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)

CONDENSED BOOK OF THE INTERVENER,
HIS MAJESTY THE KING IN RIGHT OF ALBERTA
(Pursuant to Rules 45 of the *Rules of the Supreme Court of Canada*)

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INTERVENERS

AND BETWEEN:

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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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INTERVENERS

TO: THE REGISTRAR

AND TO:

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For His Majesty the King

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Overview of Intervener's Position

1. As earlier acknowledged,[1] Alberta agrees that the test set forth in *R v Sullivan* 2022 SCC 19 for horizontal *stare decisis* applies to superior courts at first instance and not to this Court's reconsideration of its past decisions. Counsel extends her apologies to this Court and the participants in this matter for the incorrect references to the *Sullivan* test and the *Spruce Mills* test at paragraphs 3, 8 and 10 of Alberta's factum. Alberta will not rely on the references to *Sullivan* or *Spruce Mills* contained within these paragraphs.

2. This Court's jurisprudence on the principles of *stare decisis* and the circumstances in which this Court may overturn its own precedent has recently been discussed in the joint concurring reasons in *R v Kirkpatrick* 2022 SCC 33 at paragraphs 171 to 286[2], and at paragraphs 22, 23 and 102 of *R v McGregor* 2023 SCC 4 [Tab 2].

3. The Media Appellants seek a fundamental change to the procedure established in *Vancouver Sun (2007)*. The Media Appellants suggest that the *Dagenais, Mentuck* and *Sherman Estate* test apply to cases wherein informer privilege is in issue.

4. Alberta contends that the two-part procedure established by this Court in *Vancouver Sun (2007)* must remain and that the *Dagenais, Mentuck, Sherman Estate* test has no place in cases concerning informant privilege. There is no need to change the procedure as urged by the Media Appellants.

5. The proper application of the existing two-part procedure provides an approach that is best suited for cases involving informant privilege. It allows a court to uphold its duty to protect informant privilege while also respecting the openness of the court principle. It is not an unworkable procedure.

6. Any widening of the circle of informant privilege increases the risk of disclosure of the identity of the informant. Any increased risk of disclosure would have a deterrent effect on future informants coming forward and thus have a detrimental effect on the investigation and prosecution of crime.

7. To accede to the suggestions of the Media Appellants would also create further delays in the criminal justice system. As Wagner C.J. recently observed in *La Presse Inc. v Quebec* 2023 SCC 22 at paragraph 55:

> *While no evidence has been provided to that effect, one can reasonably expect that an interpretation confining the application of s. 648(1) to the post-empanelment stage would lead to a multiplication of applications for discretionary Dagenais/Mentuck/Sherman bans. This, in turn, would most likely result in further*

[1] Correspondence to Court filed October 09, 2023 [Tab 2] and served electronically upon known parties and interveners on the same date.
[2] *R v Kirkpatrick* 2022 SCC 33 [earlier provided in Alberta's authorities]

delays in the criminal justice system and the diversion of scarce resources of the accused and the court. Such a result would be antithetical to the objective of efficiency pursued by Parliament in enacting s. 648(1) and completely at odds with the teachings of this Court in R v Jordan, 2016 SCC 27, [2016] 1 S.C.R. 631.

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October 9, 2023

Chantal Carbonneau, Registrar
The Supreme Court of Canada
301 Wellington Street
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Dear Madam Registrar:

RE: SCC No. 40371 | *Canadian Broadcasting Corporation et al. v. HMK et al.*
Correction of Error in Factum of the Intervener: Attorney General of Alberta

Having reviewed the reply of the media appellants to the interveners, filed September 29, 2023, I acknowledge that they were correct in saying that the test for horizontal stare decisis outlined in *R v Sullivan* 2022 SCC 19 applies to superior courts of first instance.

I will address this error in the allotted time for submissions of the intervener at the hearing of this matter.

Yours truly,

for:

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DAA/ap

Extracts from R v McGregor 2023 SCC 4

[22] To be sure, this Court has taken notice of scholarly writings in reconsidering the soundness of its own precedents (see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 39 and 209; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438, at para. 28; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 29; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 86-88, 146-48 and 235-46; *R. v. Robinson*, 1996 CanLII 233 (SCC), [1996] 1 S.C.R. 683, at para. 39; *Tolofson v. Jensen*, 1994 CanLII 44 (SCC), [1994] 3 S.C.R. 1022, at p. 1042; *R. v. B. (K.G.)*, 1993 CanLII 116 (SCC), [1993] 1 S.C.R. 740, at pp. 765-71; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, 1992 CanLII 41 (SCC), [1992] 3 S.C.R. 299, at pp. 421-23; *R. v. Bernard*, 1988 CanLII 22 (SCC), [1988] 2 S.C.R. 833, at pp. 865-68). This is not to say, of course, that the judiciary is bound to adopt the prevailing approach proffered in the scholarship or that academic criticism is a sufficient reason not to apply the principles of *stare decisis* (see *Fraser*, at para. 86; *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, at paras. 28-29; *Friesen v. Canada*, 1995 CanLII 62 (SCC), [1995] 3 S.C.R. 103, at paras. 56 and 58; *B. (K.G.)*, at pp. 774-77). It is helpful to recall what I wrote with my colleagues Brown and Rowe JJ. in *R. v. Kirkpatrick*, 2022 SCC 33, at para. 248: criticism *per se* is not a reason to overrule one of our own judgments, but it may help a party make the case for overruling it on appropriate grounds.[3]

[23] I do not believe that this is an appropriate case in which to reconsider the extraterritorial application of the *Charter*. The parties do not contend that the *Hape* framework should be revisited; they simply debate its application to the facts at hand. As a rule, which the Court should depart from only in rare and exceptional circumstances, we should not overrule a precedent without having been asked to do so by a party. In this instance, only some interveners ask us to overturn *Hape*; in doing so, they go beyond their proper role. Doing what they are asking would mean deciding an issue that is not properly before us. Furthermore, as mentioned above, the extraterritorial application of the *Charter* has no bearing on the disposition of the present appeal. Indeed, the actions of the CFNIS conformed to the *Charter*, as the s. 8 analysis below makes clear. Simply put, I would dismiss the appeal even if I were to accept Cpl. McGregor's argument that the *Charter* applies extraterritorially in the present context.

[102] While the discussion that follows is directed to the place of interveners, I note a separate methodological point. My colleagues rely heavily on what they perceive to be academic consensus that is critical of *Hape*. I will not repeat what was set out at length in the concurring reasons in *R. v. Kirkpatrick*, 2022 SCC 33, save to highlight that primarily relying on such an approach undermines *stare decisis* and leads to doctrinal instability (paras. 246-49). Academic criticism can be persuasive where it demonstrates a recognized basis to overturn precedent, but this Court cannot depart from precedent "simply because a chorus of voices, even well-informed voices, expresses disagreement with our decisions" (para. 247, referring to *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R.

653, at para. 274, per Abella and Karakatsanis JJ., concurring). Moreover, I am concerned by my colleagues' insistence that this Court is free to depart from precedent at will, *a fortiori*, to do so without submissions or an evidentiary record (para. 82). Adherence to precedent "furthers basic rule of law values such as consistency, certainty, fairness, predictability, and sound judicial administration" (*R. v. Sullivan*, 2022 SCC 19, at para. 64). Departing from precedent in the absence of proper methodology necessarily jeopardizes those qualities of our legal system. Indeed, applying my colleagues' implicit criteria, it would be hard to imagine a judgment of the Court that could be considered secure. Having made this point, I now return to the place of interveners.