SCC File No.: 40371

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

BETWEEN:

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

APPELLANTS
(Applicants)

-and-

HIS MAJESTY THE KING and NAMED PERSON

RESPONDENTS
(Respondents)

-and-

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

INTERVENER
(Applicant)

(Style of cause continued on following page)

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INTERVENERS

AND BETWEEN:

ATTORNEY GENERAL OF QUÉBEC

APPELLANT
(Applicant)

-and-

NAMED PERSON and HIS MAJESTY THE KING

RESPONDENTS
(Respondents)

-and-

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

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-and-

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TO: THE REGISTRAR

AND TO:

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XXXXXX
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FACTUM OF THE INTERVENER

Part I: OVERVIEW AND FACTS

A. Overview

"*Whatever their motives, the position of informers is always precarious and their role is fraught with danger*."[1]
"*Publicity is the very soul of justice*" [2]

1. This appeal concerns the interplay between the two precepts enshrined in the above quotes: informer privilege and the open court principle. This Court's jurisprudence has clearly established a procedure in which these two principles are reconciled. The Attorney General of Alberta ("Alberta") contends that horizontal *stare decisis* mandates that this procedure not be overruled and that robust protection of informer privilege must not be whittled away.

2. In *Named Person v Vancouver Sun*,[3] this Court established the two-part procedure by which harmony between these two fundamental principles can exist. Critically, this procedure maintains the ability of a court to consider, in the specific circumstances of a case before it, how best to protect informer privilege while respecting the open court principle.

3. Alberta submits that this procedure **not** be changed as urged by the media appellants. The test set forth in this Court's recent decision of *R v Sullivan*[4] as to when horizontal sta*re decisis* can be detracted from has **not** been satisfied by the entities who seek to revisit the *Vancouver Sun* procedure.

4. The inherent conflict between informant privilege and the open court principle can arise in an infinite number of situations. To impose such rules as systemic mandatory notice to interested third parties in court cases involving informant privilege and to greatly expand the circle of informant privilege is dangerous and would adversely affect the administration of justice.

B. Facts

5. Alberta accepts the facts as stated by the public versions of the factums authored by the parties to

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[1] *R v Scott* [1990] 3 SCR 979 at p 994 per Cory J [*Scott*]

[2] *Scott v Scott* [1913] AC 417 at p 477

[3] *Named Person v Vancouver Sun* 2007 SCC 43 [*Vancouver Sun*]

[4] *R v Sullivan* 2022 SCC 19 [*Sullivan*]

this appeal as well as the factum of the intervener, Lucie Rondeau CJ ("Rondeau"). Alberta takes no position with respect to any factual disputes as among the parties or between the parties and the intervener Rondeau.

Part II: ISSUES

6. Alberta will focus on the following issues:
   (a) The procedure established in *Vancouver Sun* does **not** require reconsideration.
   (b) The absolute nature of informer privilege cannot be eroded by extending the "circle of privilege".

PART III: ARGUMENT

(I) The procedure established in *Vancouver Sun* does not require reconsideration

(a) Horizontal Stare Decisis

7. As the apex Court of Canada, this Court's decisions provide the "elaboration of general principles that can unify large areas of the law and provide meaningful guidance to the legal community and the general public." [5] "The Court's practice, of course, is against departing from its precedents unless there are compelling reasons to do so." [6] However, at times, as society progresses or precedents become unworkable the frameworks may need to be revisited. [7] This case is **not** such a time.

8. In *Sullivan*, [8] this Court sets forth a test that, although rendered in a case involving the constitutionality of a section of the *Criminal Code*, must also apply to decisions involving questions of law on non-constitutional issues. Binding decisions issued by a court of coordinate jurisdiction should be departed from only in the three narrow circumstances from the *Spruce Mills* framework: [9]

   1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;

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[5] *R v Kirkpatrick* 2022 SCC 33 at para 181 [*Kirkpatrick*]

[6] *Ibid* at para 44

[7] Rowe, Malcom and Leanna Katz "*A Practical Guide to Stare Decisis*" (2020), *41 Windsor Rev. Legal Soc. Issues* 1 at pp 23-24

[8] *Sullivan, supra* n 4

[9] *Ibid* at para 75

2. The earlier decision was reached *per incuriam* ("through carelessness" or "by inadvertence") or
3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

9. While not expressly asking that *Vancouver Sun* be overruled, the media appellants in this case ask that the test established in *Vancouver Sun* be "clarified." They suggest that the *Dagenais/Mentuck/Sherman Estate* test for discretionary publication bans also apply to cases involving informant privilege. They also seek a systemic mandatory notice procedure for all cases involving informant privilege. Critically, if this Court were to accede to these requests, then the parameters of the *Vancouver Sun* procedure would effectively be overruled.

10. In Alberta's submission, to mandate such fundamental changes to the *Vancouver Sun* test, satisfaction of the *Spruce Mills* test would be required. The test is not satisfied in this case. No subsequent appellate decision that undermines the *Vancouver Sun* procedure has been provided. The decision in *Vancouver Sun* was a considered decision of the full Court that had the benefits of submissions from media participants. [10] The decision was certainly not reached *per incuriam* nor was it issued in exigent circumstances. Therefore, the flexible approach provided in *Vancouver Sun*, as described below, must remain for cases involving informant privilege.

(b) The two-part *Vancouver Sun* test

11. The test established in *Vancouver Sun* strikes an appropriate balance between the two principles in question and provides a workable procedure for courts who are faced with the difficult task of protecting informer privilege while at the same time ensuring as much openness of the court as possible.

12. The two-part test is as follows:

(1) If an individual wishes to claim that they are a confidential informant, they should ask the judge to adjourn the proceedings immediately and continue *in camera*. With only the individual and the Attorney General present, the judge will determine if sufficient

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[10] In their factum the media appellants compares *Vancouver Sun* with *Leipert* and states that the *Vancouver Sun* judgment had the benefit of insight offered by the media respondents. (Media Appellants' Factum at para 26)

evidence exists to determine that the person is a confidential informant and thus able to claim informer privilege. [11] Once it has been established on the evidence that the person is a confidential informant, the judge must apply the privilege.[12] It may be permissible in some cases for a judge to appoint an *amicus curiae* in order to assist in the determination as to whether the evidence supports that the claimant is a confidential informant. [13]

(2) Once a person is found to be a confidential informant in stage one, informant privilege dictates that no information that might tend to reveal the informant's identity can be disclosed. At the same time, the open court principle must be protected and promoted.[14]At this stage, the judge may allow submissions from individuals or organizations other than the Attorney General and the informant regarding the importance of ensuring that the informer privilege not be overextended. [15] If the judge "believes that it is in the interests of justice that notice" be given, notice to interested third parties can be given. [16] The judge is able to open or close court as much as necessary. The information provided must be limited only to non-identifying information which provides a general basis from which the third party can argue to what extent the proceeding can be heard in open court.

13. This Court was emphatic in its rejection that the *Dagenais/Mentuck* test for the application of the open court principle in discretionary publication bans also apply to cases involving informant privilege.[17] Those bound to protect informer privilege, including the court, have no discretion to disclose any information that may lead to the identification of the informant. [18]

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[11] *Vancouver Sun, supra* n 3 at para 46

[12] *Ibid* at para 47

[13] *Ibid* at para 48

[14] *Ibid* at para 50

[15] *Ibid* at para 51

[16] *Ibid* at para 52

[17] *Ibid* at para 42

[18] *Ibid* at para 58

14. This Court was likewise emphatic that the question of notice to third parties be a decision left to the specific judge in the specific case. This Court **did not** impose systemic mandatory notice to interested third parties in cases involving informant privilege.
15. Therefore, in *Vancouver Sun*, this Court has already addressed the propositions of the media appellants in the present case. This Court opted for a flexible approach in informant privilege cases that allows for the finesse and caution that is required in order to maintain the privilege. There is no need now for this Court to deviate from its earlier pronouncements.

(II) Informer Privilege: "an ancient and hallowed protection"[19]

16. In *Bisaillon v Keable*, this Court described informer privilege as follows: "*the rule gives a peace officer the power to promise his informers secrecy expressly or by implication, with a guarantee sanctioned by the law that this promise will be kept even in court, and to receive in exchange for this promise information without which it would be extremely difficult for him to carry out his duties and ensure that the criminal law is obeyed*. [20]
17. The common-law rule of informer privilege is based on the public interest. It exists not only because of potential risk to the informant, but also to **encourage others** to divulge information to the authorities. The use of informers is often the only means for the police to obtain knowledge and thus the privilege ensures the effective implementation of criminal law. [21] "*By protecting those who assist the police in this manner – and encouraging others to do the same – the privilege furthers the interests of justice and the maintenance of public order.*"[22] As will be explained below, the consequences that flow from a breach of informer privilege eviscerate the effective enforcement of the criminal law.
18. Critically, informant privilege is absolute; it does not permit weighing on a case-by-case basis. It is a class privilege that always applies, whatever the circumstances of the informant. [23]
19. The privilege has consistently been protected by the judicial enunciation of its attributes including:

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[19] *R v Leipert* [1997] 1 SCR 281 at para 9 per McLachlin J as she then was [*Leipert*]

[20] *Bisaillon v Keable* [1983] 2 SCR 60 at p 105 [*Bisaillon*]

[21] *Ibid* at pp 104-105

[22] *R v Durham Regional Crime Stoppers Inc*. 2017 SCC 45 at para 12 per Moldaver J [*Durham*]

[23] *Ibid* at para 11, *Vancouver Sun supra* n 3 at paras 22-23

(1) Informant privilege protects any and all information that might serve to identify the informant, because even the most innocuous fact may identify the informant. "Informer privilege is particularly important in the context of anonymous informers."[24]

(2) The privilege applies in civil and criminal cases. [25]

(3) The fundamental importance of the privilege to the criminal justice system and society at large makes it a "near absolute" privilege that is subject only to the innocence at stake exception. The judicial veil will only be lifted by judicial order and only when the innocence of the accused is demonstrably at stake. [26]

(4) The existence of informant privilege and participation of an informant in judicial proceedings have consequences on the character of public court proceedings and "carry a degree of secrecy that can vary depending on the circumstances. It is not a discretionary privilege that a judge may lift because of competing interests.

(5) Given the mandatory nature of protecting an informant, the balancing test that stems from *Dagenais*[27], *Mentuck* [28]and *Sherman Estate*[29] for discretionary orders does not apply. [30]

(6) The privilege must be enforced by the Court, even in the absence of any other entity raising it. [31]

(7) In all cases where informer privilege applies, disclosure outside the circle requires a showing of "innocence at stake." [32]

(a) Participants in the "circle of privilege" and the danger of expanding the circle

20. Critically, in order to protect the informant privilege and effectively pursue criminal

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[24] *Durham supra* n 22 at para 13

[25] *Leipert* supra n 19 at paras 17-18

[26] *R v Basi* 2009 SCC 52 at para 37

[27] *Dagenais v CBC* [1994] 3 SCR 835 [*Dagenais*]

[28] *R v Mentuck* 2001 SCC 76 [*Mentuck*]

[29] *Sherman Estate v Donovan* 2021 SCC 25 [*Sherman Estate*]

[30] *Vancouver Sun supra* note 3 at paras 35-37

[31] *Bisaillon supra* n 20 at p 93

[32] *R v Brassington* [2018] 2 SCR 616 at para 46 [*Brassington*]

investigations and prosecutions, the circle of privilege must be limited. Typically, the circle of privilege includes the informer, the informer's police handler(s), the Crown ***and*** the court. [33]

21. The circle of privilege does not include the accused or counsel for the accused [34]or interested third parties and their counsel. The media appellants argue that in order to be able to participate in a useful debate, media or other interested third parties must have access to the documents and information that will be the subject of the debate. [35] To agree to this request would allow them entry into the circle of privilege. This is a breach of the privilege and is dangerous because the expansion of the circle increases the risk of intentional or inadvertent disclosure of the informer's identity.

22. The media appellants also suggest that information other than the name of the police informant and certain identifying information which is likely to identify the informant should be discussed. Third parties should be informed of (1) the nature of the information sought to be concealed from the public eye and (2) the concrete reason justifying not disclosing it. [36]

23. This categorization of information is dangerous. Repeatedly, courts faced with questions of disclosure of information have recognized that even the smallest details may provide an accused person with all they need to identify an informer. In *Leipert*, the example of the time of a phone call was given. The slightest detail that may not mean anything to most people, such as the color of a car, the spacing on a redacted document, the style of someone's writing, could be the one innocuous fact that provides the last puzzle piece to people trying to determine the identity of an informant.

24. It may actually be the interested media party that possesses that final puzzle piece. Journalist sources may have provided a journalist with specific information that is only known to the media. Once that information is coupled with information from the criminal case, the identity of the informant might become known. To be able to determine the identity of an informant

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[33] *Ibid* at paras 41-42

[34] *Brassington supra* note 26 at paras 42-46

[35] Media Appellants' factum at para 51

[36] Media Appellants' factum at para 85

because of the merging of separate pieces of seemingly innocuous information constitutes a breach of informer privilege.

25. It is critical therefore that a cautious approach be taken to the dissection of specific information. The colloquialism that "we do not know what we do not know," aptly applies to the question of what information may lead to the identification of an informant. The suggestion by the media appellants that they be placed in receipt of categories of information is dangerous. The type of exercise that requires caution and finesse to be performed by the court cannot be summarized in terms of the categories of information that can be disclosed. There is no pigeonholing of information to which the media can be privy. A court faced with the dilemma of what information to convey to interested third parties must be allowed flexibility.

(b) Risk to the administration of justice

26. It is an understatement to say the consequences of a breach of informer privilege are vast and serious. "If the identity of an informant becomes known, there may be serious reprisals against the informer and his or her family. Informants have been murdered for providing information to the police." [37] Physical assaults against the person and damage to property are other consequences.

27. A breach of informer privilege can also lead to the discontinuance of a prosecution. In *Scott*, this Court "upheld the use of the Crown's power to stay proceedings under s. 579 of the Criminal Code as a proper means to protect informer privilege."[38]

28. If the state breaches informant privilege, the informant's right to security of the person as protected under section 7 of the Charter is breached. [39] At times, the informant will seek compensation for the breach of informer privilege and resultant damages in a civil claim.

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[37] Robert Hubbard, Mabel Lai, & Daniel Sheppard, "Confidential Informers", *Wiretapping and Other Electronic Surveillance: Law and Procedure* (Toronto: Thomson Reuters Canada, 2021) at 4:31. Online: Westlaw Canada (date accessed September 10, 2023)

[38] Robert Hubbard & Katie Doherty, "Staying Proceeding to Protect Informants", *Law of Privilege in Canada* (Toronto: Thomson Reuters Canada, 2020) c. 2:57 Online: Westlaw Canada (date accessed September 10, 2023)

[39] *USA v Larose* 2006 QCCS 45 at para 79

29. Breaches of informer privilege have a chilling effect on the motivation of others who may have information about a crime to come forward. The enforcement and prosecution of the criminal law therefore suffers as does the administration of justice.

(III) Conclusion

30. Informer privilege is absolute. Any attempt to erode its protection must be deterred. The procedure that is currently in place to consider informant privilege must remain. This procedure allows not only the cautious approach required to protect informant privilege but also as much respect for the open court principle as possible.

31. Although Alberta cannot speak to the specific facts of this case, there may very well be the rare criminal case in which a complete lock-down of information is required in order to protect informer privilege. If not locked down, the prosecution of crime would suffer, and informers may be subject to reprisal from aggrieved parties. If not locked down, the trial may never occur. The administration of justice would suffer from such a result.

PART IV: COSTS

32. Alberta makes no submissions regarding costs.

PART V: REQUEST TO PRESENT ORAL ARGUMENT

33. This Court has allowed the intervener to present oral argument for 5 minutes at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 13th day of September, 2023.

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PART VII – TABLE OF AUTHORITIES

AUTHORITIES	Cited at Paragraph No.
R v Basi 2009 SCC 52 at paras 17-18	19
Bisaillon v Keable [1983] 2 SCR 60 at p 105 [*Bisaillon*]	16, 19
R v Brassington [2018] 2 SCR 616 at para 46 [*Brassington*]	19, 21
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