addressing material that includes confidential informer information (e.g. a search warrant application), when a witness is called in court who, to some extent, is protected by confidential informer privilege and when an accused is a confidential informer.[11]

21. The necessary flexibility includes whether notice can be given to additional parties that information has been withheld from public view in order to protect informer privilege. As this Court noted in *Named Person v. Vancouver Sun*:

> … [N]o one has a right, constitutional or otherwise, to be informed of all situations in which informer privilege is claimed. It would be unworkable and unreasonable to expect that literally every time an *in camera* proceeding is taking place, a judge has the obligation to publicize its existence and invite submissions from all comers on whether that

[11] *Named Person v. Vancouver Sun*, 2007 SCC 43 at paras. 19-23, 35-40, 53-54, 59; *R. v. B.*, 2013 SCC 9 at para. 140; *R. v. Basi*, 2009 SCC 52 at paras. 36-37

proceeding should be held *in camera*.[12]

22. The Appellants reliance on the Ontario Superior Court's Practice Direction[13] regarding notice for discretionary publication ban applications is misplaced. In the publication ban context, other parties including the media may have relevant and helpful submissions to make regarding whether the ban should issue and on what terms. In the context of an established claim of informer privilege, there are no submissions to be made regarding whether the information should be protected. The Court must protect it to satisfy its duty. Further, even advising that a particular matter engages informer privilege may at times (e.g. where the accused is the informer, or where a witness claims privilege) violate the privilege. Finally, even if such notice was provided, there would be many situations in which the notified third party would not be able to receive any information regarding the privilege claim. The privileged information cannot be shared with a third party without violating the privilege. The explanation for why a particular point is covered by the privilege may similarly not be disclosable. A mandatory notice requirement is unworkable.

- **The authority of appellate courts to vary existing sealing orders**

23. An appellate court may need to consider sealed material in a variety of circumstances in criminal proceedings.[14] With respect to materials sealed to protect informer privilege in particular, all Courts are important stakeholders in the duty to guard informer privilege. This includes appellate court judges before whom questions of informer privilege are litigated. There is no jurisdictional impediment to an appellate court varying a lower Court sealing order to reflect the

[12] *Named Person v. Vancouver Sun*, 2007 SCC 43 at para. 53

[13] Consolidated Practice Direction for Criminal Proceedings, Superior Court of Justice (effective June 15, 2023), Part IX(D) [https://www.ontariocourts.ca/scj/practice/consolidated-criminal-pd/]

[14] See e.g. *Criminal Code,* R.S.C. 185, c. C-46, s. 187, s. 278(6), *R. v. M.B.*, 2020 ONCA 89

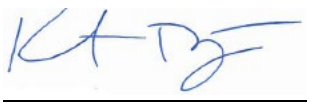
present state of affairs on appeal. Sealed information may be the subject of appellate litigation. In such circumstances there may be good reason to litigate a potential variation to an existing sealing order before the appellate court. Courts have continued authority to supervise access to the records of their own proceedings. It consequently may fall, depending on all of the circumstances, to either the originating or appellate court to vary the terms of the originating sealing order to serve the circumstances at the appellate stage of the litigation.[15]

## E. THE ORDER SOUGHT

24. For the above reasons, the Attorney General of Ontario respectfully requests that it be granted leave to intervene in this appeal. If leave to intervene is granted, the Attorney General of Ontario requests permission to file a factum no longer than 10 pages, and to make oral submissions at the hearing of the appeal.

25. I make this affidavit in support of the Attorney General of Ontario's application for leave to intervene in this case and for no other or improper purpose.

Affirmed remotely by Leslie Paine of the City of Toronto in the Toronto Region before me at the City of Toronto in the Toronto Region on June 1, 2023 in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely,
this 10th day of July, 2023.



A Commissioner of Oaths, etc.

Leslie Paine

[15] *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at paras. 1, 37-38, 41, 44, 51-52, 62-63