SCC File No. 40371

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR 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.
MEDIAQMI INC., GROUPE TVA INC.**

Appellants
(Applicants)

-and-

**HIS MAJESTY THE KING
NAMED PERSON**

Respondents
(Respondents)

AND B E T W E E N:

ATTORNEY GENERAL OF QUEBEC

Appellant
(Applicant)

-and-

**HIS MAJESTY THE KING
NAMED PERSON**

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, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF ALBERTA, CANADIAN MUSLIM LAWYERS ASSOCIATION, ADVOCATES' SOCIETY, BARREAU DU QUEBEC, ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE ET ASSOCIATION DES AVOCATS DE LA DÉFENSE DE MONTRÉAL-LAVAL-LONGUEUIL, CENTRE FOR FREE EXPRESSION, CANADIAN CIVIL LIBERTIES ASSOCIATION, AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, POSTMEDIA NETWORK INC., GLOBAL NEWS, A DIVISION OF CORUS TELEVISION LIMITED PARTNERSHIP, TORSTAR CORPORATION, AND GLACIER MEDIA INC., CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)**

Interveners

FACTUM OF THE INTERVENER
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Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*

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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.

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SCC File No. 40371

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LUCIE RONDEAU, IN HER CAPACITY AS CHIEF JUSTICE OF THE COURT OF QUEBEC, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF ALBERTA, CANADIAN MUSLIM LAWYERS ASSOCIATION, ADVOCATES' SOCIETY, BARREAU DU QUEBEC, ASSOCIATION

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FACTUM OF THE INTERVENER
ATTORNEY GENERAL OF ONTARIO
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

PARTS I & II: OVERVIEW AND STATEMENT OF POSITION

1. Police informers play a vital role in the investigation of serious criminal activity. This significant role, and the need to protect those who have and who would come forward as informers has led to this Court's repeated recognition of informer privilege as a class privilege.

2. This Court has previously recognized that the role of a confidential informant is perilous and fraught with danger. With the clear risk of retribution posed by criminals and criminal organizations, informers need *certainty* that their identity will not be disclosed. In *Named Person v. Vancouver Sun*, Bastarache J. observed that "[o]pen Courts are undoubtedly a vital part of our legal system and of our society, but their openness cannot be allowed to fundamentally compromise the criminal justice system."

3. Once the privilege is established, those within the circle of privilege (the police, Crown and Court) are duty bound to do what is necessary to protect it. What that demands will vary depending on the particulars of the case. The toolkit must remain flexible to ensure that those within the circle of privilege can meet their obligation to protect the privilege.

4. The Attorney General of Ontario intervenes in this appeal to make two broad points:

   (a) Our present jurisprudence provides robust protection for informer privilege. Any effort to dilute that protection and alter the *Vancouver Sun* framework should be rejected.

   (b) The procedures available to protect informer privilege must be flexible. One size fits all approaches involving mandatory procedures are unworkable and lead to intolerable consequences like the disclosure of privileged information or the inability to continue a prosecution.

5. The Attorney General of Ontario takes no position on the facts of this specific case.

PART III: STATEMENT OF ARGUMENT

A. THE DUTY TO PROTECT INFORMER PRIVILEGE SHOULD NOT BE DILUTED

(i) Informer privilege: a class privilege of fundamental importance

6. 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.[1]

7. 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."[2]

8. This Court has consistently recognized informer privilege as a class privilege. Class privileges, like informer privilege or solicitor-client privilege, derive their utility from the upfront certainty the person providing information has that their privileged information will not be shared. The only case specific analysis that is required is to determine that the claimant falls within the ambit of the class privilege (in this context – that he or she is an informer). Once that is established, there is no discretion. The Court must protect the privilege. In *Vancouver Sun*, this Court rejected arguments that trial judges should have the power to decide on an *ad hoc* basis

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

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

whether to protect informer privilege. Such a procedure would create a significant disincentive for would-be informers to come forward, and thereby eviscerate the usefulness of informer privilege and police investigations that rely on informants.[3]

9. Once it is determined that the privilege applies, those within the circle of privilege (the police, the Crown, and the Court) are duty bound to protect it.[4] This distinguishes informer *privileged* information from other types of confidential or sensitive information that parties may not wish to be disclosed. The duty to protect informer privilege is not to be balanced against or compromised by other concerns. The significance of this duty cannot be overstated. The need to zealously guard informer privileged information is a matter of life and death.[5]

10. The scope of information captured by the duty to protect informer privilege is itself necessarily broad. This Court's jurisprudence makes clear that the duty to protect informer privilege demands that any information that may, directly or indirectly, identify an informer be protected. This is not limited to information that "immediately" identifies the informer.

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[3] *R. v. National Post*, 2010 SCC 16 at para. 42; *Histed v. Law Society of Manitoba*, 2005 MBCA 106 at para. 22; *Named Person v. Vancouver Sun*, 2007 SCC 43 at paras. 19, 21-23, 30, 39; *R. v. Basi*, 2009 SCC 52 at paras. 36-37; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 at p. 414

[4] This obligation applies throughout the criminal justice system. Accordingly, it may fall to either an originating or appellate court to impose a sealing order or to vary the terms of any existing sealing order imposed to protect informer privilege, as the circumstances demand. Appellate courts consider materials sealed for a number of reasons in criminal proceedings (e.g., those sealed to protect privilege, those sealed by a statutory provision like s. 187 or s. 278(6) of the *Criminal Code*, or by Court rule.) There is no jurisdictional impediment to an appellate court varying a lower Court sealing order. 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 or the imposition of a further order before an appellate court. See *R. v. John Doe*, 2023 ONCA 490, *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at paras. 1, 37-38, 41, 44, 51-52, 62-63

[5] *R. v. Leipert*, [1997] 1 S.C.R. 281 at paras. 28-29; *Doe v. Doe*, 2017 ONSC 1133 at paras. 14, 21, 26; *R. v. Barros*, [2011] S.C.R. 368 at para. 37; *R. v. C. (L.)*, 2010 ONSC 3359 at paras. 30-31; *Doe v. Halifax Regional Municipality*, 2017 NSSC 17 at para. 17

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.[6]

11. 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.[7]

(ii) Attempts to dilute the protection of informer privilege should be rejected

12. The media appellants' submissions fail to give proper effect to these settled principles regarding informer privilege. Their suggested approach would drastically alter the *Vancouver Sun* landscape. These departures should be rejected. First, the media appellants' suggested procedures would require additional third parties, including media, be permitted to access information that falls within the circle of privilege on a mere promise of confidentiality. This position directly conflicts with this Court's repeated direction that informer privilege may only be breached when an accused establishes that his or her innocence is at stake. In order to litigate what must be protected by informer privilege, the media appellants' suggested procedure would require those within the circle of privilege to countenance its breach through the disclosure of

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[6] *Named Person v. Vancouver Sun*, 2007 SCC 43 at para. 26; *R. v. Leipert*, [1997] 1 S.C.R. 281 at paras. 16, 18-19; *R. v. Omar*, 2007 ONCA 117 at paras. 40, 43-44

[7] 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

potentially privileged information to third parties. But it is precisely such disclosure that would violate the duty of those within the circle of privilege to ensure that no information that may identify an informer is shared.[8]

13. Disclosure of informer privileged information beyond the circle of privilege undermines the ability of the privilege to serve its lofty purposes set out above. 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 media appellants' approach would permit the disclosure of privileged information to third parties upon request. 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.[9]

14. A promise of confidentiality by counsel for a third party is no balm to this issue. 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 by counsel for a third party does not repair the fatal damage disclosure does to informer privilege. Disclosure to third parties, regardless of undertaking, would fundamentally alter the promise of privilege that could be afforded potential informers.[10]

15. Second, the media appellants' approach misarticulates the information that may be covered by informer privilege. Confidential informer privilege may encompass a broad variety of

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[8] *Named Person v. Vancouver Sun*, 2007 SCC 43 at paras. 17-23; *R. v. Leipert*, [1997] 1 S.C.R. 281 at paras. 9, 12

[9] *R. v. Basi,* 2009 SCC 52 at para. 44

[10] *R. v. Brassington*, 2018 SCC 37 at paras. 41-42; *R. v. Basi*, 2009 SCC 52 at para. 44

information. It is not the degree to which a piece of information may identify an informer that necessitates that it is not disclosed. But the ability of a piece of information to *in any way* identify an informer that requires it be protected.[11]

16. Finally, the media appellants' approach oversimplifies the distinctions that must be drawn between information that may identify an informer and that which can be disclosed. Some pieces of information obviously identify an informer and can be easily redacted. However, some distinctions are more nuanced. Information that may, to an uninformed observer, appear innocuous can, when placed in context, narrow the pool and identify an informer. Even the redaction of information in a particular context may narrow the pool and identify an informer.[12]

17. Within these parameters, the court evaluating what information is captured by informer privilege faces a difficult task. The presiding justice must determine whether a particular piece of information may identify an informer. Not whether there is an interest, be it in full answer and defence or the open court principle more generally, that the information be made accessible. The submissions of third parties or their surrogates advocating for disclosure are of little assistance to the judge's determination.

B. THE PROCEDURES AVAILABLE TO PROTECT INFORMER PRIVILEGE MUST BE FLEXIBLE

18. Once confidential informer privilege applies, there is a mandatory obligation on those within the circle of privilege to protect it. But *how* to protect the privilege must be directed by the given circumstances of a given case. One size fits all practices or requirements are unworkable for two reasons.

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[11] *R. v. Sheriffe*, 2015 ONCA 880 at para. 135; *X.Y. v. United States of America*, 2013 ONCA 497

[12] *R. v. McKay*, 2016 BCCA 391 at paras. 20, 155; *R. v. Unnamed Person*, 2015 ONSC 3727

19. First, because the *type of information* that could tend to identify an informer varies from case to case, so too must the means to protect it. This Court has recognized that even the smallest details may be sufficient to reveal the identity of an informer. As a result, the particular facts that may tend to reveal the identity an informant cannot be determined in advance or in the abstract. Courts must be permitted flexibility to protect the privilege depending on the nature of the information that must be protected.[13]

20. Second, flexibility is necessary to address the *variety of circumstances* in which confidential informer issues arise. For example, informer privilege issues may arise: where the Court is addressing material that includes confidential informer information such as a search warrant application; where a witness is called in court who, to some extent, is protected by confidential informer privilege; or where an informant is the accused, a person sought for extradition, or a claimant in a civil proceeding. Issues may be inherent in a particular case and thus anticipated by a party to the proceeding or may arise unexpectedly. Distinct concerns will arise in each of these scenarios, and distinct methods to protect the privilege will be required as well. For these reasons, as Fish J. observed in *R. v. Basi*, "the adoption of appropriate initiatives is therefore best left to the trial judge."[14]

21. Rigid requirements for notice, *amicus*, special counsel, or the involvement of any parties outside the circle of privilege at any stage of the proceedings may leave Courts without the necessary tools to protect privilege. With respect to notice, the necessary flexibility includes

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[13] *R. v. Leipert,* [1997] 1 S.C.R. 281 at para. 18. See also *R. v. Omar*, 2007 ONCA 117 at paras. 18, 40

[14] *R. v. Named Person B,* 2013 SCC 9 at para. 140; *R. v. Unnamed Person*, 2015 ONSC 3727; *Named Person v. Vancouver Sun*, 2007 SCC 43 at paras. 19-23, 35-40, 53-54, 59; *R. v. Basi*, 2009 SCC 52 at paras. 36-37, 58, & 56-57; *R. v. Lucas*, 2014 ONCA 561 at paras. 51, 55, 64, 66-67, 69; *R. v. Leipert,* [1997] 1 S.C.R. 281 at para. 17

whether notice should 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 proceeding should be held *in camera*.[15]

22. The media appellants' reliance on the Ontario Superior Court's Practice Direction 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. It must be protected for the Court to satisfy its duty.[16]

23. Further, the publication ban context is also distinct as notice could be given of a potential publication ban in a proceeding without publishing the information that may be the subject of a ban. In that way notice of a potential publication ban may not frustrate the ends of the requested order. The same cannot be said regarding notice of an informer privilege issue. Notice itself could violate the privilege. For example, in a multi-accused proceeding, either an accused or a witness could claim to have been an informant. If a trial were already in progress, the claimant and the Crown could arrange for an *ex parte, in camera* hearing to determine privilege. But notice to anyone else outside the circle of privilege that included any particulars of the case (the location, the charges, the judge, the counsel involved), or of the nature of the claim, would

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

[16] *Consolidated Provincial Practice Direction*, Ontario Superior Court of Justice, Part IX(D)

provide a roadmap to identify the informant. Any procedures put in place to litigate the existence or extent of informer privilege cannot require a breach of the privilege. A mandatory notice requirement is unworkable.

24. Similarly, the appointment of *amicus* or special counsel, should not be established as a presumptive requirement. The use of *amicus* or special counsel in the litigation of informer privilege issues is at present the "exception, rather than the rule." Ontario courts have repeatedly rejected attempts to alter that landscape in the *Garofoli* "step six" context.[17] Rightly so. One rationale is the risk of inadvertent disclosure. As informant information is made available to more people, the risk of inadvertent disclosure increases. Even those with best intentions increase the risk.[18] In *R. v. Omar*, Sharpe J.A. of the Ontario Court of Appeal warned against misplaced confidence in one's abilities to edit out information that might disclose the identity of an informant. As the possibility of disclosure increases, the certainty that both present and future informants rely upon is eroded. Would *amicus* be able to consult with media organizations or their counsel after seeing privileged information? If so, how could the Court prevent inadvertent disclosure of privileged information? The risk and the ability to manage that risk may vary from case to case. Thus, establishing *amicus* as a mandatory requirement could only serve to limit the necessary flexibility for judges to address the particular challenges in their specific case.[19]

25. Further, the Court of Appeal also rejected the routine appointment of *amicus* because it would shift the delicate balance between the right to full answer and defence and the protection

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[17] For instance, in *R. v. Gero*, 2021 ONCA 50, at paras. 58-65, the Ontario Court of Appeal considered and rejected a similar proposal for special counsel in the context of Step Six of the *Garofoli* procedure.

[18] *R. v. Shivrattan*, 2017 ONCA 23 at paras. 65-66, 69, *R. v. Gero*, 2021 ONCA 50 at paras. 22-23, 45-46, 56-60, 63, *R. v. Atovich*, 2020 ONCJ 610 at paras. 30-32, *R. v. Katsoulis*, 2018 ONSC 7089 at para. 39, *R. v. J.(N.)*, 2017 ONSC 857 at paras. 42-43; *R. v. Thompson*, 2014 ONSC 250 at paras. 57-58, 60

[19] *R. v. Omar,* 2007 ONCA 117 at para. 41

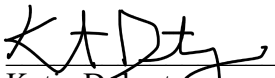
of informants that underlies *Garofoli* applications. This too applies in this context. The process outlined in *Vancouver Sun* reflects the delicate balancing judges must do to meet their duty to protect informer privilege, while respecting the open court principle to the extent possible. The mandatory appointment of *amicus* or special counsel could shift this delicate balance in favour of openness, and "fundamentally compromise" the criminal justice system in the process.

26. The media appellants ultimately ask this Court to revisit *Vancouver Sun* on the basis of two cases where they say the process has not worked. But a broader perspective encompassing more examples demonstrates that the flexibility *Vancouver Sun* permits has been used in a number of contexts to allow adversarial argument and minimize any limit to the open court principle to the extent possible, while still protecting informer privilege.[20] Collectively, these cases show that flexibility is not only necessary, it works.

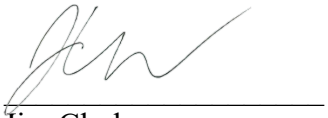
PART IV, V, VI: COSTS, ORDER SOUGHT AND CASE SENSITIVITY

27. The Attorney General seeks no costs, seeks no further orders and makes no submissions on case sensitivity.

ALL OF WHICH is respectfully submitted by



Katie Doherty
Counsel for the Intervener



Jim Clark
Counsel for the Intervener

DATED AT TORONTO this 13th day of September, 2023

[20] *R. v. Crevier*, 2015 ONCA 619; *R, v. Boussoulas*, 2014 ONSC 5542 at para. 20, aff'd 2018 ONCA 222; *R. v. Latif*, 2016 ONCJ 109 at paras. 34-37; *R. v. Dhesi*, 2019 ONCA 569; *R. v. Reid*, 2016 ONCA 524 at paras. 87-90; *R. v. Sandhu*, 2020 ONCA 479; *X.Y. v. United States of America*, 2013 ONCA 497; *Doe v. Halifax Regional Municipality*, 2017 NSSC 17; *Postmedia Network v. Named Persons*, 2022 BCCA 431; *Doe v. Doe*, 2017 ONSC 1133; *R. v. Gager*, 2012 ONSC 388, at para. 22; *R. v. McKenzie*, 2015 ONSC 6289, at paras. 7-8, 24-26; *R. v. Atovich*, 2020 ONCJ 610, at paras. 4-6; *R. v. Lucas*, 2014 ONCA 561, at paras. 43-71

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