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 INDÉPENDANTE (CN21), CANADIAN PRESS ENTERPRISES INC. MEDIA QMI INC., GROUPE TVA INC.

Appellants

- and -

HIS MAJESTY THE KING
NAMED PERSON

Respondents

[*Style of cause continues on next page.*]

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

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

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PART I — OVERVIEW

1. Recent years have seen a proliferation of "secret trials" across the country.[1] Nowhere is such secrecy provided for: not in the Constitution, not in legislation, and not at common law. "Secret trials" were never part of Canadian law, even before the enactment of the *Charter*. Not only are they contrary to many rights, including freedom of the press, but they are also in contradiction with fundamental principles of the rule of law.

2. Canadian law should not abide such underground proceedings. Informer privilege requires that confidential informers remain invisible. But this obscurity must be the exception, and it cannot extend to the criminal justice system itself, or to the trial process in particular. The Canadian Civil Liberties Association (the "**CCLA**") intervenes in this appeal to make two submissions on how these commitments should be reconciled.

3. *First*, courts must respect the limits of their jurisdiction in making confidentiality orders. The implied jurisdiction of statutory courts — like the Court of Quebec — is constrained by the Constitution. Though statutory courts' implied jurisdiction affords them supervisory powers over the court record for administrative purposes, those powers do not extend to the application of the informer privilege, which necessarily engages the administration of criminal evidence and the application of criminal procedure, both of which fall under federal jurisdiction. Provincial statutory courts, unlike superior courts, cannot exercise implied federal powers.

4. Therefore, when a statutory court judge is seized with a criminal matter that requires them to conceal the identity of an individual protected by informer privilege, they must draw their jurisdiction from federal legislation. The *Criminal Code* contains no provision that permits 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. Even where superior courts could play a complementary role in enforcing informer privilege, that jurisdiction would have to be exercised in accordance with the rule of law.

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[1] *Personne désignée c. R.*, 2022 QCCA 406 [***Court of Appeal's decision***]; *R. v. Bacon*, 2020 BCCA 140; *R. v. John Doe*, 2023 ONCA 490.

5. *Second*, 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 submits that, for hearings concerning confidentiality order requests to be fair, courts should generally provide non-media organizations with the opportunity to make submissions.

6. This 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. When a court contemplates imposing an extraordinary limitation not only on the freedom of the press but also on the public's right to know, it should invite not only the media's attention but also non-media organizations'.

7. Despite this Court's instructions, opportunities for non-media organizations to participate in judicial debates on confidentiality orders remain rare and vary greatly from province to province. To right the balance, the CCLA submits that the framework for determining non-media organizations' participatory rights in these proceedings should involve a weighing of a non-media organization's interest in the proceedings, its ability to make a meaningful contribution, and concerns regarding the security of the confidential information.

PART II —ARGUMENT

1. A court must consider the scope of its jurisdiction when making confidentiality orders

8. 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[2]

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[2] *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27 [***Reference re Court of Quebec***], para. 14; *Courts of Justice Act*, CQLR c T-16, s. 82: "[i]n criminal and penal matters, the Court has jurisdiction *within the limits* provided for by law in respect of proceedings brought under the Criminal Code (Revised Statutes of Canada, 1985, chapter C 46), the Code of Penal Procedure (chapter C 25.1) or any other Act." [emphasis added]

and the Court of Appeal of Quebec,[3] 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.[4]

9. A provincial statutory court's enabling legislation confers powers in two ways: expressly or by implication. Powers are implied only to the extent they "are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature."[5]

10. Implied jurisdiction is constrained by the Constitution, however.[6] It cannot be inferred that a provincial statutory court's enabling statute grants powers to the court that the provincial legislature itself is not constitutionally empowered to confer. Therefore, the implied jurisdiction of a provincial court is limited by s. 92(14) of the *Constitution Act, 1867*.

11. Statutory courts' implied jurisdiction provides them with supervisory powers over the openness of proceedings and the court record.[7] 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".[8]

12. However, when a court grants a confidentiality 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.[9]

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3 *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 [***CBC* v. *Manitoba***], para. 62.

4 *R. v. Raponi*, 2004 SCC 50, para. 34.

5 *R. v Cunningham* 2010 SCC 10, para. 19; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, para. 51.

6 *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, para. 69.

7 *CBC* v. *Manitoba*, para. 63.

8 *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, para. 14.

9 *CBC v. Manitoba*; *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835; *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175.

13. When a court is seized of a matter in which 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.[10] 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.[11]

14. 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).[12] Therefore, the *Charter*, the *Criminal Code*, and other federal statutes and regulations create an exhaustive and comprehensive scheme of criminal procedure.[13] This federal scheme must govern the application of informer privilege; otherwise, the assertion of informer privilege could have different substantive implications in different provinces. As this Court recognized in *Bisaillon*, such variability would "destroy[]" "[t]he basis of the federal rule".[14]

15. To sum up, statutory courts may craft sealing orders, publication bans, or other confidentiality orders under their implied jurisdiction when they exercise *administrative powers*. However, when they render confidentiality orders in order to *apply criminal procedure and administer criminal evidence*, they must rely on federal legislation.

16. In this case, the Court of Appeal of Quebec correctly concluded that it drew its jurisdiction to grant the confidentiality orders from the *Criminal Code* and, therefore, that the *Criminal Code* constrained its capacity to grant such orders.[15] 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 in the first place.

17. 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

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10 *Named Person v. Vancouver Sun*, 2007 SCC 43 [***Vancouver Sun***], para. 37.

11 *Vancouver Sun*, paras. 26, 30.

12 *Constitution Act, 1867*, s. 91(27); *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, at 356; *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206, at 223.

13 *Doyle v. R.*, [1977] 1 S.C.R. 597, at 602; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, at 72.

14 *Bisaillon v. Keable,* [1983] 2 S.C.R. 60, at 107.

15 Court of Appeal decision, para. 8.

members of the public,[16] 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.

18. Moreover, the *Criminal Code* allows for the identity of a *witness*, a *victim* or a *justice system participant* to remain confidential, but not the identity of the *accused*. There is a *Code* provision that prevents the disclosure of information when that information would compromise the identity of a confidential informer, but only to the extent that the information is related to a warrant.[17]

19. 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, *e.g.*, an application for ministerial review for miscarriage of justice, 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.[18]

20. 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*".[19]

21. The *Criminal Code* incorporates the criminal law of England in force in the province as of April 1, 1955, as well as the common law in certain areas of criminal law.[20] But this law did and does not allow for "secret trials", nor for the type of extreme confidentiality measures adopted by

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[16] *Criminal Code*, s. 486, 486.31, 486.4, 486.5, 486.7.

[17] *Criminal Code*, s. 487.3.

[18] *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).

[19] Court of Appeal decision, para. 11.

[20] *R. v. Basque,* 2023 SCC 18, para. 41; *Criminal Code*, s. 8(2) and 8(3).

the courts below.[21] These measures run afoul the open courts principle, which not only is at the core of s. 2(*b*) of the *Charter*, but is also deeply embedded in the common law tradition.[22]

22. When statutory courts reach the limits of their jurisdiction, they may be assisted by superior courts, which possess an inherent jurisdiction to enable inferior courts to administer justice fully and effectively.[23] It is not unusual for statutory courts to require the assistance of superior courts for imposing certain measures, including when informer privilege is asserted under s. 37 of the *Canada Evidence Act*.[24]

23. But superior courts must enforce informer privilege with circumspection. As the "primary guardians of the rule of law",[25] superior courts have a duty to uphold the open courts principle.[26] Moreover, superior courts are best suited to — and indeed required to — ensure that government actions do not unreasonably limit fundamental rights.[27] These rights are undoubtedly impacted by rules of procedure and evidence, which set out how someone may be searched, arrested, prosecuted, convicted, and sentenced. But informer privilege, which is held by the Crown (and its informers),[28] poses additional challenges to the rule of law. It may enable the state to prosecute offences that could not be prosecuted otherwise. Having informers testify anonymously gives the state an opportunity to meet its burden of proof while avoiding critically important procedural safeguards, *e.g.*, the entrapment doctrine (because relying on an informer may avoid using undercover officers) and the warrant requirement (because relying on an informer may avoid using a wiretap).

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21 Even when the publication of evidence or a statement was prejudicial to national safety, s. 8(4) of the *Official Secrets Act, 1920 (UK)* provided that the public could be excluded, but that the "passing of the sentence [was required] in any case [to] take place in public."

22 *Canadian Broadcasting Corp. v. New Brunswick (Attorney General),* [1996] 3 S.C.R. 480 **[*CBC v. New Brunswick*]**, para. 21; *Scott v. Scott,* [1913] A.C. 419.

23 *R. v. Caron*, 2011 SCC 5.

24 *Canada Evidence Act*, R.S.C., 1985, c. C-5, s. 37(3). See e.g. *R. v. Basi*, 2009 SCC 52.

25 *Reference re Court of Quebec*, paras. 48, 50, 52; *MacMillan Bloedel Ltd. v. Simpson,* [1995] 4 S.C.R. 725, paras. 29, 37.

26 *Vancouver Sun*, para. 33.

27 *Reference re Court of Quebec*, paras. 48-49.

28 *Vancouver Sun*, para. 23.

24. To sum up, provincial criminal courts' jurisdiction is constrained by the *Charter*, the *Criminal Code* and other federal legislation, which do not allow for the type of confidentiality measures adopted by the Court of Quebec in this case, such as keeping confidential the date of the trial, the court, the district, or the identity of the judge and counsel, or not assigning a file number to a matter. Even where superior courts can assist inferior courts to enforce informer privilege, that jurisdiction cannot be exercised to hold such "secret trials", which undermine the rule of law.

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

25. The outcome of this case will affect the ability of non-parties to make submissions on requests for confidentiality orders made in lower courts across Canada. The CCLA submits that civil society organizations should generally be given the opportunity to participate in proceedings concerning confidentiality orders, in order to pursue their missions. In particular, non-media organizations should have the same (restricted) access to the purportedly confidential information as the media, unless a non-media organization's interest in the proceedings, its ability to make a meaningful contribution, and extraordinary concerns regarding the security of the confidential information warrant otherwise.

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".[29] While this Court has recognized that, "[m]ore often than not, of course, the individuals or organizations will be the media",[30] it has never precluded other organizations from being granted standing, as the media appellants point out.[31]

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[29] *Vancouver Sun*, para. 51.

[30] *Vancouver Sun*, para. 52.

[31] Media appellants' factum, paras. 32, 33, 51, 56, 85, 87, 89, 98, 101, 103.

28. In *Vancouver Sun*, the first instance judge had given notice to "certain known and respected lawyers for the various media outlets"[32] identified by the *amicus*. This Court stated that this 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".[33] 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".[34]

29. Unfortunately, the opportunities for non-media organizations to participate in proceedings concerning confidentiality orders have remained uneven across the country. In some provinces, regulations allow third parties to be notified when a confidentiality order is sought. Some regulations allow for anyone to subscribe to the notifications;[35] however, others limit the notification to the media organizations,[36] or require court approval of a request to subscribe to the notifications.[37] In Quebec, Newfoundland and Labrador, New Brunswick and Manitoba, there is no regulation or practice rule that requires the systematic notification of non-parties.

30. This *status quo* is unacceptable. The constitutional principles at issue in a proceeding concerning a proposed confidentiality order are the same across Canada. The processes by which notice is provided to *Charter*-interested stakeholders — not only the media but also non-media civil society organizations — should accordingly conform to a consistent constitutional baseline

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32 *Vancouver Sun*, para. 64.

33 *Vancouver Sun*, para. 64.

34 *Vancouver Sun*, para. 52.

35 British Columbia: *Supreme Court of British Colombia PD – 56 Practice Direction Notification of Publication Ban Applications* (Supreme Court).

36 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.

37 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).

across jurisdictions.

31. That the media play a significant role in the dissemination of information does not justify a monopoly on the vindication of court openness. In *McNeil*, this Court considered whether a member of the public should be granted standing to challenge censorial powers granted to an administrative board that allowed it to determine what could be broadcast in theatres or other places of public entertainment. Although the Court agreed that theatre owners and operators were more directly affected by the legislation, it nonetheless granted standing to the member of the public, stating that, by allowing the board to determine what members of the public may view, the legislation "[struck] at the members of the public in one of its central aspects".[38] Similar reasoning pertains here: confidentiality orders that obscure the trial process, or that otherwise compromise curial openness, affect the constitutionally protected interests of the public at large.

32. Non-media organizations are in a position to make contributions that are different from those of the parties and the media. First, non-media organizations could make submissions in cases that do not attract the media's attention. Second, civil liberties or community 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. Third, since non-media organizations are generally less vulnerable to the vicissitudes of public opinion — *i.e.*, the sensibilities of subscribers and advertisers — than media organizations, they could take positions that may be unpopular or receive backlash, but that vindicate the rights of Canadians. Fourth, public interest groups have specific expertise and experience, and may be comprised of individuals from marginalized backgrounds whose perspectives could benefit the court.

33. Just as civil society interveners assist this Court in its adjudication of appeals, so may public interest groups "play a vital role" in proceedings concerning confidentiality orders "by providing unique perspectives and specialized forms of expertise that assist the court in deciding complex issues that have effects transcending the interests of the particular parties before it".[39] This Court has also consistently affirmed that a generous and liberal approach should be taken to the issue of standing when it comes to the application of the *Charter*-protected values — such as freedom of

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38 *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, at 271.

39 *R. v. Barton*, 2019 SCC 33, para. 52.

the press — in order to foster the enforcement of *Charter* rights.[40] It follows that courts should generally welcome, and should always invite, the participation of both media and non-media organizations in proceedings concerning confidentiality orders.

34. To empower non-media organizations to make informed decisions concerning participation, they should benefit from the same notification procedures as the media. They should then be allowed to apply for standing to make submissions.

35. In considering a request from a non-media organization for standing to make submissions, a court should consider a non-media organization's asserted interest in the proceeding and mandate. 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 (restricted) access to the purportedly confidential information as the media. This presumption could be rebutted by a non-media organization's interest in the proceedings, its ability to make a meaningful contribution, and extraordinary concerns — beyond those that attend all matters in which informer privilege is invoked — regarding the security of the confidential information.

36. This Court recently 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, non-media organizations should generally be given opportunities to participate fully in the process that leads to the granting (or refusing) of confidentiality orders.

PART III — SUBMISSIONS CONCERNING COSTS

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

PART IV — ORDER SOUGHT

38. CCLA takes no position on the outcome of the appeal.

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[40] *British Columbia (Attorney General) v. Council of Canadians with Disabilities,* 2022 SCC 27, para. 2; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 SCR 236, at 250.

[41] *CBC v. Manitoba*, para. 46.

[42] *CBC v. New Brunswick*, para. 22.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of September, 2023.

Adam Goldenberg and Simon Bouthillier
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PART V — TABLE OF AUTHORITIES

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