



SUPREME COURT OF CANADA

CITATION: Canadian
Broadcasting Corp. v. Named
Person, 2024 SCC 21

APPEALS HEARD: December 12
and 13, 2023

JUDGMENT RENDERED: June 7,
2024

DOCKET: 40371

BETWEEN:

**Canadian Broadcasting Corporation, La Presse inc., Coopérative nationale de
l'information indépendante (CN2i), Canadian Press Enterprises Inc.,
MediaQMI inc. and Groupe TVA inc.**
Appellants

and

Named Person and His Majesty The King
Respondents

AND BETWEEN:

Attorney General of Quebec
Appellant

and

Named Person and His Majesty The King
Respondents

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of Alberta, Lucie Rondeau, in her capacity as Chief Judge of the Court of Québec, Canadian Muslim Lawyers Association, Advocates' Society, Barreau du Québec, Association québécoise des avocats et avocates de la défense, Association des avocats de la défense de Montréal-Laval-Longueuil, Centre for Free Expression, Canadian Civil Liberties Association, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., Global News, a division of Corus Television Limited Partnership, Torstar Corporation, Glacier Media Inc. and Criminal Lawyers' Association (Ontario)
Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR The Court
JUDGMENT:
(paras. 1 to 93)

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Indexed as: Canadian Broadcasting Corp. v. Named Person

2024 SCC 21

File No.: 40371.

2023: December 12, 13; 2024: June 7.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Informer privilege — Open court principle — Motion for stay of proceedings and appeal by accused person having police informer status heard in camera, and information that might tend to identify person sealed — Interested third parties challenging confidentiality orders — Whether confidentiality orders were justified.

A person who had acted as an informer for a police force was charged with criminal offences. They brought a motion for a stay of proceedings based in part on abusive state conduct related to the laying of the charges. Because the person's informer

status was at the centre of the relevant factual framework and the parties' arguments, the judge dealing with the motion ordered that it be heard *in camera*. No notice was given to the media, since the judge was of the view that revealing anything about the motion, including its existence, would be likely to compromise the person's anonymity. The motion, its content and the exhibits and transcripts submitted to the judge remained confidential and were not listed in any docket. The motion was dismissed in a written judgment, which had no file number and was not public.

The person was subsequently convicted and appealed the conviction. The appeal was heard *in camera*, and no notice was given to the media. The Court of Appeal allowed the person's appeal, stayed the conviction and entered a stay of the criminal proceedings on the ground of abuse of process by the state. The Court of Appeal decided to open a record at its court office, accompanied by a sealing order, and to make public a version of its judgment in which the following information was redacted: the person's name; the identity of the court and the judge who heard the motion; the judicial district in which the proceeding was held; the identity of the prosecutor, counsel for the prosecution on appeal and counsel for the person; the identity of the police force and the police officers involved; the nature of the crime with which the person was charged and the circumstances of its commission. In that judgment, the Court of Appeal denounced the holding of a "secret trial", which alarmed the public and the media. It also expressed its disagreement with the scope of the confidentiality measures put in place for the person's trial.

A number of media organizations, the Attorney General of Quebec and the Chief Judge of the Court of Québec then asked the Court of Appeal to review the confidentiality orders made in the person’s case. In a second judgment, the Court of Appeal upheld the sealing of all information that might tend to identify the person. In its view, there was no possibility of disclosing any information that might tend to identify the person, at the risk of endangering them — it was therefore not possible to reveal their personal information, the nature, dates and circumstances of the offences with which they were charged, and the identity of the judge, the trial court, the judicial district, the prosecutor and counsel for the prosecution, counsel for the person and the police force involved. The Court of Appeal also refused to partially unseal the appeal record by redacting the same information as in the public version of its judgment. The media organizations and the Attorney General of Quebec appealed that second judgment to the Court.

Held: The appeals should be allowed in part.

No secret trial was held in this case. The magnitude of the controversy that arose after the Court of Appeal’s first judgment was released could have been limited if that court had not used the expression “secret trial” to describe what were actually *in camera* hearings held in a proceeding that began and initially moved forward publicly. When a court proceeds *in camera*, it is important that it rigorously apply the guiding rule from *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, requiring it to protect informer privilege while minimizing, as much as possible, any

impairment of the open court principle. In this case, the Court of Appeal was correct to dismiss the motions for disclosure of the information that had been kept confidential up to that time, but it erred in upholding its order that the entire appeal record be sealed. The case is remanded to the Court of Appeal so that it can make public a redacted version of the trial judgment included in the appeal record, after consulting the parties concerned on a proposal for partial unsealing and redaction.

Under the open court principle, every person, as a general rule, has the right to access the courts, to attend hearings, to consult court records and to report on their content. Court openness supports an administration of justice that is impartial, fair and in accordance with the rule of law. It also helps the public gain a better understanding of the justice system and all of its participants, which can only enhance public confidence in their integrity. Because of the fundamental importance of court openness, confidentiality orders limiting it can be made by the courts only in rare circumstances. These exceptions are predicated on the idea that openness cannot prevail if the ends of justice, or the interests that openness is meant to protect, would be better served in some other way.

One of these exceptions is informer privilege, which is a rule that protects from revelation in public or in court of the identity of those who give information related to criminal matters in confidence. The privilege is not limited simply to the informer's name, but rather extends to any information that might lead to identification. It applies whenever it is established that the police have received information under a

promise of confidentiality, whether implicit or explicit. Informer privilege is non-discretionary. Once informer status is established, courts are not permitted to weigh the maintenance or scope of the privilege on a case-by-case basis in light of the circumstances of the case and competing legitimate interests, such as the level of risk faced by the informer, the pursuit of truth or the preservation of public confidence in the administration of justice. Recognition of the non-discretionary and thus virtually absolute nature of informer privilege means that the interests protected by the open court principle yield to those protected by the privilege. The social justification for this privilege is found in the need to ensure performance of the policing function and maintenance of law and order. The ban on revealing the informer's identity has dual objectives: to protect the informer from possible retribution and to encourage other people to cooperate with the police in the future by sending them a signal that their identity too will be protected.

In *Vancouver Sun*, the Court addressed the relationship between the openness of court proceedings and informer privilege. It proposed a procedure to be applied when informer privilege is claimed, a procedure that is both flexible and malleable. This procedure has a single guiding rule: giving full effect to the requirements of this extremely broad and powerful privilege, under which a complete and total bar on any disclosure of the informer's identity applies, while limiting, as much as possible, any impairment of the open court principle. The procedure is divided into two stages. First, the court must verify the existence of the privilege. At this stage, evidence that a person is a police informer automatically engages the privilege. This is

a rule of public order. Second, having established the existence of informer privilege, the judge is charged with carrying on the proceedings without violating the privilege while at the same time accommodating, to the greatest extent possible, the open court principle, the right to be heard and the adversarial nature of the proceedings. It is at this stage that the court will determine the appropriate measures to protect the privilege. For the purposes of this determination, it may be helpful — and even generally desirable — for the court to allow third parties to make submissions on the confidentiality orders that would be appropriate to protect the informer’s anonymity while limiting any impairment of the open court principle. In lieu of or in addition to submissions from interested third parties, the court may consider it advisable to appoint an *amicus curiae* to provide it with guidance on the matter.

In order for a police informer’s anonymity to be protected, it is necessary and desirable that judges have the discretion to determine whether it is in the interests of justice to issue a notice to interested third parties advising them that the privilege has been claimed and that confidentiality orders are being contemplated. The existence of a discretion to issue a notice provides the court with the flexibility needed to ensure that, in each case, justice is served by adopting a procedure that is as consistent as possible with court openness without risking a breach of informer privilege. Well-settled jurisprudence unequivocally recognizes the importance of preserving this discretion, and there is no reason to depart from these precedents.

Nor is there any reason to depart from the current state of the law, under which as much information as possible should be disclosed to interested third parties, but never any information that might compromise the police informer's anonymity. It is not appropriate for information directly identifying the informer to be protected differently than information that is seemingly innocuous but may indirectly identify the informer. The disclosure of such privileged information to interested third parties or their representatives, even subject to undertakings of confidentiality, would unduly expand the circle of privilege, thus undermining the dual objectives of the informer privilege rule.

Where an informer is on trial, the informer asserts their status in a proceeding that began publicly in which they face charges that do not cause them to lose their status, and the informer-police relationship is central to the proceedings, the appropriate way to protect the informer's anonymity will generally be to proceed totally *in camera*. But even in these most confidential of cases, it is possible and even essential to protect the informer's anonymity while still favouring confidentiality orders that do not entirely or indefinitely conceal the existence of the *in camera* hearing and of any decision rendered as a result. This may require some creativity and perhaps some administrative arrangements, but at least one approach can be taken. This approach involves creating a parallel proceeding that is completely separate from the public proceeding in which informer privilege is initially invoked. The record for the parallel proceeding thereby created, though sealed, will have its own record number. Subject to the redaction of information that might tend to reveal the informer's identity, it will

generally be possible for the proceeding to be on the court's docket and hearing roll and for a public judgment to be released. This solution makes it possible to disclose at least a minimum amount of information to interested third parties, including the news media, that wish to file a motion for review of the confidentiality orders.

In this case, first of all, the person was not convicted following a secret criminal proceeding. The criminal proceeding against the person began and moved forward publicly until they filed a motion for a stay of proceedings. The Court of Appeal should not have used the expression "secret trial", which could have suggested that the person had been convicted following a secret criminal proceeding. In addition to being inaccurate, this expression is needlessly alarming and has no basis in Canadian law. The very concept of "secret trial" does not exist in Canada, and any comparison of hearings held totally *in camera* to a "secret trial" is wrong.

Next, having confirmed the person's informer status, the judge hearing the motion for a stay of proceedings correctly found that it had to be heard *in camera*, and his discretionary decision not to give notice to interested third parties was justified. However, there was no need for the motion for a stay of proceedings to be left off the court's docket and hearing roll and for no formal number to be assigned to it. In retrospect, after finding that it was necessary to proceed *in camera*, the trial judge should have made an order to that effect while creating a parallel proceeding completely separate from the criminal proceeding in which the person had been appearing publicly until that time. Subject to the redaction of information that might

link the parallel proceeding to the public proceeding and thus reveal the person's identity, the new proceeding thereby created could have been on the court's docket and hearing roll, and a redacted version of the judgment on the motion could have been released. As for the Court of Appeal, it had no choice but to redact its judgments as heavily as it did. However, it erred in upholding its order that the entire appeal record be sealed. It should have made public a version of the trial judgment that was redacted in such a way as to protect the person's anonymity. This was an entirely feasible undertaking that would have accommodated the open court principle and given a certain materiality to the confidential proceedings in issue.

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[2018] 2 S.C.R. 616; *R. v. Named Person B*, 2013 SCC 9, [2013] 1 S.C.R. 405; *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368; *R. v. Durham Regional Crime Stoppers Inc.*, 2017 SCC 45, [2017] 2 S.C.R. 157; *R. v. Hiscock* (1992), 72 C.C.C. (3d) 303; *R. v. Leipert*, [1997] 1 S.C.R. 281; *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Bilodeau v. Directeur des poursuites criminelles et pénales*, 2020 QCCA 1267; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *R. v. Omar*, 2007 ONCA 117, 218 C.C.C. (3d) 242; *R. v. A.B.*, 2024 ONCA 111; *R. v. Bacon*, 2020 BCCA 140, 386 C.C.C. (3d) 256; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092; *M. (A.) v. Toronto Police Service*, 2015 ONSC 5684, 127 O.R. (3d) 382; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521; *John Doe v. Halifax (Regional Municipality)*, 2017 NSSC 17, 7 C.P.C. (8th) 164; *Her Majesty the Queen v. Named Person A*, 2017 ABQB 552; *R. v. X and Y*, 2012 BCSC 325; *Postmedia Network Inc. v. Named Persons*, 2022 BCCA 431, 476 D.L.R. (4th) 747.

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APPEALS from a judgment of the Quebec Court of Appeal (Bich, Vauclair and Healy JJ.A.), 2022 QCCA 984, [2022] AZ-51867649, [2022] J.Q. n° 7045 (Lexis), 2022 CarswellQue 9416 (WL), dismissing motions for review of confidentiality orders and upholding the sealing of certain information. Appeals allowed in part.

Christian Leblanc, Patricia Hénault and Isabelle Kalar, for the appellants the Canadian Broadcasting Corporation, La Presse inc., Coopérative nationale de l’information indépendante (CN2i), Canadian Press Enterprises Inc., MediaQMI inc. and Groupe TVA inc.

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Jim Clark and Katie Doherty, for the intervener the Attorney General of Ontario.

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Olivier Desjardins and Ariane Gagnon-Rocque, for the intervener Lucie Rondeau, in her capacity as Chief Judge of the Court of Québec.

Sherif M. Foda, for the intervener the Canadian Muslim Lawyers Association.

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Mairi Springate and *Chantal Bellavance*, for the interveners Association québécoise des avocats et avocates de la défense and Association des avocats de la défense de Montréal-Laval-Longueuil.

Alexi Wood and *Abby Deshman*, for the intervener the Centre for Free Expression.

Adam Goldenberg and *Simon Bouthillier*, for the intervener the Canadian Civil Liberties Association.

Scott Dawson and *Catherine George*, for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., Global News, a division of Corus Television Limited Partnership, Torstar Corporation and Glacier Media Inc.

Anil K. Kapoor and *Alexandra Heine*, for the intervener the Criminal Lawyers' Association (Ontario).

English version of the judgment delivered by

THE COURT —

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I. Overview

[1] When justice is rendered in secret, without leaving any trace, respect for the rule of law is jeopardized and public confidence in the administration of justice may be shaken. The open court principle allows a society to guard against such risks, which erode the very foundations of democracy. By ensuring the accountability of the judiciary, court openness supports an administration of justice that is impartial, fair and in accordance with the rule of law. It also helps the public gain a better understanding of the justice system and its participants, which can only enhance public confidence in their integrity. Court openness is therefore of paramount importance to our democracy — an importance that is also reflected in the constitutional protection afforded to it in Canada.

[2] In this context, it is therefore hardly surprising that this case concerning Named Person, a police informer who, according to the Court of Appeal, was convicted following a “secret trial”, has provoked both concern and indignation among the public. The very idea that “secret trials” — that is, criminal proceedings of which no trace exists — may be conducted in our liberal democracy is indeed an intolerable one. Such proceedings go against the democratic ideals that Canadians hold dear.

[3] The controversy, which arose after the Court of Appeal released a judgment in March 2022 in which it misguidedly denounced the holding of a “secret trial”, was largely due to the gap between what the public knew and what it did not know, combined with the effect of the unfortunate expression used by the Court of Appeal.

That expression could in fact have suggested that Named Person had been convicted following a secret criminal proceeding. That state of affairs alarmed the public and the media. It also jeopardized public confidence in the justice system. But to be clear, no secret trial was held in this case. As can be seen from the Court of Appeal's second decision in July 2022, the criminal proceeding against Named Person began and moved forward publicly until Named Person filed a motion for a stay of proceedings based in part on the state's abusive conduct toward them as a police informer.

[4] In fact, the very concept of "secret trial" does not exist in Canada. This Court has long since delineated how the cardinal principle of court openness may be tempered where the circumstances of a case so require. Various confidentiality orders may be made during the proceeding for certain portions thereof, up to and including an order that all hearings be held *in camera*, that is, with all members of the public excluded for their entire duration. But it is well established that "secret trials", those that leave no trace, are not part of the range of possible measures. In this context, any comparison of hearings held totally *in camera* to a "secret trial" is wrong and needlessly alarming.

[5] These appeals therefore provide this Court with an opportunity to set the record straight, to reassure the public and to reaffirm the importance of ensuring that justice is administered openly and transparently. First, the appeals allow the Court to reiterate the relevance of the procedure set out in *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, and its guiding rule that a court must protect

informer privilege while minimizing, as much as possible, any impairment of the open court principle.

[6] Second, the appeals illustrate the excesses that may occur when the guiding rule from *Vancouver Sun* is not rigorously applied at the stage of conducting *in camera* proceedings. The appeals highlight the importance of reviewing how this rule should be applied, for the benefit of trial judges who, as in this case, determine that a police informer's identity can be protected only by proceeding totally *in camera*. Indeed, if the principles enunciated by this Court had been rigorously applied by the trial judge in dealing with the motion for a stay of proceedings, he would have created a parallel proceeding separate from the one in which Named Person had invoked informer privilege. This approach would have made the public aware of at least the existence of any *in camera* hearing held at trial and of any decision rendered as a result. The record for the parallel proceeding thereby created, though sealed, would have had its own number. Moreover, subject to the redaction of information that could link that new record to the proceeding that began publicly, the parallel proceeding could have been on the court's docket and hearing roll, and a redacted public judgment could have been released.

II. Procedural and Judicial History

[7] Named Person, a police informer, was charged with criminal offences. As their only defence, Named Person brought a motion for a stay of proceedings based both on the infringement of their right to be protected from any abusive state conduct

that had the effect of undermining the integrity of the justice system and on the infringement of their right to be tried within a reasonable time.

[8] A first *in camera* hearing was held to verify Named Person's status as a police informer. Following that hearing, there was no doubt in the mind of the judge hearing the motion that Named Person had acted as an informer for a police force. Because informer status was at the centre of the relevant factual framework and the parties' arguments, the judge ordered that the motion for a stay of proceedings be heard *in camera*. No notice was given to the media at that time, since the judge was of the view that revealing anything about the motion, including its existence, would be likely to compromise Named Person's anonymity. The motion, its content and the exhibits and transcripts submitted to the judge remained confidential and were not listed in any docket.

A. *Judgment at Trial Dismissing the Motion for a Stay of Proceedings*

[9] The motion for a stay of proceedings was dismissed. In the trial judge's view, it could not be concluded from the record that the state had acted abusively in laying charges against Named Person or that a stay of proceedings was warranted on the basis of unreasonable delay. That judgment had no file number and, like its existence and content, was not public.

[10] Named Person was subsequently convicted. They decided to appeal the conviction on the ground that the trial judge had erred in declining to find that the state

had acted abusively in laying charges. Their appeal did not concern the part of the judgment ruling on the infringement of their right to be tried within a reasonable time. Nor did the appeal relate to the existence of informer privilege or to the confidentiality orders made at trial to protect their anonymity.

B. *Judgment of the Quebec Court of Appeal of March 23, 2022, Entering a Stay of Proceedings for Abuse of Process, 2022 QCCA 406, 424 C.C.C. (3d) 322 (Bich, Vauclair and Healy J.J.A.)*

[11] On appeal, the parties asked that the proceedings remain *in camera*. The Court of Appeal agreed to their request while referring the question of whether the proceedings should be made public to the panel that was to hear the merits of the case. The appeal was therefore heard *in camera* and, as at trial, no notice was given to the media.

[12] On February 28, 2022, in a unanimous judgment, the Court of Appeal allowed Named Person's appeal, stayed the conviction and entered a stay of the criminal proceedings on the ground of abuse of process by the state. The Court of Appeal condemned the [TRANSLATION] "casual" approach that had been taken in recruiting Named Person as an informer (para. 148). Specifically, it criticized the police force that had recruited Named Person for not adequately informing Named Person before they began cooperating so that they would understand [TRANSLATION] "the limits of the protection offered [to them] and the possible consequences of [their] anticipated revelations" (para. 150). The failure to adequately inform Named Person, including the vagueness surrounding the parameters of their cooperation with the police

force, had led Named Person to believe that they [TRANSLATION] “had to admit all of the facts even if this implicated [them] in a crime, that nothing would be held against [them], and that the investigation was not interested in what [they] may have done” (para. 146). The court expressed the view that it was [TRANSLATION] “plainly offensive” for the state to turn against Named Person and lay charges on the basis of incriminating revelations (at para. 153) after implying to Named Person that they had to be transparent and “that [they] would not be prosecuted for past crimes” (para. 147). Such state conduct compromised the fairness of the trial and undermined the integrity of the judicial process, in addition to discouraging [TRANSLATION] “persons [from] provid[ing] information to the police” (para. 148).

[13] It should be noted that this conclusion reached by the Court of Appeal did not concern the question of *in camera* proceedings — a question that was not before it and that it addressed through preliminary remarks. In those remarks, the Court of Appeal expressed its disagreement with the scope of the confidentiality measures put in place for Named Person’s [TRANSLATION] “trial” (para. 11). It found that, as important as informer privilege may be, it cannot justify holding a trial of which [TRANSLATION] “no trace . . . exists, except in the memories of the individuals involved” (para. 11). In the court’s view, [TRANSLATION] “this manner of proceeding was exaggerated and contrary to the fundamental principles governing our legal system” (para. 14). A procedure that is [TRANSLATION] “[so] secretive . . . is absolutely contrary to modern criminal law that respects the constitutional rights not only of the accused, but also of the media. It is also inconsistent with the values of a liberal

democracy” (para. 15). Although the protection of informer privilege is of fundamental importance in our society, the fact remains that [TRANSLATION] “the trial itself must be public, subject to specific non-publication orders or partial *in camera* orders” (para. 16). For this reason, the Court of Appeal decided to open a record at its court office, accompanied by a sealing order, and to make public a redacted version of its judgment of February 28, 2022.

[14] Consequently, on March 23, 2022, after consulting the prosecutor and Named Person, the Court of Appeal released a version of its judgment in which the following information was redacted: Named Person’s name; the identity of the trial court and judge; the judicial district in which the proceeding was held; the identity of the prosecutor, counsel for the prosecution on appeal and counsel for Named Person; the identity of the police force and the police officers involved; the nature of the crime with which Named Person was charged and the circumstances of its commission. The nature of the redacted information was, however, indicated in brackets following each redacted passage.

[15] That decision, and more specifically the [TRANSLATION] “[p]reliminary remarks on the secret trial”, did not go unnoticed (para. 6). The public understood them as revealing the conduct of a secret criminal proceeding that had led to Named Person’s conviction. The idea that criminal proceedings of which no trace exists may be conducted in our democracy was inevitably met with shock and widespread incomprehension.

[16] That was the context in which, in early April 2022, the Canadian Broadcasting Corporation, La Presse inc., Coopérative nationale de l'information indépendante (CN2i), Canadian Press Enterprises Inc., MediaQMI inc., Groupe TVA inc. (“Canadian Broadcasting Corporation et al.”) and the Attorney General of Quebec (“AGQ”) (collectively referred to as “appellants”), along with the intervener the Honourable Lucie Rondeau, then Chief Judge of the Court of Québec, asked the Court of Appeal to review the confidentiality orders made in Named Person’s case by both the trial court and the Court of Appeal. More specifically, they requested that the orders be lifted in whole or in part or at least that limited access be given to the information that remained confidential.

C. *Judgment of the Quebec Court of Appeal of July 20, 2022, Dismissing the Motions for Review of the Confidentiality Orders, 2022 QCCA 984 (Bich, Vauclair and Healy J.J.A.)*

[17] On July 20, 2022, in a carefully crafted judgment, the Court of Appeal dismissed the motions brought by the appellants and the intervener Rondeau for review of the confidentiality orders and upheld the sealing of all information that might tend to identify Named Person. This is the judgment under appeal, on which this Court must rule.

[18] First, the Court of Appeal considered and denied the appellants’ requests to set aside or vary the confidentiality orders it had itself made. The court began by noting that it was [TRANSLATION] “indisputable” that Named Person was a police informer and was entitled to the privilege attaching to that status (at para. 103

(CanLII)), something that the appellants and the intervener Rondeau did not contest. This meant that there was no possibility [TRANSLATION] “of disclosing any information that might tend to identify Named Person, at the risk of endangering them”, including any “information that would make it possible for the people informed on by Named Person, their accomplices and associates or other members of the circle to which Named Person belonged or still belongs to identify them” (paras. 104-5). Therefore, while it was obviously not possible to reveal Named Person’s personal information (e.g., name, gender, address, employment, city of residence), it was also impermissible in this case to reveal [TRANSLATION] “the nature, dates and circumstances of the offences with which Named Person was charged”, because that information could compromise informer privilege (para. 106). In the court’s view, the same was true — as unusual as this may have seemed — of the identity of the judge, the trial court, the judicial district, the prosecutor and counsel for the prosecution, counsel for Named Person and the police force involved. The reason for this was that, given the information known to the public about this case, these details, together or separately, might tend to identify Named Person.

[19] The Court of Appeal also rejected the alternative argument that it should have partially unsealed the appeal record by redacting the same information as in the public version of the judgment of March 23, 2022. It viewed such partial unsealing as a task that was [TRANSLATION] “impracticable in light of the duty to preserve informer privilege” (para. 139). Even though [TRANSLATION] “the record is not very lengthy, this partial unsealing would require a particularly careful and keen eye so as not to overlook

details that might be revelatory” (para. 139). Given the complexity, sensitivity and high risk of error involved in such redaction, the Court of Appeal concluded that undertaking it was not appropriate.

[20] Second, the Court of Appeal considered the requests to set aside the confidentiality orders made by the trial court and denied them on the ground that it had no jurisdiction to set the orders aside. It explained that a court of appeal, unlike a superior court, has no inherent jurisdiction and that, as this Court held in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 (“*C.B.C. v. Manitoba*”), while a court of appeal can manage access to its records and review its own confidentiality orders, it cannot review orders made by another court unless they are before it on appeal, because [TRANSLATION] “[i]t has no sovereign or inherent power in this regard” (para. 144). The Court of Appeal added that [TRANSLATION] “the fact that, in its judgment on the appeal, [a court of appeal] criticized the manner of proceeding at trial (without being asked to rule on this question, which emerged on its own) does not mean that it acquired jurisdiction to correct or vary the trial judge’s orders” (para. 144). Finally, the court concluded, the fact that this situation put the appellants [TRANSLATION] “in a position where it was impossible to act” could not give the Court of Appeal jurisdiction to review the confidentiality orders made by the trial court (para. 146). This aspect of the Court of Appeal’s analysis, which concerned its lack of jurisdiction to set aside the confidentiality orders made by the trial court, is not being appealed by the parties.

[21] It is important to note here that, in this second decision, the Court of Appeal implicitly recognized that it had been wrong in using the expression “secret trial” in its preliminary remarks and that the expression had caused undue concern among the public. Although it did not explain why, it ceased referring to the erroneous concept of “secret trial”, which had alarmed the public because it could reasonably suggest that Named Person had been convicted following a secret proceeding. The Court of Appeal not only took care to avoid using the expression “secret trial” but now also clearly linked the *in camera* proceedings ordered without notice to the media, as well as the other confidentiality measures taken at trial, to the motion for a stay of proceedings.

III. Issues

[22] The appeals raise the following questions:

1. Should the procedure set out in *Vancouver Sun* be modified to make it more consistent with the open court principle?
2. How is the guiding rule from *Vancouver Sun* to be applied when proceeding *in camera*?
3. Did the Court of Appeal err in refusing to vary or set aside its confidentiality orders?

[23] We are of the view that the procedure proposed in *Vancouver Sun* should not be modified. In addition to departing from well-settled jurisprudence, the changes proposed by the Canadian Broadcasting Corporation et al. are not necessary or even desirable.

[24] Furthermore, we are of the view that the application of the guiding rule from *Vancouver Sun* — whereby full effect must be given to the requirements of informer privilege, which is broad and powerful, while minimizing any impairment of the open court principle — will necessarily ensure that, at a minimum, the existence of an *in camera* hearing and of any judgment rendered as a result will be made public. To this end, and in accordance with the circumstances of each case, it may be necessary to create a parallel proceeding that is completely separate from the public proceeding in which informer privilege is initially invoked. The record for the parallel proceeding thereby created, though sealed, will then have its own record number. Moreover, subject to the redaction of information that might tend to reveal the informer's identity, it will generally be possible for the proceeding to be on the court's docket and hearing roll and for a public judgment to be released. This is how the case before us should have moved forward at trial.

[25] Lastly, we are of the view that the Court of Appeal, in its redacted reasons, did not shield non-confidential information from public view. The combination of circumstances in this case meant that the Court of Appeal had no choice but to redact its reasons as heavily as it did. That being said, the Court of Appeal erred in upholding

its order that the entire appeal record be sealed. It should have made a redacted version of the trial judgment public.

IV. Analysis

[26] It will be helpful to begin the analysis by reviewing the importance of the open court principle and the rules surrounding informer privilege.

A. *Court Openness: A Pillar of Our Free and Democratic Society*

[27] This Court has repeatedly affirmed that the open court principle, which is protected by the constitutionally entrenched right of freedom of expression, is a pillar of our free and democratic society (*Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75, at paras. 1 and 30; *C.B.C. v. Manitoba*, at para. 78; *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162, at paras. 66 and 84; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (“*C.B.C. v. N.B.*”), at para. 23).

[28] The open court principle has two aspects: first, the public nature of hearings and court records, and second, the right to report on court proceedings. Under this principle, every person, as a general rule, has the right to access the courts, to attend hearings, to consult court records and to report on their content (see *Sherman*, at paras. 1-2; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at

pp. 1338-40; S. Menétrey, “L’évolution des fondements de la publicité des procédures judiciaires internes et son impact sur certaines procédures arbitrales internationales” (2008), 40 *Ottawa L. Rev.* 117, at p. 120, quoting A. Popovici, “Rapport sur le secret et la procédure en droit canadien”, in *Travaux de l’Association Henri Capitant*, vol. 25, *Le secret et le droit (Journées Libanaises)* (1974), 735, at p. 742).

[29] Coupled with the existence of free, robust and independent news media, the open court principle performs a number of important social and democratic functions. Among other things, it allows for informed debates and conversations in civil society about the courts and their workings, which helps ensure the accountability of the judiciary. As a result, this principle promotes both judicial independence and an administration of justice that is impartial, fair and in accordance with the rule of law. Open justice also facilitates the public’s understanding of the administration of justice and enhances public confidence in the integrity of the justice system and all of its participants (see *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at pp. 183 and 185; *Edmonton Journal*, at pp. 1337-40; *C.B.C. v. N.B.*, at para. 23; *Vancouver Sun (Re)*, at paras. 23-25; *Vancouver Sun*, at para. 32; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19 (“*C.B.C. v. Canada*”), at para. 28; *Denis v. Côté*, 2019 SCC 44, [2019] 3 S.C.R. 482, at para. 45; Menétrey, at pp. 124-27).

[30] Bailey and Burkell eloquently describe some of the important functions of open and transparent justice, including in maintaining the legitimacy of the justice system:

The very legitimacy of the legal system depends on “public acceptance of process and outcome,” and the open court system promotes this acceptance by ensuring the accountability of the justice system. . . .

. . .

It is not just judges who are presumably held to account by the open court principle. The principle is also said to support positive results with respect to other justice system players and functions outside of the courtroom, including police officers and warrants. The openness of trials has been held to be an expression of the judge’s confidence that what happens in the courtroom is “beyond reproach.” Transparency in the processes of justice is not only thought to act as a “powerful disinfectant” for exposing and remedying abuses; by acting in public view, the courts can demonstrate that fair trials (rather than show trials where conviction is a foregone conclusion) are still happening.

The open court principle, therefore, can clearly be understood to be a means of assuring the public accountability of the court system and its key actors, particularly judges. [Footnotes omitted.]

(J. Bailey and J. Burkell, “Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties’ and Witnesses’ Personal Information” (2016), 48 *Ottawa L. Rev.* 143, at pp. 152-53)

Their comments clearly underscore how court openness helps to maintain and enhance public confidence in, and serves “in a way as a guarantee of”, the integrity of the justice system, including all of its participants (*C.B.C. v. Canada*, at para. 28).

[31] When it comes to the social and democratic functions of the open court principle, the key role played by the news media cannot be overemphasized. Indeed, without free, robust and independent news media to inform the Canadian public of what is happening in courtrooms, and in the justice system more broadly, open justice is of only limited social and democratic utility. The reason for this is that, in the vast majority of cases, it is the media that serve as “the eyes and ears of a wider public which would be absolutely entitled to attend [proceedings under way] but for purely practical reasons cannot do so” (*Sherman*, at para. 30, quoting *Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161, at para. 16; see also *Edmonton Journal*, at pp. 1339-40). As Cory J. wrote in *Edmonton Journal*, “[i]t is only through the press that most individuals can really learn of what is transpiring in the courts” (p. 1340). It is only the presence of free, robust and independent news media that actually enables the public to understand and form an opinion on the justice system, to hold it accountable and to have confidence in it (see *Edmonton Journal*, at p. 1340, quoted in *C.B.C. v. N.B.*, at para. 23).

[32] Because of the fundamental importance of court openness, confidentiality orders limiting it can be made by the courts only in rare circumstances. These exceptions, which may be either statutory or judicial in nature, are predicated on the idea that openness cannot prevail if the ends of justice, or the interests that openness is meant to protect, would be better served in some other way (see *Scott v. Scott*, [1913] A.C. 417 (H.L.); *MacIntyre*; *Edmonton Journal*; *C.B.C. v. N.B.*; see also Men  tre  y, at

p. 126). One of these exceptions is informer privilege, which is the one in question in this case.

B. *Informer Privilege*

[33] Informer privilege is a “judicially created ‘rule of public policy’ designed to further the ends of law enforcement” (R. W. Hubbard and K. Doherty, *The Law of Privilege in Canada* (loose-leaf), at § 2:22). It is a “rule . . . which protects from revelation in public or in court of the identity of those who give information related to criminal matters in confidence” (*Vancouver Sun*, at para. 16). It applies whenever it is established that the police have received information under a promise of confidentiality, whether implicit or explicit (*R. v. Brassington*, 2018 SCC 37, [2018] 2 S.C.R. 616, at para. 34; *R. v. Named Person B*, 2013 SCC 9, [2013] 1 S.C.R. 405, at paras. 1-4 and 18, quoting *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, at para. 31).

[34] It will be helpful to briefly explain (1) the rationale for this privilege, (2) how it forms an exception to the open court principle and (3) its broad scope.

(1) Rationale for Informer Privilege

[35] This Court has had many occasions to emphasize the crucial role played by informer privilege in furthering the effectiveness of criminal investigations, the maintenance of public order and the protection of the public. For example, in *R. v. Durham Regional Crime Stoppers Inc.*, 2017 SCC 45, [2017] 2 S.C.R. 157, Moldaver J.

eloquently explained the rationale for informer privilege and the reason why it ultimately serves the public interest:

As with all privileges, informer privilege is granted in the public interest. Informers pass on useful information to the police which may otherwise be difficult or even impossible to obtain. They thus play a critical role in the investigation of crime and the apprehension of criminals. The police and the criminal justice system rely on informers — and society as a whole benefits from their assistance: see *R. v. Leipert*, [1997] 1 S.C.R. 281, at para. 9; *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, at para. 30. In fulfilling this important role, informers often face the risk of retribution from those involved in criminal activity: *Leipert*, at para. 9. Accordingly, informer privilege was developed to protect the identity of citizens who provide information to law enforcement: *ibid.* By protecting those who assist the police in this manner — and encouraging others to do the same — the privilege furthers the interests of justice and the maintenance of public order: see *R. v. Hiscock* (1992), 72 C.C.C. (3d) 303 (Que. C.A.), at p. 328, leave to appeal refused, [1993] 1 S.C.R. vi. [Emphasis added; para. 12.]

(See also *Brassington*, at para. 35.)

[36] Similarly, in *Vancouver Sun*, LeBel J., dissenting but not on this point, aptly noted that “the social justification for this privilege [is] found in the need to ensure performance of the policing function and maintenance of law and order” and that this protection is ultimately granted not in the interest of the informer, “but in the interest of more effective law enforcement” (para. 111, citing *R. v. Hiscock* (1992), 72 C.C.C. (3d) 303 (Que. C.A.), and quoted in *Durham*, at para. 12).

- (2) The Interests Protected by the Open Court Principle Yield to Those Protected by Informer Privilege

[37] Informer privilege is of such importance that it has repeatedly been characterized as “absolute” or “near absolute”. This characterization can be explained by the fact that the privilege is non-discretionary, in the sense that its recognition does not depend on any balancing of interests. This means that once informer status is established, courts are not permitted to weigh the maintenance or scope of the privilege on a case-by-case basis in light of the circumstances of the case and competing legitimate interests, such as the level of risk faced by the informer, the pursuit of truth or the preservation of public confidence in the administration of justice (see *Vancouver Sun*, at paras. 4, 22, 26 and 55; *R. v. Leipert*, [1997] 1 S.C.R. 281, at paras. 12 and 14; *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389, at paras. 22 and 37; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 42; *Barros*, at paras. 1, 30 and 35; *Durham*, at paras. 1, 11 and 14-15; *Brassington*, at para. 36; *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48, at paras. 6 and 8; J. Fournier, “Les privilèges en droit de la preuve: un nécessaire retour aux sources” (2019), 53 *R.J.T.U.M.* 461, at pp. 489, 491-92 and 495).

[38] The informer privilege rule applies in civil, administrative and criminal proceedings and admits but one exception, under the criminal law, in cases where this is “necessary to establish innocence in a criminal trial” (*Vancouver Sun*, at para. 27). The exception is a narrow one that is distinct from the broader right of an accused to make full answer and defence (see *Basi*, at paras. 22, 37 and 43; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at pp. 93 and 107; *Barros*, at paras. 28 and 34; *Durham*, at para. 14;

Brassington, at para. 36; *Vancouver Sun*, at para. 26; Hubbard and Doherty, at §§ 2:7 and 2:13).

[39] This privilege belongs “both to the Crown and to the informer and neither can waive it without the consent of the other” (*Durham*, at para. 11, citing *Vancouver Sun*, at para. 25). As long as its application has not been validly waived, the police, the Crown and the courts have a duty to keep the identity of informers confidential. These three actors are part of the very limited circle of privilege, which the courts have refused to widen to include, for example, defence counsel or the syndic of the Barreau du Québec (see *Vancouver Sun*, at paras. 21 and 25-26; *Basi*, at paras. 44-45; *Barros*, at para. 37; *Bilodeau v. Directeur des poursuites criminelles et pénales*, 2020 QCCA 1267; D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 334).

[40] In the case of the courts, the duty to keep a police informer’s identity confidential means that they do not have “any discretion to disclose . . . information [that might tend to identify the informer] in any proceeding” (*Vancouver Sun*, at para. 30), even where limiting the scope of the privilege in a particular case would allow “more complete justice” to be done (*Bisaillon*, at p. 102). The application of the privilege is not subject to any formal requirement, and judges must even ensure respect for it of their own motion (see *Bisaillon*, at p. 93). Therefore, contrary to the arguments made by the Canadian Broadcasting Corporation et al. (A.F., at paras. 68 and 79), the test developed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and

R. v. Mentuck, 2001 SCC 76, [2001] 3 S.C.R. 442, and reformulated in *Sherman* is of no assistance, because a judge has no discretion once it is shown that informer privilege applies (*Vancouver Sun*, at paras. 34-37).

[41] As the Court of Appeal correctly pointed out, non-discretionary privileges must [TRANSLATION] “take precedence over any other consideration, even of public order or public interest, with some limited exceptions” (2022 QCCA 984, at para. 53). Relying on this Court’s decision in *National Post* (at para. 42) and quoting Beetz J. in *Bisaillon* (at pp. 97-98), the Court of Appeal then made the following comments, which are worth reproducing:

[TRANSLATION] It is a privilege that produces its effects “without regard to the particulars of the situation” (thus without regard to the facts of each case) **and without it being necessary to establish harm, which is in fact presumed, or an increase in the risk of harm.** Indeed, this is how it differs from privilege recognized on a case-by-case basis, which calls for such a balancing of the interests of those who claim confidentiality and must show that it is necessary against the interests of those who oppose it or seek access to information. As Beetz J. explained in *Bisaillon*, comparing Crown privilege and informer privilege:

This procedure, designed to implement Crown privilege, is pointless in the case of secrecy regarding a police informer. **In this case, the law gives the Minister, and the Court after him, no power of weighing or evaluating various aspects of the public interest which are in conflict, since it has already resolved the conflict itself. It has decided once and for all, subject to the law being changed, that information regarding police informers’ identity will be, because of its content, a class of information which it is in the public interest to keep secret, and that this interest will prevail over the need to ensure the highest possible standard of justice.** [Bold added; para. 53.]

[42] In short, recognition of the non-discretionary and thus virtually absolute nature of informer privilege means that the interests protected by the open court principle yield to those protected by informer privilege. This is a difficult societal choice in the sense that it may, in some circumstances, prevail over other very important public interest objectives — for example, promoting the accountability of the judiciary through open justice, favouring adversarial proceedings and ensuring the pursuit of truth — but it is a choice that is essential in guaranteeing the effectiveness of police investigations, the maintenance of public order and the protection of the Canadian public.

(3) Scope of Informer Privilege

[43] It should be emphasized that informer privilege is extremely broad in its application. It applies “to the identity of every informer: it applies where the informer is not present, where the informer is present, and even where the informer himself or herself is a witness”, and it applies “to both documentary evidence and oral testimony” (*Vancouver Sun*, at para. 26). It “is not limited simply to the informer’s name”, but rather “extends to any information that might lead to identification” (para. 26 (emphasis added); see also *Leipert*, at para. 18; *Durham*, at para. 11; *Brassington*, at para. 48).

[44] In practical terms, the fact that the privilege covers all information that *might* lead to the identification of the police informer means that the courts must always be guided by a principle of caution: any information — even the smallest detail — that may lead directly or indirectly to the identification of the informer must be kept

confidential (see *Leipert*, at para. 18; *Vancouver Sun*, at paras. 26 and 30; *Durham*, at para. 11; *Brassington*, at para. 48). Furthermore, the sensitivity of information, in relation to the preservation of the informer's anonymity, must be assessed in light of the circumstances of each case, having regard to the perspective of the informer's accomplices and the members of the criminal circle to which the informer belongs. This can easily be explained by "the dual objectives which underlie the informer privilege rule: [n]ot 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" (*Vancouver Sun*, at para. 18).

[45] This is of particular importance in the so-called "usual" scenarios. In the context of a criminal proceeding, the informer is generally not themselves an accused but rather a third party who has provided the police with information in order to facilitate their investigation and the gathering of incriminating evidence. The question of informer privilege thus arises indirectly in the proceeding, for example at the stage of Crown disclosure or when a police officer being questioned about what led them to take a certain step invokes this privilege (see *Vancouver Sun*, at para. 24). In such situations, "only the accused incriminated by the tipster may know what details narrow the pool of potential informants", which means that "[t]he tiniest and most seemingly innocuous of details could reveal the identity of an informer", and which also provides further justification for the principle of caution based on the perspective of those in the same criminal circle as the informer (Hubbard and Doherty, at § 2:6; see also *R. v.*

Omar, 2007 ONCA 117, 218 C.C.C. (3d) 242, at paras. 43-44; *R. v. A.B.*, 2024 ONCA 111, at para. 38 (CanLII).

[46] Therefore, all details — even those that would seem the most innocuous to a person outside the police informer’s network — must be kept confidential to the extent that their disclosure risks jeopardizing the informer’s safety. In case of doubt, where it is difficult or impossible to identify the information that might compromise the informer’s anonymity, the principle of caution requires that the information provided by the informer be kept confidential (see *Leipert*, at para. 32; M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales 2023* (30th ed. 2023), at paras. 43.36-43.37).

C. *Procedure Proposed in Vancouver Sun*

[47] In *Vancouver Sun*, this Court addressed the relationship between the openness of court proceedings and informer privilege. It proposed a procedure to be applied when informer privilege is claimed, a procedure that is both flexible and malleable. This procedure has a single guiding rule: giving full effect to the requirements of this “privilege which is extremely broad and powerful”, under which “a complete and total bar on any disclosure of the informer’s identity applies”, while limiting, as much as possible, any impairment of the open court principle (para. 30; see also paras. 40-41, 44 and 55).

[48] This Court has since applied the procedure in various decisions (see, e.g., *Basi*; *Durham*). It is divided into two stages. First, the court must verify the existence of the privilege. For this purpose, it will hold an *in camera* hearing that, if necessary, will be *ex parte* (see *Vancouver Sun*, at paras. 46 and 49; *Basi*, at paras. 41-44; *Durham*, at paras. 36-37). At this first stage, “even the claim of informer privilege must not be disclosed” (*Vancouver Sun*, at para. 47). Generally, only the police informer and the Crown — that is, the holders of the privilege — may attend the hearing (*Vancouver Sun*, at para. 46; *Durham*, at para. 35). Exceptionally, the hearing may also be attended by those who are in the circle of privilege, such as a police officer called to testify about the existence of the privilege. In addition, an *amicus curiae* may be present “in those unusual situations in which the judge finds this to be necessary” because the non-adversarial nature of the proceeding gives cause for concern (*Vancouver Sun*, at paras. 47-49; see also *Basi*, at para. 38; *Brassington*, at para. 38). This stage requires the greatest caution to be exercised: no third party — which is to say no one outside the circle of privilege — may attend the hearing (*Vancouver Sun*, at para. 49; see also paras. 46-47; *Basi*, at para. 44; *Durham*, at para. 35). The judge’s responsibility at this stage is “to demand from the parties some evidence which satisfies the judge, on balance, that the person is a confidential informer” (*Vancouver Sun*, at para. 47). We emphasize that, at this stage, evidence that a person is a police informer automatically engages the privilege (at para. 47); the judge has no discretion in this regard (*Barros*, at para. 1). This is a rule of public order (*Leipert*, at para. 13, quoting *Bisailon*, at p. 93).

[49] At the second stage, having established the existence of informer privilege, the judge is charged with carrying on the proceedings without violating the privilege while at the same time accommodating, to the greatest extent possible, the open court principle, the right to be heard and the adversarial nature of the proceedings (*Vancouver Sun*, at paras. 50-51). At this stage, the court will determine the appropriate measures to protect informer privilege. For the purposes of this determination, it may be helpful — and even generally desirable — for the court to allow third parties to make submissions on the confidentiality orders that would be appropriate to protect the informer’s anonymity while limiting any impairment of the open court principle. In lieu of or in addition to submissions from interested third parties, the court may consider it advisable to appoint an *amicus curiae* to provide it with guidance on the matter. The reason for opting for this solution is that, in most cases, the court does not have the benefit of adversarial debate on the matter — given that, with some exceptions, it is in the interest of both the Crown and the police informer to argue strenuously in favour of non-disclosure of all the information in issue. Regardless of the approach chosen, the court should, while exercising great vigilance, disclose as much information as possible to the third parties or the *amicus curiae* to help ensure that their submissions are helpful. No information, even the smallest detail, that might compromise the informer’s anonymity can be disclosed to them (paras. 51 and 58).

[50] If the court decides to issue a public notice inviting interested third parties to make submissions on confidentiality orders, or if interested third parties learn in some other way that arguments are to be made on confidentiality orders, the judge will

then have to hear their submissions in order to determine what confidentiality orders are appropriate. 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” (*Vancouver Sun*, at para. 54; see also para. 56).

[51] It should be noted that the appropriate confidentiality orders will vary with the circumstances of each case. As the Court of Appeal pointed out, echoing Bastarache J.’s remarks in *Vancouver Sun*, it will be necessary in some cases to proceed totally or partially *in camera* and to seal the court record in whole or in part, while in other cases it may be sufficient to protect only a few documents or the informer’s name, and there is a wide range of situations possible between these two extremes. Everything depends on the unique circumstances of each case — and first and foremost on the nature and extent of the informer’s participation in the proceeding. If this individual is involved as an informer in a third party’s trial, which is the most common scenario, the protection required may vary based, among other things, on whether or not they testify. Similarly, the confidentiality orders needed to protect this individual’s anonymity will vary according to whether their role in the proceeding is secondary or whether, on the contrary, the individual and their informer status are at the centre of the case, as here (see *Vancouver Sun*, at para. 56; 2022 QCCA 984, at para. 65).

[52] The Canadian Broadcasting Corporation et al. argue that it is time to modify this second stage of the *Vancouver Sun* procedure to make it more consistent with the open court principle. In their opinion, the present case and a similar one from

British Columbia, the existence of which was kept from the public, reveal the shortcomings of this stage (A.F., at paras. 11, 14 and 78, citing *R. v. Bacon*, 2020 BCCA 140, 386 C.C.C. (3d) 256). They submit that these cases demonstrate the need to limit or even eliminate the judge's discretion and also to ease restrictions on the disclosure of information that might tend to identify a police informer to interested third parties wishing to make submissions on confidentiality orders.

[53] Specifically, the Canadian Broadcasting Corporation et al. first ask that this Court transform what has so far been the judge's discretion to hear interested third parties on confidentiality orders into a duty to do so. They suggest that a duty be imposed on the presiding judge to issue a notice to interested third parties, and principally the media, advising them that informer privilege has been claimed and that arguments will soon be made on the appropriate measures to protect it (A.F., at paras. 76-84). In their opinion, transforming the judge's discretion into a duty in this manner is the only way to ensure that a case is never again [TRANSLATION] "removed from the view" of the public (para. 14; see also transcript, at pp. 27, 31 and 41-46). In addition, to enable interested third parties to make detailed submissions and to ensure that there is an informed adversarial debate on confidentiality orders, they take the view that all information that does not directly identify the informer should be disclosed to interested third parties, or at least to their counsel, possibly with undertakings of confidentiality given in return. In the alternative, if the disclosure of this information is not possible, they suggest that interested third parties, or only their counsel, be apprised of the nature of the information sought to be shielded from public view and the reason

for keeping the information confidential so that they can make arguments in this regard (A.F., at paras. 85, 87-90, 96 and 98).

[54] With respect, we disagree. In addition to departing from well-settled jurisprudence, the changes called for are not necessary or even desirable.

(1) Judges Must Retain the Discretion to Issue a Notice to Interested Third Parties

[55] Since there are many circumstances in which informer privilege is claimed, it is imperative that judges have the discretion to determine whether it is in the interests of justice to issue a notice to interested third parties advising them that the privilege has been claimed and that arguments will soon be made on the appropriate confidentiality orders (*Vancouver Sun*, at paras. 52-54). While it can be presumed that issuing a notice will generally be in the interests of justice, it is always possible that doing so will not be appropriate in a particular case, such as where the “holder of the privilege is present and plays an active role in court” (para. 54).

[56] In *Vancouver Sun*, a majority of this Court considered and rejected the idea that issuing a notice to interested third parties becomes mandatory where the making of confidentiality orders is being contemplated to protect a police informer’s anonymity. The Court explained that this discretion is justified on the basis that no one has a constitutional right to be informed of all situations in which informer privilege is claimed:

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. [Emphasis added; para. 53.]

[57] Similarly, the importance of maintaining discretion in issuing such a notice was recently reiterated by the majority in *C.B.C. v. Manitoba* in the context of discretionary confidentiality orders:

To be clear, limits on court openness, such as a publication ban, can be made without prior notice to the media. Given the importance of the open court principle and the role of the media in informing the public about the activities of courts, it may generally be appropriate to give prior notice to the media, in addition to those persons who would be directly affected by the publication ban or sealing order, when seeking a limit on court openness (see *Jane Doe v. Manitoba*, 2005 MBCA 57, 192 Man. R. (2d) 309, at para. 24; *M. (A.) v. Toronto Police Service*, 2015 ONSC 5684, 127 O.R. (3d) 382 (Div. Ct.), at para. 6). But whether and when this notice should be given is ultimately a matter within the discretion of the relevant court (*Dagenais*, at p. 869; *M. (A.)*, at para. 5). I agree with the submissions of the attorneys general of British Columbia and Ontario that the circumstances in which orders limiting court openness are made vary and that courts have the requisite discretionary authority to ensure justice is served in each individual case. [Emphasis added; para. 51.]

[58] There is no reason to depart from these precedents. Anecdotal examples of the misapplication of the guiding rule from *Vancouver Sun* cannot on their own justify altering well-settled jurisprudence, which unequivocally recognizes the importance of

preserving the courts' discretion to issue a public notice when they are about to make orders limiting court openness. Such cases do not suffice to show that one of our precedents can be overturned either because it is unworkable and undermines one of the purposes of *stare decisis* (see, e.g., *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at paras. 42-44; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 18-22; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438, at paras. 24-28; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at paras. 32 and 38; *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, at pp. 817-18 and 824-25) or because its foundations have been eroded (see, e.g., *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at pp. 1243-46; *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092, at paras. 15-17, 19, 23 and 25).

[59] Furthermore, we agree with the attorneys general of Canada and Ontario that it is necessary and desirable for the courts to have the discretion to decide whether issuing a notice to interested third parties is in the interests of justice where confidentiality orders are being contemplated to protect a police informer's anonymity (I.F., Attorney General of Canada, at paras. 15-18; I.F., Attorney General of Ontario, at paras. 18-23). We take this view because one cannot exclude the possibility that a rigid rule would prevent an informer's anonymity from being preserved in a particular case. For this reason, the existence of a discretion to issue a notice — rather than an absolute duty to do so — provides the court with the flexibility needed to ensure that, in each case, justice is served by adopting a procedure that is as consistent as possible with the open court principle without risking a breach of informer privilege. Finally,

when the court is considering whether it is appropriate to issue a notice to interested third parties, the court must still bear in mind that it is only exceptionally that the best interests of justice will require that no notice be given to the public (see *C.B.C. v. Manitoba*, at para. 51, citing, among others, *M. (A.) v. Toronto Police Service*, 2015 ONSC 5684, 127 O.R. (3d) 382 (Div. Ct.), at para. 6).

(2) The Disclosure of Privileged Information to Interested Third Parties or Their Representatives Would Unduly Expand the Circle of Privilege

[60] This Court is also unable to accept the argument of the Canadian Broadcasting Corporation et al. that any information that does not directly identify the informer should be disclosed to interested third parties. The possibility of disclosing such information only to counsel for the interested third parties, subject to certain undertakings of confidentiality, changes nothing in this regard.

[61] Such a position ignores the principle reiterated time and again by this Court that all information — even the most innocuous — that might tend to directly or indirectly identify the informer must be kept confidential. If this position were accepted, it would be tantamount to saying that it is appropriate for information directly identifying the informer to be protected differently than information that is seemingly innocuous but may indirectly identify the informer. Yet the creation of such a hierarchy for these two types of information has been rejected in our jurisprudence (see *Leipert*, at para. 18; *Vancouver Sun*, at paras. 26 and 30; *Durham*, at para. 11; *Brassington*, at para. 48).

[62] As Bastarache J. wrote in *Vancouver Sun*, a judge “must be extremely careful” when considering what information to disclose to interested third parties wishing to make submissions on confidentiality orders (para. 58). The information disclosed must be limited to “non-identifying information . . . ; no identifying information can be given to the media under any circumstances” (para. 58). The reason is simple: the disclosure of such privileged information, even subject to undertakings of confidentiality, would unduly expand the circle of privilege, thus undermining the dual objectives of the informer privilege rule, that is, protecting the anonymity of present informers and encouraging other people to cooperate with the police in the future (*Leipert*, at para. 9; *Vancouver Sun*, at para. 18; *Durham*, at para. 12; *Brassington*, at para. 35).

[63] Furthermore, the position stated by the Canadian Broadcasting Corporation et al. conflicts not only with this Court’s pronouncements in *Vancouver Sun* but also with those in *Basi*. In the latter case, the Court held that informer privilege cannot be lifted in favour of defence counsel merely because they are bound by orders and undertakings of confidentiality, even if such disclosure might support an accused’s constitutional right to make full answer and defence (see paras. 42-46; see also *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521, at para. 51; *Brassington*, at paras. 41-46). This principle must, *a fortiori*, apply to disclosure to interested third parties or their representatives, persons who do not face criminal charges.

[64] In short, we are not convinced that there is any reason to depart from the current state of the law, under which as much information as possible should be disclosed to interested third parties, but never any information that might compromise the police informer's anonymity. The Canadian Broadcasting Corporation et al. may consider this rule imperfect or insufficient, insofar as the submissions made by interested third parties might be even more relevant if they had access to more information, but it is a rule that must be reiterated because it has the advantage of ensuring that the dual objectives underlying the informer privilege rule are achieved while at the same time maximizing the helpfulness of the submissions made by interested third parties.

[65] Lastly, we are also not convinced of the merits of the alternative solution proposed by the Canadian Broadcasting Corporation et al. They argue that if information that might tend to indirectly identify the informer cannot be disclosed to interested third parties, then these parties should at least be systematically apprised of both the nature of the information sought to be shielded from public view and the concrete reason for not disclosing the information to them so that they can make arguments in this regard. We agree with the Attorney General of Ontario that, in addition to endangering the protection of the informer's anonymity, this position seems to overlook the fact that the rationale for confidentiality orders in such cases — to protect informer privilege — leaves no room for a balancing of competing interests (see *Vancouver Sun*, at paras. 34-37; I.F., Attorney General of Ontario, at paras. 17 and 22). To be clear, this does not mean that disclosing this information will never be

appropriate. However, turning such disclosure into a systematic and inflexible rule might unduly tie the courts' hands and, ultimately, limit their ability to render justice in each case.

D. *Review of How the Guiding Rule From Vancouver Sun Should Be Applied When Proceeding In Camera*

[66] Having found that the procedure set out in *Vancouver Sun* should not be modified, we will now explain what the application of the guiding rule from *Vancouver Sun* requires when proceeding *in camera*. More specifically, we will review how this rule should be applied in order to ensure that judges in circumstances analogous to those in the present case will adopt a procedure that, while protecting the informer's identity, accommodates the open court principle to the greatest extent possible. Before doing so, however, we want to reiterate that Named Person was not convicted following a secret proceeding.

(1) Named Person Was Not Convicted Following a Secret Proceeding

[67] The redacted reasons released by the Court of Appeal on March 23, 2022, in which it criticized the fact that there was “no trace” of Named Person's trial (at para. 11), led the public to believe that Named Person had been convicted following a secret criminal proceeding, the existence of which would have been concealed indefinitely from the public had it not been for the appeal to the Court of Appeal. Public concern and indignation were further fuelled by the use of the erroneous expression

“secret trial”, which was repeated by the news media in a great many articles and stories.

[68] However, nothing of the sort occurred. Named Person was not convicted following a secret criminal proceeding. This fact is implicit in the Court of Appeal’s reasons of July 20, 2022, in which it backtracked and not only took care to avoid using the expression “secret trial” but now also clearly linked the *in camera* proceedings without notice to the media, as well as the other confidentiality measures, to the motion for a stay of proceedings (see paras. 18-19, 126, 131 and 136). It can also be inferred from the application of the *Vancouver Sun* procedure at trial. Under this procedure, the claim to informer status is made in a proceeding that begins publicly through the filing of a criminal prosecution and that then generally moves forward publicly (see *Vancouver Sun*, at paras. 6 and 46). This remains true even in rare and unusual cases like the one before us where the accused is prosecuted for crimes that do not cause them to lose their informer status, and in respect of which they provided information to a police force. One reason for this is that the Crown, in fulfilling its absolute duty to keep the accused’s informer status confidential, cannot presume when it initiates criminal proceedings against the accused that the accused will agree to reveal their informer status to their counsel and will raise a defence related to that status (see *Hubbard and Doherty*, at § 2:22).

[69] The proceeding against Named Person therefore began publicly through the filing of a criminal prosecution. It moved forward publicly until Named Person

decided to bring a motion for a stay of proceedings based on the state's abusive conduct toward them as a police informer. The proceeding then continued in accordance with the two-stage procedure set out in *Vancouver Sun*. First, as he was required to do, the judge held an *in camera* hearing to verify Named Person's status as an informer (see *Vancouver Sun*, at paras. 46-47 and 49). Second, having confirmed Named Person's informer status, the judge correctly found that the motion for a stay of proceedings had to be heard *in camera*, given that Named Person's status as a police informer was central to the parties' arguments and the evidence adduced in support of the motion (see *Vancouver Sun*, at paras. 55-56). At this second stage, the judge decided that it was not appropriate to give notice to interested third parties — a discretionary decision that was his to make and that was justified in this case (see *Vancouver Sun*, at para. 54).

[70] At all times, the judge and the justice system participants involved acted with honesty, integrity and a sincere desire to protect Named Person's anonymity. However, when it came to proceeding *in camera*, the judge mistakenly thought that the only approach to be taken in the unusual circumstances of this case was to completely conceal the existence of any *in camera* hearing related to Named Person's status as a police informer and of any decision rendered as a result. Yet there was no need for the motion for a stay of proceedings to be left off the court's docket and hearing roll and for no formal number to be assigned to it. There was a procedure that would have better accommodated the open court principle and been equally respectful of informer privilege. We will explain this procedure in the next section.

(2) How the Guiding Rule From *Vancouver Sun* Should Be Applied

[71] Where, as in this case, an informer asserts their status in a proceeding that began publicly in which they face charges that do not cause them to lose their status, and the informer-police relationship is central to the proceedings, the situation is particularly delicate. The appropriate way to protect the informer's anonymity will generally be to proceed totally *in camera*. Indeed, the fact that such a degree of confidentiality may be required in exceptional cases like the present one was expressly contemplated by Bastarache J. in *Vancouver Sun*, at para. 56 (see also J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (loose-leaf), at § 2:29, citing, among others, *John Doe v. Halifax (Regional Municipality)*, 2017 NSSC 17, 7 C.P.C. (8th) 164; see also *R. v. B. (A.)*, 2015 ONSC 5541, 24 C.R. (7th) 191).

[72] Once it is found to be necessary to proceed *in camera*, the application of the guiding rule from *Vancouver Sun* requires the presiding judge to do so in a manner that is as consistent as possible with the open court principle. In this regard, we note that even in the most confidential of cases, it is possible — and we would go so far as to say essential — to protect the informer's anonymity while still favouring confidentiality orders that do not entirely or indefinitely keep the existence of a hearing or judgment from the public. Although this may require some creativity and perhaps some administrative arrangements, what is in issue is compliance with the guiding rule from *Vancouver Sun* and the maintenance of public confidence in the administration of justice.

[73] Indeed, the rigorous application of the guiding rule from *Vancouver Sun* will necessarily ensure that, at a minimum, the existence of the *in camera* hearing and of any decision rendered as a result will be made public. Of course, it may well be that a range of information, including the reason for proceeding *in camera*, will have to be kept confidential. It is also possible, in an extreme case, that the existence of the *in camera* hearing will not be made public until after the fact, for example once a judgment has been released. Similarly, it is possible that, exceptionally, a judgment rendered following an *in camera* hearing must be kept under seal. But we have difficulty imagining a single scenario in which revealing the mere *existence* of an *in camera* hearing and of any decision rendered as a result is incompatible with the protection of an informer's anonymity, such that their existence must remain confidential indefinitely. Such a minimum threshold for openness also has added importance in enabling interested third parties to file a motion for review of the confidentiality orders and thus to prevent the judiciary from avoiding any form of accountability (*C.B.C. v. Manitoba*, at para. 52).

[74] In a case like this one, at least one approach can be taken to ensure that the existence of an *in camera* hearing and of any decision rendered as a result is not kept from the public entirely or indefinitely.

[75] This approach involves creating a parallel proceeding that is completely separate from the public proceeding in which informer privilege is initially invoked. The record for the parallel proceeding thereby created, though sealed, will have its own

record number. Moreover, subject to the redaction of information that might tend to reveal the informer's identity, it will generally be possible for the proceeding to be on the court's docket and hearing roll and for a public judgment to be released. As an illustration of what such a public judgment might look like, consider what was done in *B. (A.)*. In that case, arguments on the accused's guilt and on a motion for a stay of proceedings based on an allegation of abuse of process by the state against the accused, who had acted as a police informer, were made at hearings held entirely *in camera*, and a redacted public judgment on these matters was then released. The presiding judge described the measures put in place to protect informer privilege as follows:

The accused, AB, is charged with some of the most serious drug related offences under the *Controlled Drugs and Substances Act*. AB had been a confidential informant with the Z Police Service ("ABC PF") for a number of years prior to his/her arrest. He/she had been deemed a reliable informant. His/her defence and an abuse of process application arise out of his/her role as a confidential informant. It is because of this that throughout these Reasons I will be using pseudonyms for all of the individuals who played any role in the evidence as it unfolded during the trial. It is for the same reason that these Reasons will not identify when or where the events transpired, nor will my Reasons identify the type of drug involved. The trial, in its entirety, was held *in camera*. My Reasons will also refer to AB as he/she so as not to reveal his/her sex and thereby further protect his/her identity. Only in this way can AB's identity as a confidential informant be protected. An unedited version of my Reasons disclosing the names of all of the witnesses and his/her related information will be given to counsel and one copy will be filed with the court that will be sealed, to be opened only by order of this Court. The version of these Reasons that becomes public will have been reviewed with counsel to ensure that AB's identity has been fully protected. [para. 4]

[76] At the time of creating a parallel proceeding, the presiding judge must consider what information has to remain confidential in the context of that new

proceeding in order to prevent the two proceedings from being linked to each other. The judge must therefore exercise the greatest caution so as not to compromise the police informer's anonymity. There may be cases in which several pieces of information must remain confidential because of the particular features of the proceeding that began publicly. For example, the protection of informer privilege may require that one or more of the following details be kept confidential: the judge's identity, the identity of the parties' counsel, the prosecutor's identity, the judicial district or the date of a proceeding or judgment (see, e.g., *Her Majesty the Queen v. Named Person A*, 2017 ABQB 552, at paras. 7-8 (CanLII); *R. v. X and Y*, 2012 BCSC 325). The reason for this is that, in some contexts, the disclosure of one or more of these details may significantly increase the risk of an informer's identity being revealed indirectly simply through the linking of data.

[77] Where information of this kind is identified, the judge must then ask whether measures can be contemplated to accommodate the open court principle, in keeping with the guiding rule set out in *Vancouver Sun*. For example, the measures contemplated might involve a change of judge or prosecution counsel, if this would not cause undue delay or other prejudice to the accused, or the hearing of the application in another judicial district. However, if the circumstances do not allow for measures that interfere less with court openness, the judge must order that this information be kept confidential. The information will not appear in the public record for the parallel proceeding, thereby preventing the identification of the police informer.

[78] In addition, where a decision is rendered in the parallel proceeding following an *in camera* hearing, the presiding judge must consider whether the decision can be made public, subject to the redaction of confidential information. While this can generally be expected to be the case, it is always possible that exceptional cases may arise in which the protection of a police informer's identity will require that a judgment rendered following an *in camera* hearing be kept under seal, despite the creation of a parallel proceeding separate from the initial proceeding in which privilege was claimed.

[79] In every scenario, however, the creation of a parallel proceeding makes it possible to disclose, at a minimum, the existence of the *in camera* hearing and of any decision rendered as a result. The public can learn of their existence through the court's docket or hearing roll and, in appropriate circumstances, through notice that a sealed judgment has been delivered. Further, with rare exceptions, the creation of a parallel proceeding has the advantage of making the public aware of the decisions rendered at trial and, where applicable, on appeal, decisions that inform the public of at least the nature of the issues ruled on by the court and the reason for proceeding *in camera*.

[80] This approach has the advantage of not excluding the possibility, in cases where the interests of justice so require, of providing public notice of a proceeding in which an accused invokes informer privilege and of the court's intention to proceed *in camera*, so that interested third parties can make submissions on how the open court principle can best be accommodated in the circumstances (see *Vancouver Sun*, at paras. 52-54). We note in this regard that, even in the context of a parallel proceeding,

the presiding judge, before allowing interested third parties to make their submissions, may have to take special measures to prevent the proceedings from being linked to each other.

[81] Finally, this solution makes it possible to disclose at least a minimum amount of information to interested third parties, including the news media, that wish to file a motion for review of the confidentiality orders. This lessens the risk of the unfortunate occurrence where a news outlet that has become aware of the *in camera* hearing is unable to make helpful submissions because it is impossible for the court to provide it with a minimum amount of information, including the nature of the privilege invoked (see *Postmedia Network Inc. v. Named Persons*, 2022 BCCA 431, 476 D.L.R. (4th) 747).

[82] In the present case, after finding that it was necessary to proceed *in camera*, the trial judge could and, in retrospect, should have made an order to that effect while creating a parallel proceeding completely separate from the criminal proceeding in which Named Person had been appearing publicly until that time. That parallel proceeding would have had its own record number. Moreover, subject to the redaction of information that might link the parallel proceeding to the public proceeding and thus reveal Named Person's identity, the new proceeding thereby created could have been on the court's docket and hearing roll, and a redacted version of the judgment on the motion could have been released. Although this Court is not, strictly speaking, hearing an appeal from the confidentiality orders made at trial, we are of the view that it is

important to emphasize this to ensure that this type of situation does not occur again in the future.

[83] Having made these clarifications, we will now address the Court of Appeal's decision to dismiss the appellants' motions for review of its confidentiality orders and to uphold the sealing of all information that might tend to identify Named Person.

E. *Confidentiality Orders Made by the Court of Appeal*

[84] The Court of Appeal's decision to open a record in the court office and to make public a redacted version of its judgment of February 28, 2022, allowing Named Person's appeal, staying the conviction and entering a stay of proceedings was correct. These measures were necessary both to accommodate the open court principle and to promote the democratic ideals that define it. While the decision made public by the Court of Appeal is heavily redacted and the record created is sealed, the decision has the merit of disclosing to the public the existence of *in camera* proceedings as well as the abuse of process committed against Named Person in the course of a criminal prosecution.

[85] That being said, the Canadian Broadcasting Corporation et al. are challenging the Court of Appeal's refusal to lift its confidentiality orders in whole or in part. They are asking this Court to ensure that the redaction undertaken by the Court of Appeal in its two judgments to protect Named Person's anonymity is justified and

that it impairs the open court principle as little as possible (A.F., at para. 102). In addition, like the AGQ, the Canadian Broadcasting Corporation et al. argue that the Court of Appeal's repeated refusal to partially unseal the appeal record is unjustified. In their opinion, the Court of Appeal should, at a minimum, have unsealed the appeal record in a manner that corresponded to the redaction of the public version of its judgment of February 28, 2022, in which, among other things, it publicly disclosed excerpts from the trial judgment and from the transcript of the police officers' out-of-court examinations that were in the appeal record (A.F., AGQ, at paras. 11, 28 and 30-33; A.F., Canadian Broadcasting Corporation et al., at paras. 49 and 54).

[86] In our view, only one aspect of the confidentiality orders reviewed and upheld by the Court of Appeal is problematic in relation to the open court principle, namely the court's decision not to partially unseal the appeal record in order to make a redacted version of the trial judgment public.

[87] First of all, with regard to the extent of the redaction done by the Court of Appeal in its two judgments, that court did not unduly shield information in those judgments from public view. In the circumstances of this case, the Court of Appeal had no choice but to redact its judgments as heavily as it did. These circumstances include, of course, the fact that Named Person initially appeared in a public criminal proceeding and that the informer-police relationship was central to Named Person's motion for a stay of proceedings, but there are also other particular and unusual circumstances, which, however, must remain confidential so as not to risk compromising Named

Person's anonymity. We are therefore of the opinion that the Court of Appeal had a duty to keep confidential Named Person's name, the identity of the trial court and judge, the judicial district in which the proceeding was held, the identity of the prosecutor and the prosecution counsel involved in the case, the identity of counsel for Named Person, the identity of the police force and the police officers involved, the nature of the crime with which Named Person was charged and the circumstances of its commission. Otherwise, there would have been a real risk in this case of compromising Named Person's identity.

[88] Second, with regard to the Court of Appeal's decision to uphold the order to seal the entire appeal record, we are of the view that it erred in refusing to make public a version of the trial judgment that was redacted in such a way as to protect Named Person's anonymity. It is apparent from reading that judgment that this was an entirely feasible undertaking that would have accommodated the open court principle and given a certain materiality to the confidential proceedings in issue. As for the rest of the appeal record, we agree with the Court of Appeal that partial unsealing carried with it too high a risk of error in this case given the number of details that had to be kept confidential to preserve Named Person's anonymity. The Court of Appeal did not err in refusing to undertake such an unsealing exercise. The principle of caution that must guide the courts in protecting Named Person's anonymity required that the rest of the appeal record be kept under seal.

V. Conclusion

[89] Named Person was not convicted following a secret criminal proceeding. The controversy that arose after the release in March 2022 of the Court of Appeal's judgment in which it denounced the holding of a "secret trial" is unfortunate and could have been avoided. First and foremost, it could have been avoided if the trial judge had proceeded *in camera* by creating a parallel proceeding completely separate from the criminal proceeding in which Named Person had been appearing publicly until that time. The magnitude of the controversy could also have been limited if the Court of Appeal had not used the expression "secret trial" to describe what were actually *in camera* hearings held in a proceeding that began and initially moved forward publicly. In addition to being inaccurate, this expression is needlessly alarming and has no basis in Canadian law.

[90] Moreover, we want to reiterate the relevance of the *Vancouver Sun* procedure and the importance of rigorously applying its guiding rule requiring a court to protect informer privilege while minimizing, as much as possible, any impairment of the open court principle. For this purpose, the courts must be flexible and creative. What is in issue is the maintenance of public confidence in the administration of justice and respect for the rule of law.

[91] In fairness to the Court of Appeal, it was in a difficult position, as it had before it an appeal that did not relate in any way to the trial judge's confidentiality orders. In this context, we can only commend its decision to proactively champion the open court principle and the democratic ideals underlying it by opening a record at its

court office and making public a redacted version of its judgment of February 28, 2022. Given the particular circumstances of this case, the Court of Appeal had no choice but to redact its judgments as heavily as it did. It was therefore correct to dismiss the motions for total or partial disclosure of the information that had been kept confidential up to that time. However, it erred in upholding its order that the entire appeal record be sealed. It should have made public a redacted version of the trial judgment, because redacting that decision was an entirely feasible undertaking that did not compromise Named Person's anonymity and that accommodated the open court principle.

[92] In closing, even though errors were made, there is no doubt that all of the justice system participants involved were in good faith and acted with integrity. They were all motivated by a sincere desire to protect Named Person's anonymity, as was their duty. We believe that this decision will be helpful and will guide trial judges who must proceed *in camera*, in order to ensure that they accommodate the open court principle to the greatest extent possible.

VI. Disposition

[93] For these reasons, the Court allows the appeals in part and remands the case to the Quebec Court of Appeal so that it can make public a redacted version of the trial judgment included in the appeal record, after consulting the respondents on a proposal for partial unsealing and redaction.

Appeals allowed in part.

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