SCC File No.: 40371

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

BETWEEN

SOCIÉTÉ RADIO-CANADA / CANADIAN BROADCASTING CORPORATION, LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉPENDANTE (CN21), CANADIAN PRESS ENTERPRISES INC., MEDIAQMI INC., and GROUPE TVA INC.

APPELLANTS

and

HIS MAJESTY THE KING and NAMED PERSON

RESPONDENTS

(continued)

FACTUM OF THE INTERVENERS, AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, POSTMEDIA NETWORK INC., GLOBAL NEWS, A DIVISION OF CORUS TELEVISION LIMITED PARTNERSHIP, TORSTAR CORPORATION, GLACIER MEDIA INC.

(COLLECTIVELY, THE "MEDIA COALITION")

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

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RESPONDENTS

AND BETWEEN

ATTORNEY GENERAL OF QUÉBEC

APPELLANT

and

HIS MAJESTY THE KING and NAMED PERSON

RESPONDENTS

and

SOCIÉTÉ RADIO-CANADA / 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 QUÉBEC, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, CANADIAN MUSLIM LAWYERS ASSOCIATION, ADVOCATES' SOCIETY, BARREAU DU QUÉBEC, ASSOCIATION QUÉBÉCOISE DES AVOCATES ET AVOCATES DE LA DÉFENSE AND 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, GLACIER MEDIA INC., and CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

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TABLE OF CONTENTS

PART I - OVERVIEW

1. This appeal concerns a trial conducted largely in secret and the damage such proceedings inflict on public confidence in the administration of justice.

2. Although the secrecy in the instant case arose from the application of informer privilege, this appeal presents the Court with an opportunity to give general guidance on the ways that courts can protect court openness and public confidence even in cases that involve extreme secrecy.

3. This factum draws on the experience of the members of the Media Coalition in defending the public's right to court openness in Canada, including in a recent case that bears some similarities to the instant appeal.[1] In that case, the British Columbia Court of Appeal identified two tools the judiciary could make use of to protect court openness and public confidence even where extreme secrecy is warranted: (i) requiring a minimum level of public disclosure; and, if those who would defend court openness do not have access to the record, (ii) appointing of *amicus curiae* to guard against overextending restrictions on openness.[2]

4. The Media Coalition respectfully submits that no judicial proceeding in Canada should be conducted in complete secrecy. In every instance, a minimum level of public disclosure containing neutral information about the matter is necessary to preserve public confidence in the administration of justice.

5. In most cases, those who seek to defend court openness will have access to the relevant material and can participate in a full adversarial debate. Where that access is deemed to be inappropriate, the Media Coalition submits that the appointment of *amicus curiae* with access to the record would improve the judicial process and enhance public confidence, provided a meaningful role is reserved for those defending court openness and against whom openness restrictions toll.

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1 *Postmedia Network Inc. v. Named Persons*, 2022 BCCA 431 (**"*Postmedia v. Named Persons*"**)
2 *Postmedia v. Named Persons*, paras. 77, 82-84

PART II - QUESTIONS IN ISSUE

6. The Media Coalition address the questions raised by the appellants and the issues that arise implicitly from those questions in the context of the following three propositions:

(a) There is need to ensure a minimum degree of public disclosure where an order restricting court openness is made, irrespective of the basis for the restriction;

(b) In cases where those who would defend court openness do not have access to the record, and therefore cannot participate fully in the adversarial debate, the court should appoint *amicus curiae* to access the record and make submissions about how to protect confidential information while preserving court openness.

(c) The appointment of *amicus curiae* must not remove those who would defend court openness from the adversarial debate.

PART III - STATEMENT OF ARGUMENT

7. This Court concluded in 2004 that openness "is a fundamental characteristic of judicial proceedings" that is "necessary to maintain the independence and impartiality of courts" and the "legitimacy of the judicial process".[3] Despite this, hearings conducted in extreme secrecy continue to occur,[4] notice to the media on applications to restrict court openness generally remains at the discretion of the presiding judge,[5] orders restricting openness may themselves be sealed,[6] and those defending court openness are sometimes left to do so without access to the record or the order(s).[7]

8. Canadian courts have recognized that such secrecy is a threat to public confidence in the administration of justice. In 2020, for instance, the British Columbia Court of Appeal stated as follows, in the context of an "off docket" proceeding:

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3 *Re Vancouver Sun*, 2004 SCC 43 at paras. 4, 23-25
4 *R. v. Bacon*, 2020 BCCA 140; *Postmedia v. Named Persons*
5 *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 para. 51; *Postmedia v. Named Persons* at para. 44
6 *Postmedia v. Named Persons* at paras. 11, 43-48
7 *Postmedia v. Named Persons*

> Such secrecy in the court process is an anathema. A court should not hide the fact a hearing is proceeding. Listing a case as an *in camera* proceeding provides slim information to the public but it is not nothing. In the minimum, doing so informs the public that the court, which is their court, is grappling with the case listed. It allows the public to keep track of the closed proceedings and it allows for applications to the court in respect of the closure: e.g., *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. In our respectful view, proceedings that do not allow for that minimal degree of oversight should not occur.[8]
>
> (original emphasis)

9. In late June 2022, in line with the admonition described in the previous paragraph, the British Columbia Supreme Court listed an action styled *Named Persons v. Attorney General (Canada)*[9] on the weekly trial docket (the "**BC Secret Trial**"). That "slim information" is in fact all that the public to date knows about that lawsuit against a state actor because (i) the file is sealed, (ii) the matter is covered by publication bans, (iii) the trial was conducted *in camera*, and (iv) the orders giving effect to that state of affairs are themselves sealed.[10]

10. Both the trial court and the British Columbia Court of Appeal dismissed applications by Postmedia Network Inc. to obtain information about the BC Secret Trial. The decision to dismiss Postmedia's application in both courts was based on a record that was not made available to Postmedia or the public, submissions Postmedia and the public were not permitted to hear, and without ever disclosing the basis for the secrecy orders.[11] The British Columbia Court of Appeal acknowledged that level of secrecy was unsatisfactory and undermined the public confidence:

> However, this is obviously an unsatisfactory place to leave the analysis, since Postmedia and the public at large must accept the word of now two courts that their *Charter* rights to freedom of expression and freedom of the press are being limited in a justifiable way on the basis of a record that they cannot see.[12]

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8 *R. v. Bacon* at para. 70

9 *Postmedia v. Named Persons* at para. 10, referring to *Named Persons v. Attorney General of Canada*, Vancouver BCSC Registry No. S2013431

10 *Postmedia v. Named Persons* at paras. 10-12

11 *Postmedia v. Named Persons* at paras. 19, 73-75

12 *Postmedia v. Named Persons* at para. 75

11. The court suggested public confidence in such situations would be enhanced by a minimum level of disclosure concerning orders that restrict court openness,[13] and by the appointment of *amicus curiae*.[14] Both suggestions would improve the current, unsystematic process. The Media Coalition respectfully submits that each of these suggestions should, with some enhancement, be embraced and endorsed by this court to foster public confidence in the administration of justice.

A. MINIMUM DEGREE OF DISCLOSURE TO FOSTER MEANINGFUL DEBATE

12. The appellants in this informer privilege case contend the Quebec proceedings involved an unwarranted level of secrecy. The issues they raise concerning the test applicable to stage 2 of the informer privilege analysis, and the role at that stage for those seeking to preserve court openness, presupposes a certain level of disclosure about the matter at issue.

13. Drawing on its pan-Canadian experience, the Media Coalition notes there may be rare circumstances where extreme restrictions on court openness are sought on an urgent, interim basis, without notice to the public or the media, where the very basis for the restrictions is not disclosed and the order(s) sought or pronounced may themselves be sealed. In those cases, the limitations on access to the record by those who would defend court openness can be so extreme as to compromise or preclude full adversarial debate and even appellate review.

14. The Media Coalition submits the legal process involving restrictions to court openness can be streamlined and improved by requiring a minimal level of neutral public disclosure in all cases, regardless of the basis upon which the restriction on court openness is sought.

15. As noted, the British Columbia Court of Appeal described in 2020 how that minimum level of public disclosure involves, at the very least, listing every case on the court docket.[15] Two years later, the British Columbia Court of Appeal dealt with a situation where the underlying matter – the BC Secret Trial described above – had been listed on the court docket but the proceedings were *in camera* and the orders restricting court openness were themselves sealed. A practice directive designed to provide a basic level of notice to the public of the existence of sealing orders failed in

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13 *Postmedia v. Named Persons* at paras. 43-48
14 *Postmedia v. Named Persons* at paras. 82-84
15 *R. v. Bacon* at paras. 68-72

that instance.[16] The Court of Appeal observed the minimum level of public disclosure needed to preserve public confidence also includes disclosing when an order restricting openness has been made:

> In our view, following this simple direction removes a level of confusion and mystery from the process by confirming the existence of sealing orders that are themselves sealed for members of the public or the media who seek to view these files in the registry. This is the least the court can do to preserve the legitimacy of its orders; the media should not have to sleuth out their very existence.[17]

16. Many trial courts already have the technology to facilitate this minimum degree of public disclosure. For instance, the British Columbia Supreme Court has access to a notification service called an RSS feed ("Really Simple Syndication Service" feed) that can be used to notify subscribers of applications for certain restrictive orders.[18] The superior trial courts in Alberta, Nova Scotia, Nunavut, Ontario, Prince Edward Island and Saskatchewan have similar ability to provide electronic notification.[19] Manitoba and the Northwest Territories require applicants to give notice to the media directly.[20] The Supreme Court of Newfoundland and Labrador relies on social media in cases where public notification of a request to limit openness is directed.[21]

17. The process surrounding orders restricting court openness can be enhanced by requiring a notification that includes all of the following essentially neutral information:

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16 *Postmedia v. Named Persons* at paras. 43-48

17 *Postmedia v. Named Persons* at para. 47

18 Supreme Court of British Columbia, PD-56, *Notification of Publication Ban Applications*

19 *Alberta Rules of Court*, Alta Reg 124/2010, R. 6.32; *Court Information Access Guide for Alberta*, 2.3, Orders Restricting Publication or Public Access; *Nova Scotia Civil Procedure Rules*, Royal Gaz Nov 19, 2008, R. 85.05(1)-(2); Nova Scotia Courts, Publication Bans; Nunavut Court of Justice, Practice Directive #3; Ontario Superior Court of Justice, *Consolidated Provincial Practice Direction*, Part VI: F. Publication Bans, ss. 110-115; Ontario Superior Court of Justice, Publication Ban Requests; Supreme Court of Prince Edward Island, Practice Note 38, *Notice to the Media re: Discretionary Publication Ban, Sealing Order, Restricted Access Order, or Confidentiality Order*; Courts of Saskatchewan, Discretionary Publication Ban Application Notification System

20 Court of King's Bench of Manitoba, Practice Direction *Re: Filing of Application or Motion for a Publication Ban or Sealing Order*; The Supreme Court of the Northwest Territories, Practice Direction, *Publication Bans*

21 Supreme Court of Newfoundland and Labrador, Public and Media Access

(a) the style of cause in the proceeding and docket number (even if the name of the parties is anonymized);

(b) whether the basis of the order sought / granted is statutory or common law;

(c) whether the order sought / granted is discretionary;

(d) whether the order sought / granted is interlocutory or contains a sunset clause;

(e) the nature of order sought / granted;

(f) who to serve with an application to vacate or vary the order;

(g) whether any party is expected to oppose / opposed the restriction sought;

(h) whether *amicus curiae* is expected to participate / has participated in the application, and the nature of any express limitations on that participation;

(i) the name of the judge who will hear the application (if known) / who pronounced the order restricting court openness; and

(j) whether the order sought / granted will itself be sealed.

18. These are not onerous requirements. A simple notice might be drafted as follows:

> *Jane Doe v. Richard Roe*, BCSC File No. 12345. Application will be made by Roe before Smith J. on Sep 8, 2023 at the Vancouver Courthouse for a common law interlocutory ban on the publication of certain information. The ban being sought is to expire at the conclusion of the trial unless extended. The application is not expected to be opposed. The applicant will invite the court to appoint *amicus curiae*. If granted, the order itself will be sealed. Notice prepared by S. Dawson, counsel for Roe.

19. Directions regarding the notice could be sought in an extreme case but would typically be unnecessary. For instance, in the Media Coalition's submission, all the foregoing information could typically be supplied to the public when describing a stage 2 hearing for a police informant privilege. The informant's status would by then be known and the presiding judge could direct such precautions as might be necessary for the conduct of the stage 2 hearing.

20. A timely public notice containing the foregoing neutral information enhances the legitimacy of the administration of justice in several ways:

(a) The notice informs the public that a court is considering, or has granted, an order that restricts court openness;

(b) The notice gives those who would advocate for court openness the basic information needed to consider whether to contest the order and to compose application materials, and would thereby facilitate a full adversarial debate.

(c) The notice allows for efficient use of court time and meaningful appellate review because those defending the public's right to court openness can address themselves and their material to the nature of the order at issue with some understanding of the context in which the matter arises and the issues at play.

B. *AMICUS CURIAE* AND THE NEED FOR MEANINGFUL APPELLATE REVIEW

21. Extreme secrecy at the lower court level can insulate an order restricting openness from effective appellate review. That may occur, for instance, if the media learns that a proceeding is taking place in near complete secrecy, applies for access to the evidence said to warrant the order and has the application dismissed for reasons that are only meaningful to those who have knowledge of the record in the secret proceeding. An appellate court can do little more than conduct its own secret inquiry and announce the result.[22] That process erodes respect for the administration of justice and is, as the British Columbia Court of Appeal noted, unsatisfactory.

22. That court suggested the process would have been improved in the BC Secret Trial had the application judge below appointed *amicus curiae.*[23] The Media Coalition agrees the appointment of *amicus curiae* in those circumstances would represent a process improvement tending to enhance confidence in the administration of justice. In most circumstances, however, the optimal course, and the course most likely to enhance public confidence, is to provide for the full participation of those who seek to defend court openness to facilitate a fair adversarial debate.

23. In some instances the parties themselves will be aligned in favour of restrictions on court openness and may encourage the court to deny case-specific information to those who would defend the public's right to court openness. The Media Coalition submit that scenario continues to

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22 *Postmedia v. Named Persons* at paras. 73-75
23 *Postmedia v. Named Persons* at paras. 79-84

play out in Canada. The adversarial process is compromised in that circumstance because those who would oppose the openness restrictions are limited to general submissions concerning the applicable principles. Concrete submissions about how an order might be tailored to minimally impair court openness are practically impossible. In that circumstance, the appointment of *amicus curiae* to assist the court in balancing the asserted need for an order restricting openness with the public's right to an open court would represent a substantial improvement tending to increase public confidence. Where there is an imbalance in the adversarial process, appointment of *amicus curiae* – including *amicus* whose mandate includes some adversarial functions – can protect the public interest in an effective adversarial process.[24] The participation of *amicus* would then tend to demonstrate to the public that the matter had been fully argued despite the information deficit imposed on the applicant seeking to defend court openness.[25]

24. Without a client to represent, *amicus curiae* would presumably have access to the full record and could make meaningful submissions concerning how the protection required in a particular case may co-exist with court openness. The work of *amicus* would then form part of the appeal record, thus facilitating meaningful appellate review. In suggesting the appointment of *amicus curiae*, the British Columbia Court of Appeal observed how a high level of secrecy in the BC Secret Trial placed the appellate court in an untenable situation:

> We make the recommendations below as to the procedure to be followed when media seeks to bring an application to vary complete sealing orders and orders that the sealed case proceed *in camera*. We are cognizant of the fact that the court below has the inherent jurisdiction to control its own procedure and access to its own files. However, the procedure followed here placed this court and the parties in an untenable position.[26]

C. ***AMICUS CURIAE:*** NOT A SUBSTITUTE FOR THE ACCESS APPLICANT

25. The public is informed about the business of the courts by the media.[27] It often falls to the media to defend the public's right to know about what happens in its courts.[28]

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24 *R. v. Kahsai*, 2023 SCC 20 at paras. 51-52
25 *Postmedia v. Named Persons* at para. 84
26 *Postmedia v. Named Persons* at para. 80
27 *R. v. Mentuck*, 2001 SCC 76 at para. 52
28 *Named Persons v. Vancouver Sun*, 2007 SCC 43 at para. 52

26. One risk to guard against when appointing *amicus curiae* is the displacement of the applicant – often the media, against whom the restrictions on court openness toll – from a seat at the adversarial table. The Media Coalition respectfully submits those who would defend the public's right to open courts should be afforded a meaningful and ongoing role in court openness proceedings both before and after the appointment of *amicus curiae.*

27. On a practical level, the identity of *amicus curiae* should be determined by the presiding judge with the benefit of submissions from the parties and from those who seek to defend the public's right to court openness. The role of *amicus curiae* will often be most economically filled by someone already versed in the issues associated with court openness. Pools from which to draw *amicus* include senior counsel, counsel from the media bar, crown counsel, criminal defence counsel and legal academics. In each instance, however, a potential appointee may be viewed by one or more of the participants as too closely aligned with a particular perspective. Those who regularly seek to defend court openness may be particularly well-placed to make submissions that would assist in the selection process by virtue of their regular experience with openness hearings.

28. Although the role of *amicus curiae* in a given case is fixed by the appointing judge, *amicus* must remain a friend of a court and, at least to some degree, independent of the litigants.[29] As a result, *amicus* would generally not solicit or take instructions from any party before the court. However, in cases where media applicants seek access, the participants may be able to reach some accommodation so as to focus the adversarial process on those aspects of the matter that are agreed to be truly at issue. Media outlets have editorial insight that may assist in focussing access applications on matters likely to be of public interest. Absent that participation, *amicus curiae* may be compelled to presume every aspect of the matter is of equal importance.

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[29] *R. v. Kahsai* at paras. 38-42

D. SUMMARY

29. The open court principle safeguards the integrity of the judicial process, acting as "the security of securities" and demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law".[30]

30. This appeal presents an opportunity for the Court to give needed guidance concerning management of requests to restrict court openness. The guidance can and should be directed and enhancing public confidence in the administration of justice.

31. A requirement for a minimum level of public information about every case would enhance confidence in the justice system. In the rare case where those who would defend court openness are not supplied with the case-specific material necessary to participate in a meaningful adversarial debate, the appointment of *amicus curiae* would also represent an improvement over the present, unsystematic processes.

32. These salutary tools can and should be used to improve the judicial decision-making function and enhance the confidence of the public in the administration of justice.

PARTS IV & V - SUBMISSIONS ON COSTS AND ORDER REQUESTED

33. The Media Coalition does not seek costs and asks that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of September, 2023.

Scott Dawson and Catherine George
Counsel for the Media Coalition

[30] *Re Vancouver Sun* at para. 25

PART VI - TABLE OF AUTHORITIES

Case Law	Paragraph(s)
Canadian Broadcasting Corp. v. Manitoba, 2021 SCC 33	7
Named Persons v. Vancouver Sun, 2007 SCC 43	25
Postmedia Network Inc. v. Named Person, 2022 BCCA 431	3, 7, 9-11, 15, 21-24
R. v. Bacon, 2020 BCCA 140	7, 8, 15
R. v. Kahsai, 2023 SCC 20	23, 28
R. v. Mentuck, 2001 SCC 76	25
Re Vancouver Sun, 2004 SCC 43	7, 29
Secondary Sources	
Court Information Access Guide for Alberta, 2.3, Orders Restricting Publication or Public Access	16
Court of King's Bench of Manitoba, Practice Direction *Re: Filing of Application or Motion for a Publication Ban or Sealing Order*	16
Courts of Saskatchewan, Discretionary Publication Ban Application Notification System	16
Nova Scotia Courts, Publication Bans	16
Nunavut Court of Justice, Practice Directive #3	16
Ontario Superior Court of Justice, *Consolidated Provincial Practice Direction*, Part VI: F. Publication Bans, ss. 110-115	16
Ontario Superior Court of Justice, Publication Ban Requests	16
Supreme Court of British Columbia, PD-56, *Notification of Publication Ban Applications*	16
Supreme Court of Newfoundland and Labrador, Public and Media Access	16
Supreme Court of Prince Edward Island, Practice Note 38, *Notice to the Media re: Discretionary Publication Ban, Sealing Order, Restricted Access Order, or Confidentiality Order*	16
The Supreme Court of the Northwest Territories, Practice Direction, *Publication Bans*	16

Legislation	Section(s)
Alberta Rules of Court, Alta Reg 124/2010	6.32
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