** Preliminary Version **

Case Name:

Named Person v. Vancouver Sun

Named Person and Attorney General of Ontario on behalf of the Requesting State, Appellants;
v.
The Vancouver Sun, The Province, BCTV, Canadian Broadcasting Corporation, CKNW, CityTv and CTV, a Division of Bell Globemedia Inc., Respondents, and Law Society of British Columbia, Interveners.

[2007] S.C.J. No. 43

[2007] A.C.S. no 43

2007 SCC 43

2007 CSC 43

[2007] 3 S.C.R. 253

[2007] 3 R.C.S. 253

285 D.L.R. (4th) 193

368 N.R. 112

[2008] 1 W.W.R. 223

J.E. 2007-1909

247 B.C.A.C. 1

73 B.C.L.R. (4th) 34

224 C.C.C. (3d) 1

51 C.R. (6th) 262

2007 CarswellBC 2418

75 W.C.B. (2d) 103

162 C.R.R. (2d) 104

EYB 2007-124673

File No.: 30963.

Supreme Court of Canada

Heard: April 24, 2007;
Judgment: October 11, 2007.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

(156 paras.)

Appeal From:

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA

Constitutional law -- Canadian Charter of Rights and Freedoms -- Fundamental freedoms -- Freedom of expression -- Appeal by Named Person and Attorney General, acting on behalf of State requesting Named Person's extradition, from order allowing respondent media groups' application to review documents prepared by an amicus curiae regarding whether proceedings ought to remain in camera, allowed -- Named Person disclosed in camera that he was a confidential police informer -- Informer privilege was a matter beyond a trial judge's discretion -- No case-by-case weighing of the justification for the privilege was permitted -- Any disclosure and publication by the judge was to be restricted only for that information which might tend to reveal the informer's identity.

Criminal law -- Procedure -- Trials -- Publication ban -- Appeal by Named Person and Attorney General, acting on behalf of State requesting Named Person's extradition, from order allowing respondent media groups' application to review documents prepared by an amicus curiae regarding whether proceedings ought to remain in camera, allowed -- Named Person disclosed in camera that he was a confidential police informer -- Informer privilege was a matter beyond a trial judge's discretion -- No case-by-case weighing of the justification for the privilege was permitted -- Any disclosure and publication by the judge was to be restricted only for that information which might tend to reveal the informer's identity.

Criminal law -- Evidence -- Privilege -- Documents -- Publication bans and confidentiality orders -- Appeal by Named Person and Attorney General, acting on behalf of State requesting Named

Person's extradition, from order allowing respondent media groups' application to review documents prepared by an amicus curiae regarding whether proceedings ought to remain in camera, allowed -- Named Person disclosed in camera that he was a confidential police informer -- Informer privilege was a matter beyond a trial judge's discretion -- No case-by-case weighing of the justification for the privilege was permitted -- Any disclosure and publication by the judge was to be restricted only for that information which might tend to reveal the informer's identity.

International law and conflict of laws -- Criminal law -- Extradition -- Procedure -- Appeal by Named Person and Attorney General, acting on behalf of State requesting Named Person's extradition, from order allowing respondent media groups' application to review documents prepared by an amicus curiae regarding whether proceedings ought to remain in camera, allowed -- Named Person disclosed in camera that he was a confidential police informer -- Informer privilege was a matter beyond a trial judge's discretion -- No case-by-case weighing of the justification for the privilege was permitted -- Any disclosure and publication by the judge was to be restricted only for that information which might tend to reveal the informer's identity.

Appeal by Named Person and Attorney General of Canada, acting on behalf of the state requesting Named Person's extradition, from a British Columbia Supreme Court order allowing respondent media groups' application to review documents prepared by the amicus curiae upon filing undertakings of non-disclosure. During in camera proceedings, and in support of his application for a stay of his extradition, Named Person disclosed to the Extradition Judge that he was a confidential police informer who had provided information to the authorities, either in Canada or the Requesting State. While the proceedings were still in camera, the Extradition Judge asked the parties for submissions as to whether the proceedings ought to remain in camera, and sought the assistance of an amicus curiae. On the basis of the amicus' submissions, the Extradition Judge sent a letter to a number of media counsel, requesting that they attend a hearing on a specified date, having filed undertakings of confidentiality and non-disclosure to their clients of anything learned at the hearing. Respondents successfully applied at a subsequent hearing for an order that they be allowed to review the documents prepared by the amicus curiae upon filing undertakings of non-disclosure. The order was stayed, and Named Person and Attorney General appealed to this Court.

HELD: Appeal allowed. The law's protection for confidential informers was provided in the form of the informer privilege rule, which protected from revelation in public or in court the identity of those who gave information related to criminal matters in confidence. The importance of this general protection rendered informer privilege a matter beyond the discretion of a trial judge. Outside the innocence at stake exception, the rule's protection was absolute. No case-by-case weighing of the justification for the privilege was permitted. However, a judge had to make every effort to ensure that as much information as possible was made public, and that disclosure and publication were restricted only for that information which might tend to reveal the informer's identity. The Extradition Judge erred as the decisions he made at several steps were not consistent with the proper approach. The determination of the proper legal test was his responsibility, such that the appointment of the amicus curiae was not warranted. He should not have given notice to media counsel. Media counsel or their clients were not entitled to any of the privileged material at any time, and should have only been given limited non-identifying materials in order to make any submissions.

Statutes, Regulations and Rules Cited:

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 39(1), s. 39(2)

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 2(b), s. 8, s. 11(d)

Criminal Code, R.S.C. 1985, c. C-46, s. 486(1), s. 537(1)(i)

Extradition Act, S.C. 1999, c. 18, s. 24

Ontario Court of Justice Criminal Proceedings Rules, SI/92-99 Rule 6.04(1)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Courts -- Procedure -- Informer privilege -- In camera proceedings -- Open court principle -- Procedure to be followed where party claims to be confidential police informant -- Whether extradition judge erred in interpreting and applying Dagenais/Mentuck test in context of claim of informer privilege -- Whether judge erred in granting media counsel and representatives access, subject to confidentiality undertakings, to information over which informer privilege was being asserted.

Court Summary:

The appellant Named Person informed the judge, during an *in camera* portion of extradition proceedings, that he was a confidential police informer, and on that basis requested some disclosure from the appellant Attorney General, who was acting on behalf of the state requesting the Named Person's extradition. The judge asked the parties for submissions as to whether the proceedings ought to remain *in camera* and sought the assistance of an *amicus curiae*. On the basis of the latter's submissions, the judge sent a letter to a number of counsel who act for certain media groups, requesting that they attend a hearing on a specified date having filed undertakings of confidentiality and undertakings not to disclose anything learned at the hearing to their clients. A number of counsel for media groups, including the respondents, attended at that hearing.

At a subsequent hearing, the respondents applied for an order that they be allowed to review the documents prepared by the *amicus curiae* upon filing undertakings of non-disclosure. The judge allowed the application and ordered that counsel for the respondents as well as specific representatives of each respondent be allowed to review the *amicus* documents on each individual filing an undertaking of confidentiality. The Named Person and the Attorney General appealed that order to this Court.

Held (LeBel J. dissenting in part) : The appeal should be allowed and the extradition judge's order set aside.

Per McLachlin C.J. and **Bastarache**, Binnie, Deschamps, Fish, Abella, Charron and Rothstein JJ.: The law has long recognized that those who choose to act as confidential police informers must be protected from the possibility of retribution. The law's protection has been provided in the form of the informer privilege rule, which protects from revelation in public or in court the identity of those who give information to the police in confidence. This protection in turn encourages cooperation with the police for future potential informers. This general protection is so important that it renders informer privilege a matter beyond the discretion of a trial judge. Once a trial judge is satisfied that

the privilege exists, a complete and total bar on any disclosure of the informer's identity applies. Outside the innocence at stake exception, the rule's protection is absolute. No case-by-case weighing of the justification for the privilege is permitted. All information which might tend to identify the informer is protected by the privilege, and neither the Crown nor the court has any discretion to disclose this information in any proceeding, at any time. [para. 16] [para. 19] [para. 30]

While open courts are undoubtedly a vital part of our legal system and of our society, their openness cannot be allowed to fundamentally compromise the criminal justice system. *Dagenais/Mentuck*, insofar as that line of cases now represents a "test" for the application of the open court principle in discretionary action by courts, does not apply here since the informer privilege rule allows the trial judge no discretion. An informer must simply indicate that it is necessary to proceed *in camera*. No reasons need be given at this point because the basis of the informer status is the very issue to be examined *in camera* at the first stage. In more practical terms, this will mean that a trial judge must have the authority to hold an entire proceeding *in camera* if informer privilege is found to be present; however, an entirely *in camera* proceeding should be seen as a last resort. A judge ought to make every effort to ensure that as much information as possible is made public, and that disclosure and publication are restricted only for that information which might tend to reveal the informer's identity. [para. 4] [para. 37] [paras. 40-42]

Here, the extradition judge erred insofar as the decisions made at several steps were not consistent with the proper approach. The appointment of the *amicus curiae* was not warranted, because the determination of the proper legal test that applied was the judge's responsibility. Moreover, the decision to reveal to the *amicus* detailed facts about the Named Person was inconsistent with the extradition judge's obligation to protect the information which was covered by informer privilege and with the particular mandate given. A second mistake made by the extradition judge was in giving notice to the media counsel. This practice cannot be supported, as it privileged unfairly and arbitrarily certain members of the media on the basis of the views of the judge or the *amicus*. A third error was the extradition judge's handling of the material covered by informer privilege. The judge should have proceeded by determining *in camera*, without the media, on the facts presented by the Named Person and the Attorney General, whether or not the informer privilege properly applied. As an informer, the Named Person was absolutely protected by the informer privilege. In particular, he did not waive the privilege by coming forward to rely on it. The media were not entitled to any of the privileged material at any time, and ought to have been given only limited non-identifying materials in order to make their submissions at the second stage, after the existence of the privilege had been accepted. [paras. 62-65]

*Per***LeBel** J. (dissenting in part): Two principles stand in opposition in this case: the open court principle and the rule of confidentiality made necessary by informer privilege. The relationship between this privilege and a justice system that is, in principle, open requires certain adjustments, since a simple assertion that the rule of confidentiality flowing from the privilege is absolute does not suffice either to guide or to settle the debate in all circumstances. It is therefore necessary, at the very least, to discuss the conditions and procedures that will govern the review of the privilege and incorporate this review into the broader legal debate. At times, consideration of the limits of the privilege, and its extinguishment, will be required. If a meaningful debate is to take place and if the applicable constitutional principles are to be adhered to, the trial judge must be found to have a residual discretion to order the disclosure, even in open court, of information on the factual background to the case. *A fortiori*, to this end, the judge retains the discretion to authorize or order the disclosure of information that might tend to identify a police informer to parties with an interest in

the issue of the openness of court proceedings, while taking any precautions needed to prevent or limit further dissemination of this information. [paras. 79-80]

The open court principle, which was accepted long before the adoption of the *Canadian Charter of Rights and Freedoms*, is now enshrined in it. This is due to the fact that the principle is associated with the right to freedom of expression. Members of the public must have access to the courts in order to freely express their views on the operation of the courts and on the matters argued before them, and the right to freedom of expression guaranteed by s. 2(*b*) of the *Charter* protects not only the right to express oneself on an issue, but also the right to gather the information needed to engage in expressive activity. The open court principle also has as a corollary the right of the press to have access to the courts and publish information on their operation. This principle is not absolute, however. Informer privilege constitutes a limit on the open court principle but, like any other rule, this privilege has its exceptions, and these exceptions are not limited to situations where accused persons could be prevented from proving their innocence. It is more consistent with the logic of the common law and with the values of the *Charter* to hold that the trial judge always has the discretion (except where the law withdraws it) to authorize or order the disclosure of information that might tend to identify an informer in the rare cases where the judge is satisfied that disclosure of the information would better serve the interests of justice than keeping it secret. [paras. 88-89] [para. 91] [para. 100] [para. 103] [para. 105]

Here, the issues relating to the named person's status as a police informer are not incidental to the legal proceedings, as is generally the case. On the contrary, they are at the very heart of the named person's applications. Furthermore, the stay of proceedings application the named person ultimately intends to make should relate to how the foreign and Canadian governments treated him as an informer. This is the very type of legal proceeding in which the open court principle assumes particular importance. How the Canadian government deals with informers can be of considerable significance in a democratic debate on the values of this country's justice system and on the proper administration of justice. The rule of informer privilege cannot deprive a trial judge of the discretion to consider whether the rule is applicable. In classic fact situations, the application of the rule will appear to be absolute. In certain exceptional circumstances, however, it will be more difficult to establish the scope of the privilege and an adversarial proceeding will be necessary. This will be true, for example, where, as appears to be the case here, the judge must consider the possibility that the privilege is being abused or is being diverted from its purpose. As a result of the constitutional status of the open court principle, anyone who relies on informer privilege to limit the scope of the principle bears the onus of showing that his or her case is indeed one in which the privilege should be applied and that the objectives of the privilege can be attained by no means less intrusive than applying it absolutely. In considering this issue, the trial judge may ask to hear the parties' arguments in an adversarial proceeding and make any orders he or she deems necessary to enable those with an interest in the matter to make a meaningful contribution to the proceeding. This was what the extradition judge in the case at bar intended when he ordered the disclosure of all the evidence in the record to media counsel and to certain representatives of the media. [para. 68] [para. 106] [para. 109]

The decision to order the disclosure of the documents in issue to media counsel was within the extradition judge's authority and was discretionary in nature. According to the standard of review applicable to this type of decision, the Court will be justified in intervening only if the judge misdirects him or herself or if the decision is so clearly wrong as to amount to an injustice. In the instant case, a series of factors provided ample justification for the extradition judge's decision to conduct an adversarial proceeding to determine whether this was a case in which information that might tend

to identify a police informer should be disclosed in open court. He also correctly exercised his discretion in ordering the disclosure to media counsel of certain information that might tend to identify the named person so that they could make a meaningful contribution to the proceeding. The extradition judge considered the fact that this is a case in which there has already been unusually wide disclosure of the named person's identity and in which the named person's co-conspirator is aware of his identity. The judge also seems to have feared that the government was attempting to divert informer privilege from its real purpose. Finally, he appears to have felt that the very nature of the stay of proceedings application favoured hearing it in open court, and also seems to have attached great weight to the fact that disclosure of the documents in issue to lawyers, after they had given appropriate undertakings of confidentiality, would probably not result in any additional risk to the named person. There is accordingly no basis for finding that the extradition judge misdirected himself or that his decision is so clearly wrong as to amount to an injustice. As for the extradition judge's decision to allow media counsel to share any information disclosed to them with their clients, but only under strict conditions and after each of the media representatives had given an undertaking of confidentiality, it was also within the ambit of his discretion and there is no basis for this Court to intervene. This decision was based on undertakings by the media representatives and on an accurate understanding of the relationship between them and their counsel. However, the extradition judge went too far in ordering that the entire record be disclosed to media lawyers and representatives. The sole purpose of this disclosure is to ensure that the adversarial proceeding is helpful. Consequently, the judge should have screened and expurgated the documents in issue to remove information that might tend to identify the named person but is not relevant to the specific proceeding. [paras. 123-126] [paras. 128-133] [para. 137]

Finally, the extradition judge was entitled to select the media counsel he wanted to invite to take part in the proceeding on the *in camera* application. As a superior court judge, he has the power to regulate the course of the extradition hearing in any way that appears to him to be consistent with the *Criminal Code* and the *Extradition Act*. This power includes the power to invite interested parties to take part in proceedings incidental to the extradition request. The judge has some leeway as regards the conditions of this invitation, provided that these conditions facilitate the conduct of the hearing. Likewise, it was open to him to appoint an *amicus curiae* to assist him with the analysis of both the facts and the applicable law. [para. 152] [para. 155]

Accordingly, the order should be set aside and the case remanded to the extradition judge to decide what information may be disclosed to media counsel and the media representatives. [156]

Cases Cited

By Bastarache J.

Applied: *R. v. Leipert*, [1997] 1 S.C.R. 281; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; **approved:** *R. v. Dell* (2005), 194 C.C.C. (3d) 321; **distinguished:** *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; **referred to:** *R. v. Hunter* (1987), 57 C.R. (3d) 1; *Powell v. Chief Constable of North Wales Constabulary*, [1999] E.W.J. 6844 (QL); *Savage v. Chief Constable of Hampshire*, [1997] 1 W.L.R. 1061; *R. v. Brown*, [2002] 2 S.C.R. 185, 2002 SCC 32; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Scott*, [1990] 3 S.C.R. 979; *R. v. Davies* (1982), 1 C.C.C. (3d) 299; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43; *Scott v. Scott*, [1913] A.C. 417; *Ambard v. Attorney-General for Trinidad and Tobago*, [1936] A.C. 322; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480;

Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75; *R. v. Oakes*, [1986] 1 S.C.R. 103.

By LeBel J. (dissenting in part)

Toronto Star Newspapers Ltd. v. Ontario, [2005] 2 S.C.R. 188, 2005 SCC 41; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Lawrence*, [2001] O.J. No. 5776 (QL); *R. v. Hunter* (1987), 57 C.R. (3d) 1; *R. v. Leipert*, [1997] 1 S.C.R. 281; *R. v. Scott*, [1990] 3 S.C.R. 979; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *R. v. Hiscock* (1992), 72 C.C.C. (3d) 303; *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, 2002 SCC 57; *Roviaro v. United States*, 353 U.S. 53 (1957); *R. v. Salituro*, [1991] 3 S.C.R. 654; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Carosella*, [1997] 1 S.C.R. 80; *Reza v. Canada*, [1994] 2 S.C.R. 394; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24; *R. v. Henry* (1990), 61 C.C.C. (3d) 455; *Spector v. Ageda*, [1971] 3 All E.R. 417; *R. c. Guess* (2000), 148 C.C.C. (3d) 321; *Orfus Realty c. D.G. Jewellery of Canada Ltd.* (1995), 24 O.R. (3d) 379; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R 724.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 39(1), (2).

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 8, 11(*d*), 24(2).

Criminal Code, R.S.C. 1985, c. C-46, ss. 486(1), 537(1)(*i*).

Extradition Act, S.C. 1999, c. 18, s. 24.

Ontario Court of Justice Criminal Proceedings Rules, SI/92-99, r. 6.04(1).

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History and Disposition:

APPEAL from a judgment of the Supreme Court of British Columbia [2006] B.C.J. No. 3122 (QL), 2006 BCSC 1805, allowing an application for disclosure of relevant information and documentation to the counsel and representatives of the respondents. Appeal allowed, LeBel J. dissenting in part.

Counsel:

Ian Donaldson, Q.C., for the appellant Named Person.

Bernard Laprade and *Cheryl D. Mitchell*, for the appellant the Attorney General of Canada.

Robert S. Anderson and *Ludmila B. Herbst*, for the respondents The Vancouver Sun, The Province and BCTV.

Daniel W. Burnett and *Heather E. Maconachie*, for the respondent Canadian Broadcasting Corporation.

Michael A. Skene and *Angus M. Gunn, Jr.*, for the respondent CTV, a Division of Bell Globemedia Inc.

No one appeared for the respondents CKNW and CityTv.

Christopher Webb, for the intervener the Attorney General of Ontario.

Leonard T. Doust, Q.C., and *Michael A. Feder*, for the intervener the Law Society of British Columbia.

[Editor's note: A corrigendum was published by the Court October 22, 2007. The corrections have been incorporated in this document and the text of the corrigendum is appended to the end of the judgment.]

The judgment of McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella, Charron and Rothstein JJ. was delivered by

BASTARACHE J.:--

I. Introduction

1 Information is at the heart of any legal system. Police investigate crimes and act on the information they acquire; lawyers and witnesses present information to courts; juries and judges make decisions based on that information; and those decisions, reported by the popular and legal press, make up the basis of the law in future cases. In Canada, as in any truly democratic society, the courts are expected to be open, and information is expected to be available to the public. However, from time to time, the safety or privacy interests of individuals or groups and the preservation of the legal system as a whole require that some information be kept secret.

2 This case is about a conflict between two principles, each vital to Canadian law, which pull in fundamentally opposite directions *vis-à-vis* the treatment of information in our legal system. On the one hand is the open court principle, which, as has been repeatedly recognized by this Court, provides that court proceedings should presumptively be a matter of public record. On the other hand lies informer privilege, an age-old privilege according to which the identity of a confidential informer cannot be exposed under any but the narrowest of exceptions.

3 In this case, the appellant, whose name cannot be disclosed, informed the Extradition Judge (who, along with the Named Person, is referred to in the masculine), during an *in camera* portion of the extradition proceedings, that he was a confidential police informer, and on that basis requested some disclosure from the appellant Attorney General of Canada, who was acting in the extradition proceeding on behalf of the state requesting the Named Person's extradition. Upon learning of the existence of these extradition proceedings, the respondents claimed a right to publicize details of the proceedings and to have access to information alleged to be protected by informer privilege.

4 The question posed to this Court is how to satisfy the interests which underlie the Named Person's privilege in light of the interests which underlie the open court principle on the basis of which the respondents claim a right to publish details of the proceedings. In my view, informer privilege must remain absolute. Information which might tend to identify a confidential informant cannot be revealed, except where the innocence of a criminal accused is at stake. Open 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. The appeal should therefore be allowed.

II. Judicial History

5 This appeal is from an order made in the course of an extradition hearing before a judge of the Supreme Court of British Columbia, sitting as an extradition judge (the "Extradition Judge"). (The facts are taken, except where noted otherwise, from the Statement of Non-Identifying Facts, found in the public file at AR, pp. 105-9.) The appellant Named Person was the subject of the extradition hearing, having been charged with an offence in the requesting state. The appellant Attorney General of Canada was a party to the extradition hearing, acting on behalf of the requesting state.

6 At some point during the hearing, the Named Person applied for an order that the proceedings continue *in camera*. The Attorney General consented and the Extradition Judge allowed the application.

7 While the proceedings were taking place *in camera*, the Named Person made it known that he wished to apply for a stay of his extradition on the grounds that his rights under the *Canadian Charter of Rights and Freedoms* had been breached. In support of the application for a stay, the Named Person disclosed to the Extradition Judge that he was a confidential police informer who had provided information to the authorities (either in Canada or the requesting state). In addition, the Named Person told the Extradition Judge that he had been charged with criminal offences in the requesting state and that his confidential informer status had been breached in the requesting state by way of disclosure of that status to a co-conspirator who had in turn provided more information implicating the Named Person which had resulted in the extradition request.

8 While the proceedings were still *in camera*, the Extradition Judge asked the parties for submissions as to whether the proceedings ought to remain *in camera*. Both the Attorney General and the Named Person submitted that they should.

9 The Extradition Judge then sought the assistance of an *amicus curiae* on the following issues:

> (1) The public interest and policy considerations which would favour an open court hearing of these issues notwithstanding the risks associated with that open process;
> (2) The extent to which counsel for the press should be entitled to address these *in camera* issues and if so, the measures that could be put in place to protect [the Named Person's] interest;
> (3) The possibility of other means of protecting the interests of [the Named Person], including through publication bans but considering also their potential utility and risks; and
> (4) If these proceedings continue *in camera*, the manner by which the Court may render judgments on [the Named Person's] disclosure application and ultimately on [his] stay of proceedings application without exposing [the Named Person] to unacceptable risk but at the same time sufficiently informing the public of the issues and providing a proper judicial record both for potential appeal and for consideration by the Minister if extradition is ultimately ordered.
>
> ([2006] B.C.J. No. 3122 (QL), 2006 BCSC 1805, at para. 25)

The *amicus* was provided with all the exhibits and documents which were before the court, as well as with transcripts of all the *in camera* proceedings. The *amicus* then made submissions to the Extradition Judge. In summary, his assessment was that:

> (1) issues concerning the extent to which these proceedings should remain *in camera* would be most appropriately and effectively addressed by adversarial argument provided proper safeguards could be put in place to protect the identity of the Named Person pending determination of the issues through the adversarial process; and

(2) since *amicus curiae* could not take an adversarial position he recommended that notice of the *in camera* proceedings should be given to those media counsel who had been known to represent local and national media outlets in past judicial proceedings in British Columbia involving publication bans on appropriate undertakings and orders to protect the Named Person's interests. [para. 10]

10 On the basis of the *amicus*' submissions, the Extradition Judge sent a letter to a number of counsel who act for certain media groups, requesting that they attend a hearing on a specified date having filed undertakings of confidentiality and non-disclosure to their clients of anything learned at the hearing. A number of counsel for media groups - including counsel for all the respondents in this appeal - attended at that hearing. The Extradition Judge then directed that another hearing would take place in which the Judge would entertain submissions on "*in camera* issues" (para. 28), and on how the protection of the privilege could or should be balanced against the media's and the public's interest in publicizing the proceedings. Notwithstanding forceful opposition from the counsel of both appellants, the Extradition Judge allowed the media counsel to report the details of the hearing to their clients but imposed a limited publication ban on the proceedings.

11 At the next hearing, the Extradition Judge heard submissions from the Attorney General, the Named Person, and the respondents on the scope of the claimed privilege. The Extradition Judge determined that "the informant privilege rule does not act as a bar to proceeding otherwise than *in camera*" (para. 48) and that the issue of whether or not to proceed *in camera* "must be decided in accordance with the principles established in *Dagenais, Mentuck* and *Re Vancouver Sun*" (para. 48). The Extradition Judge permitted the media to publish the fact that the court had heard the matter *in camera* and that the court had determined that further *in camera* proceedings were needed.

12 The Extradition Judge then heard submissions regarding the materials that would be disclosed to counsel for the respondents, and to specific representatives of the respondents on an interim basis to allow the respondents to instruct their counsel regarding their submissions on the applicability of the *Dagenais/Mentuck* test and whether that test required that the Named Person's extradition proceedings be held *in camera*. The respondents also applied for an order that they be allowed to review the documents prepared by the *amicus curiae* upon filing undertakings of non-disclosure.

13 The Extradition Judge allowed this application and ordered that counsel for the respondents as well as specific representatives of each respondent be allowed to review the *amicus* documents on each individual filing an undertaking of confidentiality.

14 It is this order, currently stayed, that the appellants contest in this Court.

III. Analysis

15 At stake here are two important principles which seem fundamentally opposed. The principle of informer privilege provides an all but absolute bar against revealing any information which might tend to identify a confidential informer. The open court principle, on the other hand, provides that information which is before a court ought to be public information to the extent possible. How are these two principles to be reconciled? In order to answer this question, I will examine each of them in turn. The result of this exercise will be a model procedure to guide judges in similar situations.

A. *Informer Privilege*

16 Police work, and the criminal justice system as a whole, depend to some degree on the work of confidential informers. The law has therefore long recognized that those who choose to act as confidential informers must be protected from the possibility of retribution. The law's protection has been provided in the form of the informer privilege rule, which protects from revelation in public or in court the identity of those who give information related to criminal matters in confidence. This protection in turn encourages cooperation with the criminal justice system for future potential informers.

17 A useful summary of the rule was set out by Cory J.A. (as he then was) in his decision in *R. v. Hunter* (1987), 57 C.R. (3d) 1 (Ont. C.A.), at pp. 5-6, and adopted by McLachlin J. (as she then was) in her reasons in this Court's decision in *R. v. Leipert*, [1997] 1 S.C.R. 281, at para. 9:

> The rule against 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 might 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. [Emphasis added.]

18 This passage usefully recognizes the dual objectives which underlie the informer privilege rule. Not only does the ban on revealing the informer's identity protect that informer from possible retribution, it also sends a signal to potential informers that their identity, too, will be protected. Without taking away from the particular protection afforded by the rule to an individual informer in a given case, we must emphasize the general protection afforded by the rule to *all* informers, past and present.

19 This general protection is so important that it renders informer privilege a matter beyond the discretion of a trial judge. As McLachlin J. wrote in *Leipert* at para. 12: Informer privilege is of such importance that once found, courts are not entitled to balance the benefit enuring from the privilege against countervailing considerations ... [Emphasis added.]

20 To similar effect was the Court's finding in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 93, that the application of the rule "does not depend on the judge's discretion, as it is a legal rule of public order by which the judge is bound".

21 Thus a court does not have any discretion with regard to the privilege; a court is under a duty to protect the informer's identity. Indeed, the duty of a court not to breach the privilege is of the same nature as the duty of the police or the Crown.

22 It deserves emphasizing here that the rationale for the privilege's existence is not something that allows for weighing on a case-by-case basis the maintenance or scope of the privilege depending on what risks the informer might face. Informer privilege is a class privilege that always applies when it has been established that a confidential informer is present.

23 Once it has been established that the privilege exists, the court is bound to apply the rule. It is the non-discretionary nature of the informer privilege rule which explains that the rule is referred to as "absolute": see R. W. Hubbard, S. Magotiaux and S. M. Duncan, *The Law of Privilege in Canada* (loose-leaf), at p. 2-7. The Crown has a similar obligation: the privilege is "owned" by both the Crown and the informer himself, so the Crown has no right to disclose the informer's identity: *Leipert*, at para. 15.

24 This is a highly exceptional case. Usually, the informer is not a party to the proceedings, nor is he or she going to be a witness. The Crown will not be presenting his or her evidence. The confidential information is used by the police in its investigation, leading to evidence that will be presented in the usual way. The question of informer privilege is more likely to arise indirectly at trial, as when counsel seeks to cross-examine a Crown witness on whether he or she is or has been a confidential informer, or when a police officer is questioned on what led him or her to take a certain step and the officer invokes the informer privilege. Where such an informer reveals his or her identity, this would normally signify that he or she desires to waive the privilege. This could not have been the case in the present context however. Here, the Named Person came forth for the very purpose of enforcing the confidential informer agreement. The Extradition Judge was wrong in finding that the Named Person compromised the privilege by revealing his status. The Extradition Judge's decision on waiver is possibly due to the unusual circumstances of this case and the absence of clear precedent to provide guidance.

25 Moreover, the informer himself or herself cannot unilaterally decide to "waive" the privilege. The authors of *The Law of Evidence in Canada* write, at p. 883, that "[t]he privilege belongs to *both* the Crown and the informer and thus the informer alone cannot 'waive' the privilege and neither can a party to a civil proceeding": J. Sopinka, S. N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999) (emphasis in original). Courts in the United Kingdom have found that a court may refuse to disclose an informer's identity even if he or she has explicitly requested disclosure: see *Powell v. Chief Constable of North Wales Constabulary*, [1999] E.W.J. 6844 (QL) (C.A.), and *Savage v. Chief Constable of Hampshire*, [1997] 1 W.L.R. 1061 (C.A.).

26 In addition to its absolute non-discretionary nature, the rule is extremely broad in its application. The rule applies to the identity of every informer: it applies when the informer is not present, where the informer is present, and even where the informer himself or herself is a witness. It applies to both documentary evidence and oral testimony: Sopinka, Lederman and Bryant, at pp. 882-83. It applies in criminal and civil trials. The duty imposed to keep an informer's identity confidential applies to the police, to the Crown, to attorneys and to judges: Hubbard, Magotiaux and Duncan, at p. 2-2. The rule's protection is also broad in its coverage. *Any* information which might tend to identify an informer is protected by the privilege. Thus the protection is not limited simply to the informer's name, but extends to any information that might lead to identification.

27 The informer privilege rule admits but one exception: it can be abridged if necessary to establish innocence in a criminal trial (there are no exceptions to the rule in civil proceedings). According to the innocence at stake exception, "there must be a basis on the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused": *Leipert*, at para. 21. It stands to be emphasized that the exception will apply only if there is an evidentiary basis for the conclusion; mere speculation will not suffice: Sopinka, Lederman and Bryant, at p. 884. The exception applies only where disclosure of the informer's identity is the *only* way that the accused can establish innocence: *R. v. Brown*, [2002] 2 S.C.R. 185, 2002 SCC 32, at para. 4.

28 In this Court's decision in *Leipert*, it was clearly established that innocence at stake is the *only* exception to the informer privilege rule. The rule does not allow an exception for the right to make full answer and defence. Nor does the rule allow an exception for disclosure under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. Indeed, the Court's decision in *Leipert* suggests, at para. 24, that an absolute informer privilege rule, subject only to the innocence at stake exception, is consistent with the *Charter*'s provisions dealing with trial rights:

> To the extent that rules and privileges stand in the way of an innocent person establishing his or her innocence, they must yield to the *Charter* guarantee of a fair trial. The common law rule of informer privilege, however, does not offend this principle. From its earliest days, the rule has affirmed the priority of the policy of the law "that an innocent man is not to be condemned when his innocence can be proved" by permitting an exception to the privilege where innocence is at stake: *Marks v. Beyfus* [(1980), 25 Q.B.D. 494 (C.A.)]. It is therefore not surprising that this Court has repeatedly referred to informer privilege as an example of the policy of the law that the innocent should not be convicted, rather than as a deviation from it.

29 For the sake of clarity, it is useful to pause here to explain the law regarding what were argued before us as some "other" exceptions to the informer privilege rule. As already noted, the only real exception to the informer privilege rule is the innocence at stake exception: *Leipert*. All other purported exceptions to the rule are either applications of the innocence at stake exception or else examples of situations in which the privilege does not actually apply. For example, situations in which the informer is a material witness to a crime fall within the innocence at stake exception: *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 996. The privilege does not apply to an individual whose role extends beyond that of an informer to being an *agent provocateur*: *R. v. Davies* (1982), 1 C.C.C. (3d) 299 (Ont. C.A.); Hubbard, Magotiaux and Duncan, at p. 2-28. Similarly, situations in which s. 8 of the *Charter* is invoked to argue that a search was not undertaken on reasonable grounds may fall within the innocence at stake exception: *Scott*. Thus, as I noted, the only time that the privilege, once found, can be breached, is in the case of an accused raising the innocence at stake exception. All other so-called exceptions are simply applications of this one true exception: *Scott*, at p. 996; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (4th ed. 2005), at p. 254.

30 In conclusion, the general rationale for the informer privilege rule requires a privilege which is extremely broad and powerful. Once a trial judge is satisfied that the privilege exists, a complete and total bar on any disclosure of the informer's identity applies. Outside the innocence at stake exception, the rule's protection is absolute. No case-by-case weighing of the justification for the privilege is permitted. All information which might tend to identify the informer is protected by the privilege, and neither the Crown nor the court has any discretion to disclose this information in any proceeding, at any time.

B. *The Open Court Principle*

31 The "open court principle" is a "hallmark of a democratic society", as this Court said in *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43, at para. 23. This principle, as the Court noted in that case, "has long been recognized as a cornerstone of the common law" (para. 24), and has been recognized as part of the law since as far back as *Scott v. Scott*, [1913] A.C. 417 (H.L.), and *Ambard v. Attorney-General for Trinidad and Tobago*, [1936] A.C. 322 (P.C.), where Lord At-

kin wrote, at p. 335: "Justice is not a cloistered virtue". "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity" (J. H. Burton, ed., *Benthamiana: Or, Select Extracts from the Works of Jeremy Bentham* (1843), p. 115).

32 Open courts have several distinct benefits. Public access to the courts allows anyone who cares to know the opportunity to see "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 ("*CBC*"), at para. 22. An open court is more likely to be an independent and impartial court. Justice seen to be done is in that way justice more likely to be done. The openness of our courts is a "principal component" of their legitimacy: *Vancouver Sun*, at para. 25.

33 In addition to its longstanding role as a common law rule required by the rule of law, the open court principle gains importance from its clear association with free expression protected by s. 2(*b*) of the *Charter*. In the context of this appeal, it is important to note that s. 2(*b*) provides that the state must not interfere with an individual's ability to "inspect and copy public records and documents, including judicial records and documents" (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1338, citing *Nixon v. Warner Communications Inc.*, 435 U.S. 589 (1978), at p. 597). La Forest J. adds at para. 24 of *CBC*: "[e]ssential to the freedom of the press to provide information to the public is the ability of the press to <u>have access to this information</u>" (emphasis added). Section 2(*b*) also protects the ability of the press to have access to court proceedings (*CBC*, at para. 23; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at para. 53).

34 Returning to our examination of the open court principle, I note that it is clearly a broad principle of general application to all judicial proceedings. The principle has gained some jurisprudential purchase through this Court's decisions in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76. In those decisions, the Court developed a test - colloquially known as the *Dagenais/Mentuck* test - "to balance freedom of expression and other important rights and interests, thereby incorporating the essence of the balancing of the *Oakes* test": *Vancouver Sun*, at para. 28. The test has two parts, which mirror the minimal impairment and proportionality steps in the s. 1 analysis set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. The test was set out at para. 23 of *Mentuck*.

35 However, we need not delve into a detailed analysis of the *Dagenais/Mentuck* test. As the Court made clear in *Dagenais*, at pp. 874-75, the test was intended to apply only to exercises of discretionary power by a trial judge. This understanding of the test was reaffirmed in *Vancouver Sun* at para. 31, where Iacobucci and Arbour JJ. expanded the application of the test beyond discretionary publication bans (which were at issue in the *Dagenais* and *Mentuck* decisions) to "all <u>discretionary</u> actions by a trial judge to limit freedom of expression by the press during judicial proceedings" (emphasis added).

36 The *Dagenais/Mentuck* test has a wide area of application, but we must take caution not to widen it beyond its proper scope. The test was never intended to apply to all actions limiting freedom of expression in a court. The limitation to discretionary action was clear from the test's first incarnation in *Dagenais*, where Lamer C.J. wrote at pp. 874-75:

> Challenges to publication bands may be framed in several different ways, depending on the nature of the objection to the ban. If legislation <u>requires</u> a judge

> to order a publication ban, then any objection to that ban should be framed as a *Charter* challenge to the legislation itself. Similarly, if a common law rule requires a judge to order a publication ban or authorizes a judge to order a publication ban that infringes *Charter* rights in a manner not reasonably and demonstrably justified in a free and democratic society, then any objection to that ban should be framed as a *Charter* challenge to the common law rule. [Emphasis in original.]

37 As should now be clear from the examination of the informer privilege rule, it is this last situation which faces the Court in this case. *Dagenais/Mentuck*, insofar as that line of cases now represents a "test" for the application of the open court principle in discretionary action by courts, does not apply to the privilege in this case. The informer privilege rule does *not* provide a trial judge with a discretionary power to order a publication ban. Quite the contrary. When a trial judge finds that an informer privilege exists, then, as the Court stated in *Bisaillon v. Keable*, at p. 93, "[i]ts application does not depend on the judge's discretion, as it is a legal rule of public order by which the judge is bound".

C. *Secrecy and Openness*

38 What is being argued in this case is that the informer privilege rule is discretionary, and that judges have the power to determine, on a case-by-case basis, whether the courtroom should be closed to protect informer privilege.

39 This proposition cannot be accepted. The informer privilege rule is mandatory (subject only to the "innocence at stake" exception). To permit trial judges wide discretion in determining whether to protect informer privilege would undermine the purposes of the rule. Part of the rationale for a mandatory informer privilege rule is that it encourages would-be informers to come forward and report on crimes, safe in the knowledge that their identity will be protected. A rule that gave trial judges the power to decide on an *ad hoc* basis whether to protect informer privilege would create a significant disincentive for would-be informers to come forward, thereby eviscerating the usefulness of informer privilege and dealing a great blow to police investigations.

40 Although a judge has no discretion not to apply the informer privilege rule, to ensure that the open court principle is respected, we must ensure that it retains the maximum effect possible by requiring that the informer privilege cover only that information which would in fact tend to reveal an informer's identity; all other information regarding the proceeding would continue to be information which should be published under the open court principle. It is clear therefore that an informer need simply indicate that it is necessary to proceed *in camera*. No reasons need be given at this point because the basis of the informer status is the very issue to be examined *in camera* at the first stage, i.e. at the stage where the privilege is to be found to be present.

41 In more practical terms, this will mean that a trial judge must have the authority to hold an entire proceeding *in camera* if informer privilege is found to be present; however, an entirely *in camera* proceeding should be seen as a last resort. A judge ought to make every effort to ensure that as much information as possible is made public, and that disclosure and publication are restricted only for that information which might tend to reveal the informer's identity.

42 This approach is in line with the one taken to the open court principle in *Dagenais* and *Mentuck*. As noted above (at para. 35), the test set out in those cases is a particular attempt to balance open courts with secrecy requirements in situations of judicial discretion. In other words, it is

one application of the open court principle to a situation of secrecy. This case presents a different application: where the secrecy arises out of the informer privilege rule and allows the trial judge no discretion, *Dagenais/Mentuck* does not apply.

43 In this case, the trial judge found that the common law rule requiring a publication ban was discretionary. He therefore disposed of the appellant Named Person's claim as if it were governed by the *Dagenais*/*Mentuck* test. With respect, he erred in this regard. As a result, the parties chose not to bring the *Charter* application required to challenge a mandatory common law rule, and there is no *Charter* challenge before us.

44 The range of situations in which the open court principle and informer privilege are in conflict is not easy to describe in the abstract. As noted earlier, informer privilege arises most often in the course of a criminal trial, when a Crown witness is asked on cross-examination about the source of some information which led to the trial. I do not think it is necessary at this time to weigh in on the specific application of the open courts principle in such circumstances. The facts before this Court in this case present a different, less common circumstance in which the open court principle must still accommodate the protection of informer privilege. In order to see clearly how this ought to play out, I think it is useful to describe the procedure to be followed by a judge in a case of informer privilege such as the one before the Court. The procedure described below, although informed by the particular facts of this case, will nonetheless provide guidance in all cases where a question of informer privilege arises; other circumstances may of course require the court to modify this approach accordingly.

D. *The Procedure to Be Followed*

45 The interface between the informer privilege rule and the open court principle in the context of a hearing where a party claims to be a confidential police informant must at the same time allow for the protection of the identity of the informer from any possibility of disclosure and the maintenance of public access to the courtroom to the greatest extent possible. In order to best illustrate how this can be achieved, I will in what follows set out a procedure to be followed in a case such as the one before the Court, where an individual who is in the midst of criminal or quasi-criminal proceedings for some reason discloses to the court his or her status as a confidential informer.

46 In such a proceeding, the parties before the judge will be the individual and the Attorney General of Canada (or the Crown). If the individual wishes to make a claim that he or she is a confidential informer, he or she should ask the judge to adjourn the proceedings immediately and continue *in camera*. The proceedings will proceed *in camera*, with only the individual and the Attorney General present, in order to determine if sufficient evidence exists to determine that the person is a confidential informer and therefore able to claim informer privilege.

47 While the judge is determining whether the privilege applies, all caution must be taken on the assumption that it does apply. This means that under no circumstances should any third party be admitted to the proceedings, and even the claim of informer privilege must not be disclosed. The only parties admitted in this part of the proceeding are the person who seeks the protection of the privilege and the Attorney General. It is the responsibility of the judge at this stage to demand from the parties some evidence which satisfies the judge, on balance, that the person is a confidential informer. Once it has been established on the evidence that the person is a confidential informer, the privilege applies. I cannot over-emphasize the importance of this last point. The judge *has no dis-*

cretion not to apply the privilege: *Bisaillon v. Keable*, at p. 93. If the person is an informer, the privilege applies fully.

48 Of course, we must make allowances for the difficult position that the judge will be in, namely an *in camera* proceeding in which both parties - the alleged informer and the Attorney General - will often both be arguing in favour of the same conclusion. (Conceivably, of course, the Attorney General might dispute the individual's claim to informer privilege status.) If such a circumstance should arise, the non-adversarial nature of the proceedings at this stage may cause concern. Therefore, it may be permissible in some cases for a judge to appoint an *amicus curiae* in order to assist in the determination of whether or not the evidence supports the conclusion that the person is a confidential informer. However, the mandate of the *amicus* must be precise, and the role of the *amicus* must be limited to this factual task. The legal issues are of another nature. The judge alone makes the legal determination that a confidential informer is present, and that the informer privilege applies. Here, the *amicus* was asked what was the scope of the privilege. Moreover, given the importance of protecting the confidential informer's identity, if a trial judge decides that the assistance of an *amicus* is needed, caution must be taken to ensure that the *amicus* is provided with only that information which is absolutely essential to determining if the privilege applies. Given the mandate of the *amicus* in the present case, it appears that the appointment was inappropriate.

49 In the course of the determination of whether or not the privilege applies, the proceedings will be carried on *in camera*. During this determination, the only parties with standing will be the Attorney General and the person claiming the protection of the privilege, in addition to an *amicus* with the mandate set out above, in those unusual situations in which the judge finds this to be necessary. No other parties have standing in this part of the proceeding. The reason for this is simple: since the determination of the applicability of the privilege is a simple matter of determining whether the person is indeed a confidential informer - I repeat that no balancing of competing legal interests or rights is at stake - no one else will have any arguments of value to contribute to this determination. Furthermore, allowing third parties standing at this stage would needlessly increase the risk of disclosure of the identity of the confidential informer.

50 Having established the existence of an informer privilege, the judge is charged with carrying on the proceedings without violating that privilege by disclosing any information that might tend to reveal the confidential informer's identity while at the same time protecting and promoting the values of the open court principle.

51 In determining the proper way of protecting informer privilege and realizing the open court principle, the judge must concern himself or herself with minimal intrusion. He or she may allow submissions from individuals or organizations other than the Attorney General and the informer at this point. This is of course because the Attorney General and the confidential informer will argue strenuously in favour of restricting any and all disclosure of information related to the proceeding, eliminating the efficiencies of the adversarial process. Restricted disclosure will of course be necessary to protect the privileged information, but the protection of the open court principle demands that all information necessary to ensure that meaningful submissions, which can be disclosed without breaching the privilege, ought to be disclosed. Therefore, standing may be given at this stage to individuals or organizations who will make submissions regarding the importance of ensuring that the informer privilege not be overextended and the way in which that can be accomplished in the context of the case.

52 A judge faced with an informer privilege who believes that it is in the interests of justice that notice of it be given ought to post in some public forum - ideally in hard copy at the courthouse as well as in electronic form over the internet - a notice to all interested parties regarding the existence of a proceeding in which informer privilege has been invoked. More often than not, of course, the individuals or organizations will be the media.

53 The decision to post a public notice regarding the existence of the proceeding is a matter of discretion on the part of the judge. In other words, no one has a right, constitutional or otherwise, to be informed of all situations in which informer privilege is claimed. The reason for this is simply practical: there is no real difference - *vis-à-vis* the open court principle - between a situation in which informer privilege exists and any other situation in which some part of a proceeding takes place *in camera* - be it a situation of a child sexual assault victim, or a situation involving solicitor-client privilege. 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*. Nor should a judge choose "worthy" interveners.

54 Instead, the judge retains discretion as to whether or not to provide public notice of the *in camera* proceeding involving informer privilege. The exercise of the discretion will depend on the circumstances, such as whether the holder of the privilege is present and plays an active role in court, for instance, as was the case here. Whether the judge issues notice, or (as can certainly happen) the media independently learns of the existence of the *in camera* proceeding, the next step in the procedure is to hear submissions to determine the extent of the need for *in camera* proceedings. It is at this point that the media is granted standing to present arguments on how informer privilege can be respected with minimal effect on the open court principle.

55 The question that the judge must ask is this: is a totally *in camera* proceeding justified on the basis that only an *in camera* proceeding will properly protect the informer privilege, or will sufficient protection be possible via other means, such as a partial *in camera* proceeding, or some other option? The guiding rule at this stage should always remain the following: the judge must accommodate the open court principle to as great an extent possible without risking a breach of the informer privilege. This rule is meant to protect informer privilege absolutely while minimally impairing the open court principle.

56 At this point in the proceeding, the persons with standing - which will now include the Attorney General, the confidential informer, and media representatives - will make submissions on how that rule will play out in the circumstances of each case. The correct result will of course depend on the circumstances of each case, but certain parameters are clear. On the one extreme is a case which must be heard entirely *in camera*. On the other side would be a situation in which the facts of the proceeding are sufficiently remote from the confidential informer's status as an informer so that much of the proceeding could be heard in open court without disclosing any information that might tend to reveal his or her identity. In the most extreme case, perhaps no *in camera* proceedings would be necessary, and the informer might be able to be present in open court, hidden behind a screen. In the middle lies what I think will be the typical case, in which some of the proceedings - in particular any parts in which the informer's identity might be revealed - are heard *in camera* and other aspects - those in which there will be no risk of disclosure of the informer's identity, likely including many legal arguments - are heard in open court.

57 It is impossible to determine in the abstract how the two principles will be met; judges must use their judgment in following the guidelines set out above, ensure that the identity of an informer is always protected, and attempt to promote open courts within that framework.

58 One issue which must be addressed is this: as noted, whether through notice or through their own resourcefulness, media groups may from time to time appear to make submissions on the proper procedure to use in a given case. In such a situation, what materials may be given to the media in order to allow them to make submissions? As in the case of the *amicus curiae* discussed above (at para. 48), the judge must be extremely careful in the information that is given to the media. The information must be limited only to non-identifying information which provides a general basis from which the media can argue to what extent the proceeding can be heard in open court; no identifying information can be given to the media under any circumstances. This would constitute a breach of the informer privilege and is outside the authority of the judge. At this stage minimal information should be given, that is, only that which is essential to make a legal argument of assistance to the judge.

59 Moreover, circumstances may arise in which this information should be given not to the actual members of any media organizations who may wish to make submissions, but rather to their counsel only, as officers of the court. Since the information released will always be limited to non-identifying information, in some cases there may be no great harm in allowing members of the media themselves to see this information. However, this must remain within the discretion of the judge, as it is possible that the sensitivity of the information is such that the only way to ensure protection of the privilege is to insist that the information not be disclosed beyond counsel. In such a case, the media counsel will be given access only by agreeing to be bound by a court order not to disclose this information to their clients or to anyone else pending the court's decision on the extent of the *in camera* coverage. Of course, since media counsel cannot be forced to take information without revealing it to the media itself - as this would be a breach of counsel's obligation to their clients - allowing counsel to view this information on a limited basis must be accepted by the media in consultation with their counsel.

60 An example of the proper procedure at this stage was set out by the Ontario Court of Appeal in its recent decision in *R. v. Dell* (2005), 194 C.C.C. (3d) 321. The court described its procedure as follows, at paras. 68-69:

> When we reached the point in argument where counsel could no longer make submissions without public disclosure of some of the information over which a claim of privilege was asserted ... before proceeding *in camera*, we ordered that the media be notified.
>
> Counsel for *The Globe and Mail* and the *Toronto Star* appeared in response to that notice. At that point, it was not clear to us that we could publicly reveal the nature of the issue that confronted us without destroying the privilege claim, and we therefore made the following order:
>
> > We are prepared to disclose to counsel for the media representatives the legal category within which the disclosure issue arises, provided that

> counsel make an undertaking that they will not disclose this information to anyone, including their clients, pending further order of the court.
>
> The reason for this order is to enable counsel for the media to receive information to consider whether to make submissions on whether the hearing on this issue should proceed *in camera*.

61 As I noted above, this is a fact-sensitive determination that will depend on the particulars of each case. But the Court of Appeal's procedure in *Dell* - as set out in the form of order reproduced in the excerpt - is a laudable example of how to accommodate the open court principle in light of the clear prohibition on publication arising out of the informer privilege. Hopefully this example, along with the general guidelines set out above, will be of assistance to courts faced with a similar problem.

IV. Application to the Case at Bar

62 Given the detailed description of the ideal procedure to be followed in a case such as this, an in-depth review of the facts is not necessary. This was a difficult case concerning a novel area of the law. The Extradition Judge dealt with the issues as best he could. But he erred insofar as the decisions made at several steps were not consistent with the proper approach set out in these reasons. Three errors in particular deserve special comment.

63 The appointment of the *amicus curiae* was not warranted: as I noted above, there is no justification for the appointment of an *amicus* to assist in legal matters, because - as in any trial situation - the determination of the proper legal test to be applied was the responsibility of the Extradition Judge. Moreover, the decision to reveal to the *amicus* detailed facts about the Named Person was inconsistent with the Extradition Judge's obligation to protect the information covered by informer privilege and with the particular mandate given.

64 A second mistake made by the Extradition Judge was in giving notice to media counsel. Notice was given by the Extradition Judge to "certain known and respected lawyers for the various media outlets" identified by the *amicus* (para. 28). This practice cannot be supported, as it unfairly and arbitrarily privileged certain members of the media on the basis of the judge's or the *amicus*' views. As noted above, the notice to media, if given, ought to be justified, and made in a public manner available to all interested parties.

65 A third error was the Extradition Judge's handling of the material covered by informer privilege. Of course, the treatment of this material stemmed from the erroneous conclusion that informer privilege was not absolute; this conclusion was wrong as illustrated by the discussion of the law of informer privilege above. The Extradition Judge should have proceeded by determining *in camera*, without the media, on the facts presented by the Named Person and the Attorney General, whether or not the informer privilege properly applied; the Extradition Judge had no discretion to attempt to determine if the underlying rationales of the privilege were present in this case or if the risk to the Named Person justified the privilege. As an informer, the Named Person was absolutely protected by the informer privilege. In particular, as shown above, the Named Person did not waive the privilege by coming forward to rely on it. Had the Extradition Judge correctly determined the privilege issue, the handling of the privileged material might have been performed properly. Neither the media nor their counsel should have been granted access to any of the privileged material at any

time, and ought to have been given only limited non-identifying materials in order to make their submissions at the second stage, i.e. after the existence of the privilege had been accepted.

V. Disposition

66 For the reasons set out above, the appeal should be allowed, and the Extradition Judge's order granting disclosure to selected media representatives and their counsel set aside.

English version of the reasons delivered by

LeBEL J. (dissenting in part):--

I. Introduction

67 I have read the reasons of my colleague Bastarache J. and, although I agree with many of his comments on the issues and on the outcome of this appeal, I am unable to agree with certain fundamental elements of his analysis. In particular, I disagree with him on the interpretation to be given to the common law rule relating to informer privilege. According to my colleague, the duty of confidentiality flowing from informer privilege means that the trial judge has no power whatsoever to authorize or order the disclosure of any evidence that might tend to identify a police informer. In his view, there is only one exception to this rule - innocence at stake - that is, where disclosure of such evidence is necessary to establish the innocence of the accused. With respect, an interpretation of the rule as "absolute" as this is unnecessary. In his interpretation of the privilege, Bastarache J. fails to give due consideration to the purpose of this judge-made rule of confidentiality: to promote the proper administration of justice. This purpose should instead lead to the conclusion that a trial judge always retains a residual discretion to decline to apply the rule of confidentiality if the judge is satisfied that this would better serve the administration of justice or that the party relying on the rule is seeking to divert it from its purpose to his or her own advantage.

68 My colleague also fails to give due consideration to the constitutional status of the open court principle. As a result of this status, anyone who relies on informer privilege to limit the scope of the open court principle bears the onus of showing that his or her case is indeed one in which the privilege should be applied and that the objectives of the privilege can be attained by no means less intrusive than applying it absolutely. In considering this issue, the trial judge may ask to hear the parties' arguments in an adversarial proceeding and make any orders he or she deems necessary to enable those with an interest in the matter to make a meaningful contribution to the proceeding. This was what the extradition judge in the case at bar (who, along with the named person, is referred to in the masculine) intended when he ordered the disclosure of all the evidence in the record to media counsel and to certain representatives of the media. Had the extradition judge not erred in law by ordering a more extensive disclosure than was necessary, my view would have been that this exercise of discretion should not be interfered with and that members of the media should be allowed to make a meaningful contribution to the adversarial proceeding in which they have been invited to participate.

69 Finally, I am unable to agree with my colleague regarding the procedure the trial judge must follow in inviting members of the media to take part in the proceedings. I also disagree with him on the limits the court must place on the role of an *amicus curiae* in cases where it considers the appointment of an *amicus* to be necessary in order, *inter alia*, to preserve the adversarial nature of court proceedings and protect the public interest in having them conducted properly.

II. Judicial History

70 Although my colleague has already set out the procedural history of this case, I would nevertheless add a few comments on this subject in order to delineate more precisely the issues this Court must resolve and to better understand the particular difficulties the extradition judge faced in this case.

71 This appeal is incidental to an extradition proceeding in which the opposing parties are, on the one hand, the appellant named person and, on the other hand, the appellant Attorney General of Canada, who is acting on behalf of a requesting state. In the course of that extradition proceeding, the named person indicated that he intended to invoke s. 24(2) of the *Canadian Charter of Rights and Freedoms* to apply for a stay of the proceeding on the ground that the requesting state had violated certain of his fundamental *Charter* rights (the "stay of proceedings application"). In support of that claim, the named person applied to the extradition judge for an order that the Attorney General of Canada disclose certain evidence to him (the "disclosure application"). He also made a further application to have the disclosure application heard *in camera* (the "*in camera* application"). The *in camera* application resulted in four interlocutory judgments.

72 In the first of these interlocutory judgments, the extradition judge appointed an *amicus curiae*. He considered the appointment of an *amicus* to be necessary to ensure that he heard adequate submissions on the *in camera* application from all relevant points of view, since the appellant Attorney General of Canada, far from contesting the application, had instead decided to support it. To enable the *amicus curiae* to make informed submissions, the extradition judge also considered it essential to order that the *amicus* be provided with transcripts of all the hearings held up to that time, as well as all with the documents the named person was relying on in support of the disclosure application and the *in camera* application. None of the parties contested the appointment of the *amicus curiae* or tried to appeal this interlocutory judgment.

73 After reviewing the evidence in the record and doing the necessary legal research, the *amicus curiae* concluded that the difficult questions of law and fact raised by the *in camera* application would be best addressed by means of a genuine adversarial proceeding. However, he felt that adequate safeguards would have to be put in place to protect the informer's identity pending a decision on this application. Being of the view that he could not himself argue one position or the other in this proceeding, the *amicus curiae* recommended that the extradition judge invite certain lawyers representing media outlets ("media counsel") to take part in the proceeding on the *in camera* application. These lawyers would have to be respected members of the legal community who had participated in past proceedings involving publication bans. Moreover, they should be authorized to participate in this proceeding only after having given appropriate undertakings of confidentiality, and only after the extradition judge had made the necessary orders to protect the identity of the named person.

74 Although both appellants opposed such an invitation, the extradition judge decided to implement the *amicus curiae*'s recommendations and send a notice to certain media counsel he himself had selected. The appellants had also made submissions concerning the conditions of the invitation to be extended to media counsel and their participation. The extradition judge then decided on a very limited disclosure of facts to media counsel who chose to take part in the proceedings, and also held that this disclosure would be made only after they had signed undertakings of confidentiality. None of the parties attempted to appeal this second interlocutory judgment.

75 Certain media counsel agreed to take part in the proceeding under the rigorous conditions imposed by the extradition judge. The extradition judge then acceded to the appellants' joint application to first decide, in a separate proceeding, the issue of his power to decline to order an *in camera* proceeding. Following an adversarial proceeding in which counsel for the media took part, the extradition judge ruled that there was no common law rule requiring him to order an *in camera* proceeding (the "no absolute bar ruling"). Once again, none of the parties attempted to appeal this third interlocutory judgment.

76 After the third decision, media counsel applied to have additional evidence disclosed to them. They argued that this disclosure was necessary to enable them to make a meaningful contribution to the legal proceeding on the *in camera* application. The appellants vigorously opposed the application, but the extradition judge ruled that the media representatives and their counsel should have access to the same documents as the *amicus curiae* (the "documents in issue"). Only this fourth interlocutory judgment was appealed to this Court ([2006] B.C.J. No. 3122 (QL), 2006 BCSC 1805).

77 This brief account of the proceedings giving rise to this appeal serves to delineate more precisely the issues this Court must resolve. It should be borne in mind that what this Court must do is not to determine the outcome of the *in camera* application. Rather, we must decide whether the extradition judge erred in ordering the disclosure of the documents in issue to media counsel. Should we conclude that he did not err in doing so, we will then have to ask whether he erred in authorizing media counsel to give the information in these documents to certain media representatives - whom he himself had selected - after each of them had signed an undertaking of confidentiality.

78 In deciding these two issues, we must bear in mind the precise limits that were to apply to the disclosure of the documents in issue under the terms of the extradition judge's order. The judge carefully circumscribed this disclosure. The documents were to be disclosed to a short list of lawyers he himself had selected. Moreover, the order authorized designated media representatives to review the documents and evidence only in the presence of their counsel. They were prohibited from taking away copies of these materials. Any dissemination of any information obtained from them was strictly prohibited, and the media representatives had to sign written undertakings to this effect. I think it will be helpful to reproduce the order in question:

> THIS COURT ORDERS that
>
> 1. Robert S. Anderson, Daniel W. Burnett, Amy J. Davison, Ludmila B. Herbst, Heather E. Maconachie, [and] Michael A. Skene ... (the "Media Counsel") are entitled to review copies of:
>
> (a) all information and material provided to *amicus curiae* in the *in camera* proceedings;
> (b) all transcripts of the *in camera* proceedings related to the Named Person's disclosure and anticipated stay application to date at which the Media Counsel were not present;
> (c) any and all Orders made by the Honourable ... in the *in camera* proceedings related to the Named Person's disclosure and anticipated stay application to date at which the Media Counsel were not present;

(d) all arguments advanced *in camera* by *amicus curiae*, counsel for the Named Person, and counsel for the Attorney General of Canada on behalf of the Requesting State

(the "Relevant Information and Documentation")

at the courthouse in ...

2. Upon payment by Media Counsel of an appropriate fee for photocopying, counsel for the Attorney General of Canada on behalf of the Requesting State must:

   (a) edit copies of the Relevant Information and Documentation to delete reference to the Named Person's name and the court file identifying the extradition proceedings in which he is named (the "Edited Relevant Information and Documentation"); and
   (b) supply Media Counsel with copies of the Edited Relevant Information and Documentation.

3. Upon payment by Media Counsel of appropriate fees, the Supreme Court of British Columbia Registries must supply Media Counsel with copies of any Edited Relevant Information and Documentation not available from counsel for the Attorney General of Canada on behalf of the Requesting State.
4. Upon the filing and acceptance of undertakings, Patricia Graham, Lisa Green, Ian Haysom, Daniel J. Henry, Susan Lee, Gordon MacDonald, Wayne Moriarty, Tom Walters, Wayne Williams, and Steve Pasternak (the "Media Representatives") are entitled to review the Relevant Information and Documentation on terms that:

   (a) the Media Representatives may review the Relevant Information and Documentation only in the presence of one or more of the Media Counsel;
   (b) the Media Representatives must not copy or otherwise create any permanent record of the Relevant Information and Documentation;
   (c) the disclosure of the Relevant Information and Documentation to the Media Representatives will be subject to the court order upon which the Media Counsel have to date received and will in future receive information and documents, altered as necessary to reflect their status as Media Representatives.

5. Until further Order of the Court:

   (a) the Media Counsel may inform the Media Representatives only of paragraphs 1, 2, 3, 4, 5, and 6 of this Order;

(b) there must be no publication by the media represented by the Media Representatives of that information given to them by the Media Counsel.

6. The Named Person's disclosure application and paragraph 1, 2, 3, and 4 of this Order be and are hereby stayed for a period of up to 60 days pending determination by the parties of an intention to appeal this Order.
7. This Order be and is hereby sealed until further Order of the Court.
8. This Order is subject to variation by Order of the Court on application by any party or *ex mero motu.*

III. Applicable Legal Principles

79 I will now summarize the legal principles relevant to the issue before discussing how they should be applied here. Two principles stand in opposition in this case: the open court principle and the rule of confidentiality made necessary by informer privilege. In his reasons, my colleague recognizes the fundamental importance of these principles to the proper administration of justice, but he concludes that informer privilege must always prevail over the open court principle where holding proceedings in public might tend to identify a police informer.

80 In my opinion, such an interpretation of the scope of informer privilege cannot be reconciled with either the constitutional nature of the open court principle or the principles of public policy on which informer privilege is based. The relationship between this privilege and a justice system that is, in principle, open requires a more refined examination than a simple assertion that the rule of confidentiality flowing from the privilege is absolute. Such an assertion does not suffice either to guide or to settle the debate that will then have to be held to determine how to apply the rule of confidentiality. In such a case, it will at the very least be necessary to discuss the conditions and procedures that will govern the review of the privilege and incorporate this review into the broader legal debate. At times, consideration of the limits of the privilege, and its extinguishment, will be required. It is difficult to hold a debate such as this in the abstract, without knowledge of the context. This means that, if a meaningful debate is to take place and if the applicable constitutional principles are to be adhered to, the judge must be found to have a residual discretion to order the disclosure, even in open court, of information on the factual background to the case. *A fortiori*, to this end, it would appear to be more consistent with the applicable legal principles for the judge to retain the discretion to authorize or order - where he or she considers this necessary - the disclosure of information that might tend to identify a police informer to parties with an interest in the issue of the openness of court proceedings, while taking any precautions needed to prevent or limit further dissemination of this information.

A. *Open Court Principle*

(1) The Principle and the Rationale for It

81 The open court principle is now well established in Canadian law. This Court has on numerous occasions confirmed the fundamental importance and constitutional nature of this principle (see *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, 2005 SCC 41; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *R. v. O.N.E.*,

[2001] 3 S.C.R. 478, 2001 SCC 77; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122). In general terms, the open court principle implies that justice must be done in public. Accordingly, legal proceedings are generally open to the public. The hearing rooms where the parties present their arguments to the court must be open to the public, which must have access to pleadings, evidence and court decisions. Furthermore, as a rule, no one appears in court, whether as a party or as a witness, under a pseudonym.

82 For centuries, the importance of the open court principle has been recognized at common law. Various justifications have been given for it. The oldest of these is probably the connection made between openness and the pursuit of truth. For example, Blackstone made the following comment in his *Commentaries on the Laws of England* (1768), vol. III, chap. 23, at p. 373:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk ... .

In a similar vein, Wigmore made the following comment on the effect openness has on the quality of testimony:

> Its operation in tending to *improve the quality of testimony* is two-fold. Subjectively, it produces in the witness' mind a disinclination to falsify; first, by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to hear of the testimony from others present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information.
>
> *Wigmore on Evidence*, vol. 6 (Chadbourn rev. 1976), S. 1834, at pp. 435-36 (emphasis in original).)

83 Another frequently proposed justification for the principle is that openness fosters the integrity of judicial proceedings (see in particular *Edmonton Journal*, at p. 1360 (*per* Wilson J.)). Thus, it has been argued that all participants in judicial proceedings will be further induced to conduct themselves properly if they know that they are under the watchful eye of the public. This is what led Bentham to state that "[p]ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity" (J. H. Burton, ed., *Benthamiana: or Select Extracts from the Works of Jeremy Bentham* (1843), at p. 115).

84 Openness ensures both that justice is done and that it is seen to be done. For justice to be seen to be done is necessary to preserve public confidence in the administration of justice. Bentham is often quoted in support of this argument, too:

> The effects of publicity are at their *maximum* of importance, when considered in relation to the judges; whether as insuring their integrity, or as producing public confidence in their judgments.
>
> (J. Bentham, *Treatise on Judicial Evidence* (1825), at p. 69 (emphasis in original).)

This Court adopted a similar argument in *Vancouver Sun*:

> Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts. [para. 25]

85 More recently, stress has been laid on the relationship between open courts and the promotion of democracy. (In my view, this is the justification that is most relevant in the case at bar.) The courts play a key role in a democracy, not only because they are where disputes between citizens can be resolved peacefully, but also - and perhaps most importantly - because they are where citizens' disputes with the state are decided. Furthermore, there is no denying that the importance of the courts' role is accentuated by the constantly increasing complexity of contemporary societies. It is therefore essential that what the courts do be open to public scrutiny in order both to improve the operation of the courts and to maintain public confidence in them (see *Edmonton Journal*, at p. 1337 (*per* Cory J.)).

86 Similarly, the "educational" aspect of an open court process has been noted in, for example, the following passage from the reasons of Wilson J. in *Edmonton Journal*:

> It provides an opportunity for the members of the community to acquire an understanding of how the courts work and how what goes on there affects them. Bentham recognized the importance of publicity in fostering public discussion of judicial matters, *Treatise on Judicial Evidence*, op. cit., at p. 68, and Wigmore pointed out in *Evidence*, op. cit., s.1834, at p. 438, that "[t]he educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy". [pp. 1360-61]

87 Openness also ensures that matters considered in court are not debated only in the courts. It fosters the extension of such debates to other areas of society. In my view, this consideration played an important part in this Court's decision in *Mentuck* to uphold the trial judge's refusal to order a publication ban on the methods used by the police in investigating the accused. This Court found that the deleterious effects of such an order would be substantial, particularly because the freedom of the press to report information regarding a subject of great importance to any free and democratic society would be curtailed. I will reproduce the relevant passage insofar as the extradition judge appears to have had similar concerns in the case at bar:

> The deleterious effects, however, would be quite substantial. In the first place, the freedom of the press would be seriously curtailed in respect of an issue that may merit widespread public debate. A fundamental belief pervades our political and legal system that the police should remain under civilian control and supervision by our democratically elected officials; our country is not a police state. The tactics used by police, along with other aspects of their operations, is a matter that is presumptively of public concern. Restricting the freedom of the press to report on the details of undercover operations that utilize deception, and that encourage the suspect to confess to specific crimes with the prospect of financial and other rewards, prevents the public from being informed critics of what may be controversial police actions.
>
> As this Court recognized in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976, "participation in social and political decision-making is to be fostered and encouraged", a principle fundamental to a free and democratic society. See *Switzman v. Elbling*, [1957] S.C.R. 285; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. Such participation is an empty exercise without the information the press can provide about the practices of government, including the police. In my view, a publication ban that restricts the public's access to information about the one government body that publicly wields instruments of force and gathers evidence for the purpose of imprisoning suspected offenders would have a serious deleterious effect. There is no doubt as to how crucial the role of the police is to the maintenance of law and order and the security of Canadian society. But there has always been and will continue to be a concern about the limits of acceptable police action. The improper use of bans regarding police conduct, so as to insulate that conduct from public scrutiny, seriously deprives the Canadian public of its ability to know of and be able to respond to police practices that, left unchecked, could erode the fabric of Canadian society and democracy. [paras. 50-51]

88 The open court principle, which was accepted long before the adoption of the *Charter*, is now enshrined in it. This is due to the fact that the principle is associated with the right to freedom of expression guaranteed by s. 2(*b*) of the *Charter*. It is clear that members of the public must have access to the courts in order to freely express their views on the operation of the courts and on the matters argued before them. The right to freedom of expression protects not only the right to express oneself on an issue, but also the right to gather the information needed to engage in expressive activity (see *Canadian Broadcasting Corp. v. New Brunswick*, at para. 27).

(2) Role of the Press

89 Of course, few citizens have the time to attend court proceedings. The scope of the open court principle would therefore be quite limited were it not for the corollary right of the press to have access to the courts and publish information on their operation. As Cory J. wrote in *Edmonton Journal*:

> That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings - the nature of the evidence that was called, the arguments presented, the comments made by the trial judge - in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media. [pp. 1339-40]

90 Thus, the right of the press to have access to the courts and report on what takes place in them is also guaranteed by s. 2(*b*) of the *Charter*, as was expressly recognized by this Court in *Canadian Broadcasting Corp. v. New Brunswick* (see the comments of La Forest J., at para. 26).

(3) Limits on the Open Court Principle

91 The open court principle is not absolute, however. A court generally has the power, in appropriate circumstances, to limit the openness of its proceedings by ordering publication bans, sealing documents, or holding hearings *in camera*. It can also authorize an individual to make submissions or appear in court under a pseudonym should this be necessary in the circumstances. In some cases, courts may be required by statute to order such measures. In others, they are merely authorized to do so, whether under legislation granting them this power or - where superior courts are concerned - pursuant to their inherent power to control their own processes. There are common law rules that also apply in such cases, and informer privilege establishes one of them. However, careful consideration must be given to the scope of the privilege and, where applicable, to whether the limits it places on the openness of court proceedings are necessary or how they are to be implemented.

92 As Lamer C.J. acknowledged in *Dagenais*, the wide range of possible situations means that the form of a challenge to an order limiting the openness of court proceedings will vary depending on the nature of the objection to the ban (at pp. 874 *et seq*.). Thus, if legislation or a common law rule *requires* a judge to make such an order, any objection to the order must be framed as a *Charter* challenge to that legislation or common law rule. If, however, the legislation or the common law rule merely grants the trial judge the discretion to make such an order, any *Charter* review must concern the exercise of this discretion in the specific case before the court. Discretionary powers must be exercised in a manner consistent with the *Charter*. For a judge to exceed the limits placed by the *Charter* on the exercise of such powers would be an error of law that would justify setting the order aside.

93 To determine whether a legal rule compelling a trial judge to limit the openness of court proceedings is constitutional, it will be necessary to conduct the analysis adopted in *R. v. Oakes*, [1986] 1 S.C.R. 103. Since such a rule eliminates the court's discretion to review the specific cir-

cumstances of the case before it, there is always a possibility that the rule's impairment of freedom of expression will not be minimal. Motivated by a desire to preserve the public nature of justice in Canada to the greatest extent possible, this Court has acted with reserve and circumspection in accepting such limits (see *Canadian Newspapers*).

94 In *Dagenais*, this Court developed, for the purpose of reviewing the constitutionality of the exercise of a discretion to limit the openness of court proceedings, an approach that incorporates the gist of the *Oakes* test, but is tailored to the specific context of the exercise of such a discretion. This approach was subsequently reformulated as follows in *Mentuck*:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. [para. 32]

95 It is interesting to note that the Law Reform Commission of Canada had, in a working paper on public and media access to the criminal process, recommended that all automatic publication bans be eliminated from the *Criminal Code*, R.S.C. 1985, c. C-46. The Commission expressed the view that "there should always be room for a judge or justice to refuse to make an order limiting openness where there is no demonstrable need for it" (Working Paper 56, *Public and Media Access to the Criminal Process* (1987), at p. 45). It is indeed inconceivable that an order limiting openness could be justified if the need for it was not demonstrated. Recognizing that the trial judge has the discretion to make such an order eliminates this potential pitfall. It is thus up to the judge to weigh the interests at stake. In this context, a number of means are available to the judge to deal with the situation in a way that impairs freedom of expression as minimally as possible in the specific circumstances of a given case. These means range from a partial or temporary publication ban to a temporary or permanent sealing order regarding certain pieces of evidence to an order that proceedings be held entirely *in camera*.

(4) Distinction Between the Right of Access to the Courts and the Right to Inform the Public on Matters Before Them

96 It will now be necessary to turn to a problem relating to the definition of the rights flowing from the open court principle. The recognition of the right of the press to inform the public on court proceedings as a corollary to the public's right to open courts tends to lead to the view that these two rights are one and the same. However, a conceptual distinction must be maintained between them in order to deal with the difficulties that the application of this principle gives rise to in the relationships between these rights and other rights without taking the relevant values into consideration. For example, in certain situations, a judge might consider it appropriate - or might be required by legislation - to order a publication ban but not to order that the proceedings be held *in camera*. Such an order would restrict the right of the press to report on what happens in court. However, it would not infringe the more general right to open courts. In this sense, an order that proceedings be held *in*

camera is more drastic because, in practice, it constitutes a publication ban, whereas the converse is not true.

97 The difference between the two types of orders can be seen in *Canadian Newspapers*, in which this Court ruled on the constitutionality of a statutory provision compelling the trial judge to order a publication ban in certain circumstances in sexual assault cases. On that occasion, the Court agreed that such a provision limits the right to freedom of expression guaranteed by s. 2(*b*) of the *Charter*. It nevertheless held that the provision was justified under s. 1 of the *Charter* because, *inter alia*, it did not require the trial judge to proceed *in camera* but, on the contrary, allowed the media to be present at the hearing and report on the conduct of the hearing and the facts of the case, provided that this information did not tend to identify the complainant.

98 *Canadian Broadcasting Corp. v. New Brunswick* also illustrates the difference between the two types of orders and it shows clearly that courts should exercise caution before ordering that proceedings be heard *in camera*. In that case, which concerned sexual assaults committed against young female persons, the trial judge had ordered under s. 486(1) of the *Criminal Code* that the media and the public be excluded from a part of the sentencing proceeding dealing with the specific acts committed by the accused. The order remained in effect for only 20 minutes. Nevertheless, this Court decided that the trial judge should not have excluded the public in this manner, as there was insufficient evidence to support a concern for undue hardship to the accused or the complainants. The Court reached this conclusion because, *inter alia*, of the fact that the victims' privacy was already protected by a publication ban.

B. *Scope of Informer Privilege*

(1) Informer Privilege and the Rationale for It

99 In the case at bar, the appellants are relying on informer privilege to justify violations of the open court principle. It is, generally speaking, true that this privilege entails a rule prohibiting the Crown or a witness from revealing in court any information that might tend to identify a police informer. In the classic scenario involving this rule, the informer is not a party to the case and his or her identity, or evidence that might reveal it, is not essential to the outcome of the case. In such a situation, the rule generally prohibits the judge from ordering the disclosure of such information and authorizes witnesses to refuse to answer certain questions if their answers might tend to identify the informer.

100 Correlatively, where applicable, informer privilege prohibits revealing information that might tend to identify a police informer in a public hearing. On this point, I agree with my colleague that, to this extent, the privilege constitutes a limit on the open court principle (see *R. v. Lawrence*, [2001] O.J. No. 5776 (QL) (Ct. J.)). We disagree, however, on the scope of this limit. In my colleague's view, the limit is binding on the trial judge and is subject to only one exception, the "innocence at stake" exception. According to his interpretation of the privilege, the trial judge is required at all times to prevent the disclosure of information that might tend to identify an informer, except where the ability of the accused to prove his or her innocence is at stake. I myself do not think that this rule is so absolute that the judge has no residual discretion regarding its application. In my view, on a proper interpretation of informer privilege, the trial judge has at all times a discretion to decline to apply the privilege where an attempt is being made to divert it from its purpose or where there is no longer any need to protect the informer's identity.

101 The rule of confidentiality resulting from the privilege is not an end in itself. It was developed by the common law courts to foster the proper administration of justice and, in particular, the effective prevention and suppression of crime. The need to resort to informers in police investigations has long been accepted. Informers must be confident that their identities will be protected if we want them to share information with the police. Otherwise, the risk of retaliation would deter many people from becoming informers. At any rate, I am loath to think that the state would place itself in a situation where it would be responsible for an act of revenge against an informer. Cory J. identified these two justifications in *R. v. Hunter* (1987), 57 C.R. (3d) 1 (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. [pp. 5-6]

102 Cooper distinguishes the "protection/inhibition theory" from the "continual flow theory" in his explanation of the rationale for informer privilege:

> Two related theories are involved in the rationale of the rule of public policy that states the identities of police informers ought not to be disclosed. The "protection/inhibition theory" recognizes that although the relation of information concerning crime to the police is a civic duty, citizens may abdicate these types of duties where disclosure of their identities could place their physical safety or economic interests in jeopardy. Although some writers would suggest that the personal interests of informers are protected merely to obtain an ongoing supply of information, this position is, perhaps, too exploitive to be characterized as a basis for a rule of public policy. Just as the citizen has a specific duty to assist in law enforcement, the public has a duty to protect the interests of a citizen who puts his or her interests at risk in furtherance of a public object.
>
> The "continual flow" theory is the second basis on which the public policy supporting informer privilege is founded. This theory is directly related to the public's interest in crime prevention. The theory is one of deterrence; if the identities of some informers are disclosed prospective informers will reject the risk of possible disclosure and decline to supply information to the police. The constriction of these channels of information would seriously impair the ability of law enforcement officials to protect the public from criminal activity.
>
> (T. G. Cooper, *Crown Privilege* (1990), at pp. 189-91)

(2) Limits on the Scope of Informer Privilege

103 Like any other rule, that of informer privilege has its exceptions. The most widely accepted one relates to situations where the accused could be prevented from proving his or her innocence if he or she were not permitted to obtain and use information that might tend to identify an informer ("innocence at stake exception"). In such cases, it is now accepted that informer privilege does not apply where the principles of criminal justice designed to avoid conviction of the innocent are in issue (see, *inter alia*, *R. v. Leipert*, [1997] 1 S.C.R. 281).

104 In my colleague's view, this is the only exception to the privilege. Where it does not apply, informer privilege is "absolute". Thus, he proposes an interpretation to the effect that proof that a person is an informer is sufficient to compel the trial judge to prevent the disclosure, to anyone in any circumstances (unless, of course, the innocence of the accused is at stake), of any information that might identify the informer. According to this interpretation of the rule of confidentiality, which is based on *obiter dicta* of this Court, only an application of the privilege as strict as this will be consistent with the objectives the privilege was developed to achieve.

105 I cannot bring myself to adopt so inflexible an interpretation of this judge-made rule of the common law. In my opinion, it is more consistent with the logic of the common law and with the values of the *Charter* to hold that the trial judge always has the discretion (except where the law withdraws it) to authorize or order the disclosure of information that might tend to identify an informer in the rare cases where the judge is satisfied that disclosure of the information would better serve the interests of justice than keeping it secret. However, this disclosure should be no more extensive than is required by the best interests of justice. It should be noted that the interests of justice constitute the justification for and purpose of the privilege. It is in reference to them that the limits on informer privilege will be established.

(3) Special Nature of the Case at Bar

106 This case raises particular difficulties with regard to the application of informer privilege. The decisions of this Court that are being relied upon to support the "absolutist" interpretation of the privilege arise from the classic scenario in which an attempt is made to adduce in evidence information that might tend to identify an informer who is not a party to the case (see *Leipert*, *R. v. Scott*, [1990] 3 S.C.R. 979, and *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, although the last of these cases relates to proceedings of a board of inquiry investigating police activities). This scenario is first and foremost a matter of the law of evidence and only quite indirectly involves the public's constitutional right to open courts. The case at bar has a completely different factual matrix. Here, the issues relating to the named person's status as a police informer are not incidental to the legal proceedings, as is generally the case. On the contrary, they are at the very heart of the named person's applications. Furthermore, the stay of proceedings application the named person ultimately intends to make should relate to how the foreign and Canadian governments treated him as an informer. This is the very type of legal proceeding in which the open court principle assumes particular importance. There is no denying that how the Canadian government deals with informers can be of considerable significance in a democratic debate on the values of this country's justice system and on the proper administration of justice, which are matters of public interest.

107 Thus, the public's right to open courts and the imperative of protecting the public's interest in the proper administration of justice are much more directly affected by informer privilege in the case at bar than in the classic scenario. In fact, the circumstances of the instant case appear to be so

unusual that counsel for the parties could not refer us to any similar cases. In a situation such as this, this Court must be careful in considering a proposal to resolve the problem with significant constitutional ramifications that is before it by importing a legal rule developed in a completely different context, that of the law of evidence, and applying that rule in its entirety. The commentators and the courts have noted that an exhaustive inquiry should be conducted every time extending informer privilege beyond its traditional parameters is being contemplated (see J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2d ed. 1999), at p. 883, para. 15.59).

108 It is also important to bear in mind that although this Court's comments in *Leipert* came after the decision in *Dagenais*, they were made before the Court stressed the constitutional nature of the open court principle in *Mentuck*, *Vancouver Sun* and *Toronto Star*. Furthermore, the case the Court was commenting on in *Leipert* was not as exceptional as the case at bar, in which the issue involves reconciling potentially conflicting values and principles.

109 In my opinion, the judge-made rule of informer privilege cannot deprive a judge of the discretion to consider whether the rule is applicable. The issue will of course be resolved so easily in classic fact situations that the reasoning will be implicit and the application of the rule will appear to be absolute. However, the instant case clearly shows that, in certain exceptional circumstances, it will be more difficult to establish the scope of the privilege and an adversarial proceeding will be necessary. This will be true, for example, where, as appears to be the case here, the judge must consider the possibility that the privilege is being abused or is being diverted from its purpose.

110 The decision of the Quebec Court of Appeal in *R. v. Hiscock* (1992), 72 C.C.C. (3d) 303 (Que. C.A.), appears to be based on the reasoning. In that case, one of the two accused was a police informer whom the RCMP had asked to set up an operation to import hashish. The RCMP soon suspected that something was amiss in the operation. After electronic surveillance, followed by a search of the informer's vehicle, the informer was arrested and charged with conspiracy, trafficking, and possession of narcotics for the purpose of trafficking. According to the Crown, the informer had misappropriated part of the shipment of drugs that was supposed to be controlled by the RCMP.

111 After being convicted at trial, the accused argued that the wiretap evidence should be excluded because to admit it on appeal would be to violate informer privilege. The Quebec Court of Appeal rejected this argument, stating that informer privilege did not apply in the circumstances of the case. Writing for a unanimous panel, I took the opportunity to emphasize that the social justification for this privilege was found in the need to ensure performance of the policing function and maintenance of law and order (p. 329). The informer was granted the protection of informer privilege not in his personal interest, but in the interest of more effective law enforcement (p. 329). I concluded that the privilege should not be interpreted and applied so as to authorize the commission of criminal acts in the sole interest of the accused and therefore could not be used by the accused as they proposed to use it (p. 330). The opposite interpretation would have endorsed an abuse of the privilege, given its objective.

112 Furthermore, this Court's decision in *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, 2002 SCC 57, seems to me to be based on similar reasoning. In a proceeding in the British Columbia Supreme Court between the federal government and some of its staff lawyers, the government had originally filed a list of documents described as producible. It later changed its position and filed a certificate of the Clerk of Privy Council pursuant to s. 39(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, in order to object to the disclosure of certain documents on the ground that they contained information constituting confidences of the Queen's Privy Council for Canada. The plain-

tiffs then brought an application to compel production of the documents in question. Their application was dismissed by the British Columbia Supreme Court, but that decision was reversed by the Court of Appeal. According to the Court of Appeal, the government had waived its right to claim confidentiality of the documents by listing them as producible and by disclosing selected information in an affidavit it had filed (see *Babcock*, at para. 6).

113 The appeal to this Court concerned the constitutionality of s. 39 of the *Canada Evidence Act*, and the nature of Cabinet confidentiality and the processes by which it may be claimed or waived. According to s. 39(1), "[w]here a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body". Section 39(2) gives examples of such confidences. The Court held that this section of the *Canada Evidence Act*, despite its draconian language, could not "oust the principle that official actions must flow from statutory authority clearly granted and properly exercised: *Roncarelli* [*v. Duplessis*, [1959] S.C.R. 121]" (para. 39). It deduced from this principle "that the certification of the Clerk or minister under s. 39(1) may be challenged where the information for which immunity is claimed does not on its face fall within s. 39(1), or where it can be shown that the Clerk or minister has improperly exercised the discretion conferred by s. 39(1)" (para. 39).

114 The rationale underlying the decisions in *Babcock* and *Hiscock* is in my view applicable, with necessary adaptations, to the situation now before the Court. Under an absolute interpretation of informer privilege, the mere fact that an informer is involved would suffice to compel the judge to protect any information that might tend to identify the informer unless either the informer waived this privilege or the possibility of establishing the innocence of an accused would be compromised if secrecy were maintained. In my opinion, *Hiscock* and *Babcock* demonstrate the importance of ensuring that the courts have the power to review the reasons given for shielding certain information from public scrutiny and to refuse to grant an application for disclosure where an attempt is being made to divert the rule of confidentiality from its intended purpose, namely to foster the proper administration of justice and protect the public interest therein. These judgments clearly illustrate why it is important not to interpret the informer privilege rule as preventing the trial judge from asking whether the proposed use of the privilege for a specific purpose is consistent with the very reason for its existence. As Burton J. of the United States Supreme Court stated in *Roviaro v. United States*, 353 U.S. 53 (1957), "[t]he scope of the privilege is limited by its underlying purpose" (p. 60).

(4) Effect of the Two Justifications for the Privilege on Judicial Discretion

115 There will be other, undoubtedly rare situations in which courts will be justified in reviewing the appropriateness of applying informer privilege to limit the openness of their proceedings, and in conducting an adversarial proceeding on this issue. This will be the case where a court has doubts that it will be possible both to keep the information secret and to achieve the two purposes on which the informer privilege rule is based.

116 For example, where an attempt is made to keep information secret, a judge would have to be able to decline to apply the rule of confidentiality if it is established that public disclosure of the information would not place the informer at risk, or if the information is already in the public do-

main. As one author notes, "[i]f the informer's name is already known, either generally or to those who are likely to resent his activities, further concealment becomes pointless. This is merely an application of the principle now universally accepted in Crown privilege cases that prior publication will defeat the privilege [*Robinson v. South Australia*, [1931] A.C. 704 (P.C.); *Sankey v. Whitlam* (1978), 21 A.L.R. 505 (H.C.A.)]" (I. Eagles, *Evidentiary Protection for Informers - Policy or Privilege?* (1982), 6 *Crim. L.J.* 175, at p. 188; see also *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), S. 2374). Given the constitutional significance of the open court principle, it is not enough to invoke informer privilege mechanically for it to apply automatically. There must also be a requirement to show that the informer will be at risk if the information is revealed, and the burden of proof on this point must rest with the party alleging this danger (see *Lawrence*).

117 Insofar as the "absolutist" interpretation of informer privilege forces the trial judge to limit the openness of court proceedings, it seems clear that this interpretation could lead to an infringement of the right to freedom of expression guaranteed to the press and the public by s. 2(*b*) of the *Charter*. It should be noted that in *Canadian Broadcasting Corp. v. New Brunswick*, this Court agreed with the New Brunswick Court of Appeal that s. 486(1) of the *Criminal Code* - which *permits* the trial judge to exclude the public from a trial in appropriate circumstances - infringes the freedom of the press protected by s. 2(*b*). *A fortiori*, in my opinion, a rule that *requires* the trial judge to do so also infringes this fundamental freedom. According to the principles of statutory interpretation, it would be best to interpret the common law rule relating to informer privilege in a manner more consistent with the provisions and values of the *Charter*. The common law's flexibility allows it to adapt incrementally to its constitutional context (*R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8, at para. 20).

118 Although it is true that the respondents have not explicitly challenged the constitutionality of the rule as interpreted by my colleague Bastarache J., the Constitution continues to apply even in the absence of such a challenge and should guide the Court in interpreting and reconciling the relevant legal principles. Furthermore, it should be borne in mind that no one has appealed the "no absolute bar ruling". This procedural context was hardly likely to prompt the respondents to mount a direct challenge of the constitutionality of the common law rule in this appeal.

(5) Application of the Legal Principles to the Facts

119 Having set out the relevant legal principles, I will now apply them to the facts of the instant case. In this regard, I think it appropriate to reiterate once again the very specific issue this Court has been asked to decide: whether the extradition judge erred in ordering the disclosure of the documents in issue to the media representatives and media counsel.

120 It is common ground that these documents contain information that might tend to identify the named person. This alone leads my colleague to conclude that the privilege applies and that the trial judge therefore erred in law.

121 I explained above why, in my opinion, this Court should not accept so inflexible and mechanical an application of the informer privilege rule. I also explained why it is appropriate to hold that the trial judge always has the discretion to authorize, in appropriate exceptional circumstances, the disclosure of information that might tend to identify an informer, even in open court. Given the importance of the principles in issue, the decision whether or not to allow the disclosure of such information in open court must be made on the basis of a well-substantiated factual record. Conse-

quently, I believe that the judge must be allowed, where he or she considers it appropriate to do so, to authorize or order the disclosure to interested parties of any information deemed necessary for the issue to be argued in a helpful adversarial proceeding. Of course, the judge must then be very careful and must authorize this disclosure only if he is satisfied that the information will be kept confidential. He must also avoid disclosing more than is strictly necessary to ensure that the adversarial proceeding is helpful. Thus, he is under an obligation to reduce what is disclosed to a minimum and to control the dissemination of the information.

122 Did the extradition judge abide by these principles in the case at bar? I will now consider the problems raised by the disclosure of the documents in issue to media counsel, and will address those raised by their disclosure to the media representatives in the subsequent section.

C. *Scope of the Information That Can Be Disclosed to Media Counsel*

(1) Discretionary Nature of the Decision

123 The decision to order the disclosure of the documents in issue to media counsel was within the extradition judge's authority and was discretionary in nature. Gonthier J., writing for this Court, discussed the standard of review applicable to this type of decision in *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375:

> The principles enunciated in the *Harper* case [*Harper v. Harper*, [1980] 1 S.C.R. 2] indicate that an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice.

To the same effect, see *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at paras. 117 and 139; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Carosella*, [1997] 1 S.C.R. 80, at paras. 48-50; *Reza v. Canada*, [1994] 2 S.C.R. 394, at pp. 404-5; and *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.

(2) Application of the Legal Principles to the Facts of the Case at Bar

124 It can be seen from the extradition judge's reasons and from the facts admitted by the parties for the purposes of this appeal that the judge ultimately relied on a series of factors in reaching the conclusion that this might be a case in which the appropriateness of applying the rule of informer privilege was questionable. He accordingly felt that this might be a case in which information that might tend to identify a police informer should be disclosed in open court, and that an adversarial proceeding would be required to decide this issue. It may be that none of these factors would on its own have been sufficient to justify this decision. However, it seems clear to me that, taken as a whole, these factors provide ample justification for the decision.

125 Furthermore, given the complexity of the facts and of the applicable legal principles, the extradition judge considered it necessary for media counsel to have access to more evidence in order to be able to make a meaningful contribution to this proceeding. I see no sufficient reason for intervening as regards the principle behind the actual decision to disclose additional information. Here again, it seems clear to me that the evidence considered by the extradition judge, taken as a whole, justified this decision. I therefore find that he correctly exercised his discretion in ordering the disclosure to media counsel of certain information that might tend to identify the named person

so that they could make a meaningful contribution to the proceeding. However, I am of the opinion that he erred in law in allowing a more extensive disclosure than was necessary without attempting to screen the information so as to minimize its dissemination.

126 The extradition judge's decision appears to be based on several grounds. First, he considered the fact that this is a case in which there has already been unusually wide disclosure of the named person's identity. In the typical scenario in which informer privilege is invoked, the informer's identity is known to only a limited number of people in the police force for which he or she acts as an informer. In the case at bar, however, the named person's identity has probably already been disclosed to a very large number of people. The list is long. For example, it may include the named person's counsel and their associates, the lawyers and officials of the governments involved in the extradition proceeding, members of the police forces involved in preparing the case and in conducting the operations or, finally, and this could be particularly significant, even the named person's co-conspirator.

127 Of course, the named person cannot be held responsible for this broad disclosure. I do not mean to suggest that he has, as a result, lost his right to confidentiality regarding his status as an informer. Nevertheless, the scope of the disclosure confirms that the fact situation in the case at bar is quite different from that of the classic scenario in which informer privilege is usually invoked. It would be rather unrealistic to discount the scope of this disclosure when assessing the harm the named person would suffer as a result of the disclosure of the documents in issue to media counsel. Owing to the breadth of the prior disclosure, it can be asked whether ordering the controlled release of this information to a few more people would really increase the risk faced by the named person.

128 This is particularly true in light of the fact that even the named person's co-conspirator is aware of his identity, which is the second piece of evidence on which the extradition judge appears to have founded his decision. The extradition judge seems to have felt that this might be a case in which it could be shown, at the hearing of the *in camera* application, that proceeding with the stay of proceedings application in open court would pose no additional risk to the named person insofar as the only person likely to want to seek revenge, his co-conspirator, already knows his identity. It should be noted that this is why members of the media want to know the identity of the requesting state, as they are aware that the named person's identity may already have been disclosed in that country, during the legal proceedings and in the media. In such circumstances, as I explained above, it would have been appropriate for the extradition judge to dismiss the *in camera* application, unless there were other grounds favouring a closed hearing.

129 Third, the extradition judge appears to have been afraid that the government was concerned more with shielding certain of its activities from public scrutiny than with assuring an informer's safety. In other words, the extradition judge seems to have feared that the government was in fact attempting to divert informer privilege from its real purpose. The extradition judge also appears to have been concerned about the risk that the public might be unduly deprived of the right to debate a subject of importance to any democratic society. In this regard, his concerns were not unlike those of this Court in *Mentuck*.

130 Fourth, the extradition judge appears to have felt that the very nature of the stay of proceedings application favoured hearing it in open court. On the one hand, the extradition judge noted that it is at first glance incompatible with the integrity of judicial proceedings to secretly decide an application for a determination as to whether the public would be so shocked by the government's conduct that it would be preferable to stay the proceedings. On the other hand, he added that this

might be a case in which the public policy considerations underlying the rule of informer privilege might be better served by proceeding in open court.

131 Fifth, the extradition judge seems to have attached great weight to the fact that disclosure of the documents in issue to lawyers, and only after they had given appropriate undertakings of confidentiality, would probably not result in any additional risk to the named person. Lawyers are officers of the court and are held to strict ethical standards. Any violation of the confidentiality of these documents in breach of the undertakings they have given could be sanctioned, not only through contempt of court proceedings, but also through the disciplinary process. Moreover, in their profession, lawyers are used to working with confidential documents. Consequently, it must be assumed that they would handle the disclosed documents with the utmost diligence and care.

132 In my opinion, these various factors provide an ample basis for concluding that the extradition judge was justified in believing that this was probably a case in which informer privilege simply would not apply or in which it would have to be reconciled with the open court principle. They also justify the conclusion that the extradition judge, having considered the whole of the evidence introduced up to that point, was right to consider this case to be one in which it was appropriate to exercise his discretion and order the disclosure to media counsel of all the information they would need to make a meaningful contribution to the proceeding on the *in camera* application. There is no basis for me to find that the extradition judge misdirected himself in reaching this decision or that his decision is so clearly wrong as to amount to an injustice (see *Elsom*), and I would not interfere with this exercise of his discretion, except as regards the scope of the disclosure.

133 I continue to believe that it was open to the judge to conduct an adversarial proceeding on the issue of whether the named person's application should be heard *in camera* and, to this end, to order that certain information that might tend to identify the named person be disclosed to the media outlets to enable them to make a meaningful contribution to the proceeding. However, the extradition judge went too far in ordering that the entire record be disclosed to media lawyers and representatives. The sole purpose of this disclosure is to ensure that the adversarial proceeding is helpful. Consequently, the extradition judge was entitled to order the disclosure of all information relevant to that proceeding, but no more. The extradition judge should accordingly have screened and expurgated or "censored" the documents in issue to remove information that might tend to identify the named person but is not relevant to the specific proceeding.

134 Before concluding these comments, I would reiterate that my intention in adopting this position is not at all to prejudge the merits of the *in camera* application. At the end of the adversarial proceeding, the extradition judge may well conclude that the risks to the named person are so high that to hear the stay of proceedings application in open court would be unacceptable. He may also decide that the public's interest in this application is so minimal that it does not justify any additional risks to the named person's safety, as slight as those risks might be. He may ultimately decide to hear the application *in camera*, or he may determine that it will suffice to hold only parts of the hearing *in camera* or to order a publication ban. Because of the importance of the principles in issue, what is essential is that the extradition judge's decision must be as informed as possible and that, for this purpose, he was entitled to the benefit of a helpful adversarial proceeding on the issue. If, after considering all the evidence, the extradition judge thought that such a proceeding was necessary and that the media needed access to certain information that might tend to identify the named person in order to make a meaningful contribution to it, then his decision to order the disclosure of the information must be deferred to, provided that he took the necessary steps to ensure that the dis-

closure was minimized and controlled. His only error was in not trying to determine which information was actually relevant to the proceeding and to limit the disclosure to it.

D. *Scope of the Information That Can Be Disclosed to Media Representatives*

135 As the extradition judge noted at para. 127 of his reasons, disclosure to the media representatives is more problematic than disclosure to media counsel. Thus, he was right to point out that, unlike media counsel, the media representatives are not officers of the court. Furthermore, whereas the British Columbia legislature chose to give one particular institution, the Law Society, the power to sanction ethical breaches by lawyers, no comparable institution oversees the journalistic profession. The responsibility for sanctioning a journalist's misconduct with respect to an undertaking of confidentiality would therefore fall to the courts through, in particular, contempt of court proceedings, with all the evidentiary difficulties such proceedings entail.

136 The extradition judge also noted that the fact that lawyers are officers of the court and are supervised by an organization with the authority to do so creates a presumption in favour of reliance on their undertakings of confidentiality. There is no such presumption in favour of the media representatives. As a result, the judge could often be placed in the uncomfortable situation of having to assess the value of each media representative's undertaking of confidentiality before ordering the disclosure of the information in question.

137 Finally, the extradition judge recognized that there is a tension between, on the one hand, the interest of media outlets in publishing any information they might gather in connection with their participation in legal proceedings and, on the other hand, the interests of justice in ensuring that this information is not made available to the public before the judge authorizes its publication. Although he was aware of these problems, the extradition judge nevertheless concluded that it would be preferable to allow media counsel to share any information disclosed to them with their clients, but only under strict conditions and after each of the media representatives had given an undertaking of confidentiality. In my opinion, this decision of the extradition judge was also within the ambit of his discretion, and I see no basis for this Court to intervene. The decision appears neither to be based on a misdirection nor to be so clearly wrong as to amount to an injustice (*Elsom v. Elsom*). It was based on undertakings by the media representatives and on an accurate understanding of the relationship between them and their counsel.

138 I found the submissions of the intervener Law Society of British Columbia with regard to the legal principles applicable to this aspect of the case to be particularly helpful. For instance, the Law Society quite rightly pointed out that a lawyer's relationship with his or her client is a fiduciary one, as this Court reaffirmed in a recent judgment (*Strother v. 3464920 Canada Inc.*, 2007 SCC 24), and that for this reason, the lawyer has a duty to disclose to his or her client any relevant information that he or she may properly disclose (*R. v. Henry* (1990), 61 C.C.C. (3d) 455 (Que. C.A.), at pp. 464-65). This duty to disclose serves a number of purposes, one of which is to enable the client to give informed instructions to the lawyer. Another is to protect the integrity of the solicitor-client relationship. This duty is so important that, according to some, a lawyer who is unable or unwilling to discharge it must refuse or cease to represent the client in question (*Spector v. Ageda*, [1971] 3 All E.R. 417 (Ch. D.), at p. 430).

139 Circumstances can nevertheless arise in which it is impossible to authorize counsel to pass certain disclosed information on to his or her client. *R. v. Guess* (2000), 148 C.C.C. (3d) 321 (B.C.C.A.), is a good example of such a situation. In that case, the Crown objected to an application

by the accused for the disclosure of evidence, arguing that the evidence included privileged or irrelevant documents. The trial judge felt that it would be impossible for him to review all the evidence in question on his own in order to decide whether the Crown's arguments were well founded. His solution was to allow counsel for the accused to review the evidence, but to limit counsel's right to disclose what he learned to his client.

140 I agree with the intervener Law Society of British Columbia that such a solution must remain one of last resort. Counsel's right to disclose evidence to his or her client must not therefore be limited unless this is the only conceivable solution. Furthermore, it is not open to counsel in such situations to consent on their own initiative to limits on their duty to disclose evidence to their clients. They must first obtain their clients' consent (see on this point the reasons of the minority in *Guess*, at para. 101). The reasons why a client might refuse to consent to such a limit may vary. For example, the client may feel that the limit would too seriously undermine his or her relationship with counsel, or may refuse to incur additional expenses without being apprised of the information to which counsel will have access. In this respect, when all is said and done, only the client's interest is at stake. It is therefore up to the client to decide whether to accept any limits on the information that counsel may disclose.

141 Because of the requirement that the client's consent be obtained, limits on counsel's right to disclose all relevant information to the client should not be imposed solely by means of a court order. The best way to ensure compliance with the limits will generally be to require an undertaking to this effect by counsel (see *Guess*, at paras. 20-21). Breaches of such undertakings can be sanctioned through disciplinary action (G. MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (loose-leaf at p. 17-7) or contempt of court proceedings (*Orfus Realty v. D.G. Jewellery of Canada Ltd.* (1995), 24 O.R. (3d) 379 (C.A.)). Of course, an undertaking is not an infallible means to avoid leaks. Nevertheless, in most cases, it will be sufficiently reliable to serve as a basis for authorizing the disclosure of the evidence in question. It will be up to the judge, in exercising his or her discretion, to decide in a given case, in light of the information in issue and the risks of disclosing it, whether such undertakings constitute a sufficient guarantee.

142 In the case at bar, the extradition judge did not consider it necessary to require such undertakings from media counsel before ordering the disclosure of the documents in issue. I see no sufficient reason to interfere with this exercise of discretion. Here again, the judge appears to have reached this decision after considering various factors that, taken together, provide ample justification for his decision. I count at least five of them.

143 First, the extradition judge appears to have attached a great deal of importance to the fact that the information would be disclosed only to respected members of the media, and on the condition that they themselves give undertakings of confidentiality. He explicitly considered the good reputations and good faith of the media representatives who had expressed their willingness to give such undertakings of confidentiality in exchange for access to the information.

144 Second, the judge noted that journalists are used to working with confidential information. They seek to protect such information at all costs, since their access to sources depends in large part on their reputation for keeping such promises of confidentiality. The judge added that the media outlets involved in this case have been involved in many important cases in the past and that they have always properly discharged their obligation of confidentiality.

145 Third, the extradition judge considered the fact that there had already been unusually wide disclosure of the named person's identity. He concluded from this that to authorize the disclosure to a few media representatives of information that might tend to identify the named person would not pose enough of an additional risk to the named person to justify prohibiting the disclosure.

146 Fourth, he took into account the negative effects that could result from a refusal to authorize disclosure of the information to the media representatives. For instance, he noted that some media outlets might refuse to commit substantial resources if they are denied knowledge of the substance of the information they intend to publish.

147 Fifth, the extradition judge felt that the media outlets were entitled, except in the most exceptional circumstances, to know the factual background to a decision affecting their rights. In his view, this information would be needed to enable them either to accept a decision adverse to their interests or to make an informed decision on a possible appeal.

148 In light of all these factors, I am of the opinion that this Court should defer to the exercise by the extradition judge of his discretion to order the disclosure of the documents in issue to media counsel, even in the absence of undertakings by counsel not to pass this information on to their clients. In my view, the extradition judge did not err in law in reaching this conclusion, nor does his ruling appear in any way to be unjust (see *Elsom v. Elsom*). The only real issue here is, I repeat, the scope of the disclosure. In my opinion, the disclosure itself is not, in principle, in issue.

IV. Procedure for Inviting Media Outlets to Take Part in the Proceedings

149 According to my colleague, the extradition judge erred in law in inviting only certain lawyers - selected by him on the *amicus curiae's* recommendation - to take part in the proceeding on the *in camera* application, because the judge did not have the power to make such a selection. Instead, he should have issued a public notice to allow any interested party to intervene.

150 Although this power may seem problematic, it does exist and the extradition judge did not err in exercising it. Furthermore, the injustice done to those who are not selected is less important than it appears to be. It is inevitable that there will be cases in which judges are forced to limit the number of participants in proceedings concerning the issue of open courts.

151 The issue of giving the media notice of applications that would limit the openness of court proceedings was addressed by Lamer C.J. in *Dagenais*. In that case, a motion for a publication ban had been made in the course of a criminal proceeding. Lamer C.J. concluded that the motion was criminal in nature and that solutions to the practical problems involved in notice to the media should therefore to be sought in the provincial rules of criminal procedure and the relevant case law. He accordingly considered Rule 6.04(1) of the *Ontario Court of Justice Criminal Proceedings Rules*, SI/92-99, which provided that "[t]he notice of application shall be served on all parties and, where there is uncertainty whether anyone else should be served, the applicant may make a motion without notice to a judge for an order for directions". This led him to hold that the choice of who was to be given notice and how notice was to be given was at the judge's discretion, and that the judge was to exercise that discretion in accordance with the provincial rules of criminal procedure and the relevant case law. For the same reason, he recognized that issues related to standing were also at the judge's discretion, and that the same conditions applied to the exercise of this discretion. (paras. 49-50).

152 In my opinion, the same approach should be taken to resolve the problems that arise in the case at bar. British Columbia's legislation seems to be silent on the procedural rules applicable to an extradition request. Parliament, on the other hand, has provided, in s. 24 of the *Extradition Act*, S.C. 1999, c. 18, that a judge who holds an extradition hearing has, subject to that Act, the powers of a justice acting under Part XVIII of the *Criminal Code*, which concerns the preliminary inquiry. Under s. 537(1)(*i*) of the *Criminal Code*, a justice holding a preliminary inquiry has the power to "regulate the course of the inquiry in any way that appears to the justice to be consistent with this Act". I infer from this that an extradition judge, who is customarily a superior court judge, has the power to regulate the course of the extradition hearing in any way that appears to him or her to be consistent with the *Criminal Code* and the *Extradition Act*. In my opinion, this power includes the power to invite interested parties to take part in proceedings incidental to the extradition request. The judge has some leeway as regards the conditions of this invitation, provided that these conditions facilitate the conduct of the hearing. On this basis, the extradition judge in the case at bar was entitled to select the media counsel he wanted to invite to take part in the proceeding on the *in camera* application.

153 Furthermore, judges will often be unable to avoid choosing who will be authorized to take part in proceedings on applications such as this. It is reasonable to assume that there will be cases of particular interest to the public in which many people will want to participate, if only to have access to the evidence they would need in order to take part, which would not otherwise be available to them. The people wanting to participate might therefore include not only media representatives, but also ordinary citizens. (At any rate, it must be acknowledged that it is becoming increasingly difficult to distinguish the two in this age of electronic media and the "blogosphere".) In such circumstances, it will generally be impossible to permit all these people to participate in the proceeding in light of the fact that judicial resources are limited and of the physical and legal framework of court proceedings. The judge will then have to decide who will be authorized to make submissions and therefore will not be able to avoid making choices, which will at times be problematic. In other words, the judge will often not be able to avoid these problematic choices. It consequently makes little difference whether they are made before or after the invitation. This seems to me to be particularly obvious in a case such as the one at bar, in which, after extending the invitation, the extradition judge still had to determine which media outlets and which lawyers would be able to give reliable undertakings of confidentiality.

154 The problem of an advantage being conferred upon certain media outlets is more apparent than real. It should not be forgotten that the information obtained by the media outlets in order to take part in the proceeding on the *in camera* application is, in practice, of no use to them in that it cannot be published until judgment is rendered on the issue. But if the judgment is favourable to the media, it will also be favourable to the general public, and the benefit will therefore not be limited to the media outlets chosen to participate in the proceeding. While it is true that the selected media outlets are in theory favoured over the others, in practice, being selected gives them no tangible advantage. No basis for interfering with this aspect of the decision under appeal has therefore been established.

V. Role of the *Amicus Curiae*

155 My colleague considers that the extradition judge erred in law in appointing an *amicus curiae* to assist him with the analysis of both the facts and the applicable law. In my colleague's view, although the extradition judge did have the power to appoint an *amicus curiae*, he should neverthe-

less have limited the role of the *amicus* to an analysis of the facts in the record. In my opinion, no legal rule limited in this way the extradition judge's power to appoint an *amicus curiae* and give the *amicus* what he considered the most appropriate terms of reference. As has already been mentioned, an extradition judge has the power to regulate the course of the extradition hearing in any way that appears to him or her to be consistent with the *Criminal Code* and the *Extradition Act*. Moreover, my colleague's position appears to me to be contrary to the well-established practice of allowing an *amicus curiae* to be appointed to assist a court with both the legal and factual aspects of a case. In this Court, the role played by the *amicus curiae* in the *Reference re Succession of Quebec*, [1998] 2 S.C.R. 217, is an obvious example of a case in which an *amicus curiae* was appointed to make submissions solely on questions of law. There have been other cases in which this Court has appointed an *amicus curiae* to provide assistance with respect to both facts and law (see *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 (in which the Court appointed an *amicus curiae* to present arguments against the Commission's jurisdiction); *Miron v. Trudel*, [1995] 2 S.C.R. 418 (in which the Court appointed an *amicus curiae* to make submissions with regard to s. 1 of the *Charter*); and *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724 (in which the Court appointed an *amicus curiae* because the respondents had declined to take part in the appeal)).

VI. Conclusion

156 For these reasons, I would allow the appeal, set aside the order under appeal, and remand the case to the extradition judge to decide what information may be disclosed to media counsel and the media representatives in accordance with the legal principles set out above.

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Solicitor for the appellant the Attorney General of Canada: Department of Justice, Vancouver.

Solicitors for the respondents The Vancouver Sun, The Province and BCTV: Ferris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the respondent Canadian Broadcasting Corporation: Owen Bird, Vancouver.

Solicitors for the respondent CTV, a Division of Bell Globemedia Inc.: Borden Ladner Gervais, Vancouver.

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Solicitors for the intervener the Law Society of British Columbia: McCarthy Tétrault, Vancouver.

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Corrigendum, released October 22, 2007

Please note the following change in *Named Person v. Vancouver Sun*, 2007 SCC 43, released on October 11, 2007, the references in the second sentence of para. 11 should both be to para. 48. Also, in the English version of the same sentence, "that *in camera*" should be "than *in camera*". The corrected sentence should read:

> The Extradition Judge determined that "the informant privilege rule does not act as a bar to proceeding otherwise than *in camera*" (para. 48) and that the issue of whether or not to proceed *in camera* "must be decided in accordance with the principles established in *Dagenais*, *Mentuck* and *Re Vancouver Sun*" (para. 48).

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