The Supreme Court of Canada holds police informer proceeding was not a “secret trial”

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The Supreme Court of Canada ’s Decision in *Canadian Broadcasting Corp. v. Named Person* (2024 SCC 21)

In a unanimous decision by the Court, the Supreme Court of Canada (SCC) emphasized that there was no “secret trial” when parts of a police informer’s criminal trial were held *in camera* in Québec. The Court highlighted the fundamental importance of court openness, though it must yield to the extent required to protect police informer privilege.

The Court affirmed the two-step procedure proposed in *Named Person v Vancouver Sun*, 2007 SCC 43, is to be applied when informer privilege is claimed. In doing so, the Court rejected the appellants’ requests for modifications to make it easier for third parties to respond to requests for confidentiality orders. The guiding principle of *Vancouver Sun* is to give full effect to informer privilege through a complete bar on any disclosure of identity, while limiting, to the extent possible, any impairment of the open court principle. Although the Court agreed with the Québec Court of Appeal’s decision to heavily redact its reasons to maintain the confidentiality of the informant, it overturned the Court of Appeal’s decision to seal the entire appeal record, remanding the case to the Court of Appeal to make a redacted version of the trial judgement publicly available.

Background

“Named Person”, a police informer, was charged with criminal offences based on information they gave while acting as a police informer. Named Person brought a motion for a stay of proceedings based on alleged abusive state conduct in bringing the charges. A first *in camera* hearing was held to verify Named Person’s informer status. Because Named Person’s informer status was at the centre of the relevant issues, the motion judge heard the motion for a stay of proceedings *in camera* as well. No notice was given to the media because the motion judge felt that public knowledge of the mere existence of the motion could compromise Named Person’s identity. In addition, no court record of the *in camera* session was made; the content of the exhibits and transcripts reviewed by the motion judge remained confidential and were not listed on any docket. The judge dismissed the stay motion, finding that there was no abusive

conduct in the laying of the charges. The motion judgment had no file number and was not public. Named Person was subsequently convicted on the criminal charges.

Named Person appealed the conviction on the grounds that the motion judge erred in declining to find that the state had acted abusively in laying the charges. The appeal was heard *in camera* and once again, no notice was given to the media. The Court of Appeal unanimously allowed the 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 held that the failure to adequately inform Named Person about the consequences of their information led Named Person to believe that he had to admit all the facts even if it implicated him in the crime as well, and that nothing they admitted would be held against them. The Court concluded that for the police to then lay charges against Named Person on the basis of incriminating revelations was "plainly offensive".

The Court of Appeal released a heavily redacted version of its decision. Although the appropriateness of the *in camera* proceedings were not at issue before the Court of Appeal, in the opening remarks to its decision, the Court denounced the holding of a "secret trial" for which there was no public record, and expressed its concern with the scope of the confidentiality measures put into place for Named Person's trial, stating that the manner in which the court below proceeded was "contrary to the fundamental principles governing our legal system". The phrase "secret trial" in particular alarmed the public and the media.

The Attorney General of Québec and various media organizations, along with the Chief Judge of the Court of Québec as intervener, asked the Court of Appeal to review the confidentiality orders made in the case. In its second decision, the Court of Appeal upheld the sealing of the information that might tend to identify the person and refused to partially unseal the appeal record. It is this second decision that the media organizations and the Attorney General of Québec appealed to the SCC.

The SCC's unanimous decision

The Court openness and informer privilege balancing exercise

The SCC called the Court of Appeal's use of the phrase "secret trial" in the context of this case "needlessly alarming". The SCC stated that the controversy that occurred after the Court of Appeal's first decision could have been mitigated had it chosen different words to describe what were *in camera* hearings held in a proceeding that was initially public. The SCC took the opportunity to "set the record straight, to reassure the public and to reaffirm the importance of ensuring that justice is administered openly and transparently."

The SCC reaffirmed the necessity of maintaining public confidence in the administration of justice. The open court principle is protected by the constitutionally entrenched rights of freedom of expression and is a pillar of Canadian society. Allowing public access to courts and court records promotes an impartial and fair judicial system that enhances public confidence in the integrity of the justice system. The SCC also specifically commented on the important role that news outlets play in informing Canadians of what goes on in the courtroom and in the justice system. Confidentiality orders limiting court openness can only be made in rare circumstances. Informer privilege is one judicially

created exception to court openness that is granted in the interest of more effective law enforcement.

The SCC previously addressed the relationship between court openness and informer privilege in the *Vancouver Sun*, where the Court confirmed that informer privilege 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). This privilege has been characterized as "near absolute" because it is non-discretionary; once informer status is established courts are not permitted to determine the scope of the privilege by weighing legitimate interests such as level of risk faced by the informer, the pursuit of truth, or the administration of justice (see, for example, *Vancouver Sun*, at paras 4, 22, 26 and 55; *R. v. National Post*, 2010 SCC 16 at para 42). The scope of the informer privilege extends to any information that might lead to identification and therefore, any details that might put the informant at risk if disclosed must be kept confidential.

Confidentiality procedures when informer privilege is claimed

The *Vancouver Sun* proposed a two-step process to be applied when informer privilege is claimed. First, the court must verify the existence of the privilege via an *in camera* hearing. Once informer privilege is established, the judge must carry on the proceedings without violating that privilege while at the same time accommodating the open court principle to the greatest extent possible. It is at this second stage that the court determines the appropriate measures to protect informer privilege.

In *CBC v Named Person*, the SCC rejected requests by the media appellants to modify the Vancouver Sun's procedure, including a request to make notice to third parties mandatory. Instead, the Court confirmed that judges retain their discretion for determining what constitutes an appropriate measure and are not required to issue notices to third parties like the media when informer privilege has been claimed during a court proceeding. While issuing a notice will generally be in the interests of justice, it is critical that judges maintain a discretion to determine if this is appropriate on a case-by-case basis. The SCC also rejected the media appellant's alternative argument that any information that does not directly identify the informer should be disclosed to interested third parties, noting the often-repeated principle that even seemingly innocuous information if it might tend to indirectly identify the informer must be kept confidential.

The SCC reiterated that the trial was not a "secret trial", but rather progressed according to the two-stage *Vancouver Sun* procedure. There was a public criminal trial. When the informer brought a motion for a stay of proceedings based on the state's abusive conduct toward them as a police informer, the judge first held an *in camera* hearing to verify the informer status. Second, using their discretion, the judge found the stay motion needed to be heard *in camera* and the media did not need to be notified. These discretionary decisions were justified.

The SCC confirmed that the trial judge erred, however, in assuming that the very *existence* of the *in camera* hearing and the decision rendered needed to be concealed. The SCC held that in a case like this one a parallel proceeding should be created. This parallel proceeding, separate from the original public proceeding, can be sealed but will have its own record number. Subject to any necessary redaction of identifying information, it will generally be possible for the proceeding to be listed on the court's

docket and hearing roll, and for a public judgment to be released (although that will not always be the case). At a minimum therefore, the parallel proceeding makes it possible to disclose the existence of the *in camera* hearings and any decision rendered. Importantly, at the time the parallel proceeding is created the judge has to consider what information must remain confidential so that the two proceedings do not become linked to each other. In the present case, after finding it was necessary to proceed *in camera*, the trial judge should have created a parallel proceeding separate from the criminal proceeding in which the informer was named.

The propriety of confidentiality redactions in judgements

The SCC held that the Court of Appeal was correct in releasing a heavily redacted version of their judgement and not partially unsealing the records, agreeing that such a process carried too great a risk for error given the number of details that had to be kept confidential to maintain the informer's anonymity. However, the Court of Appeal erred when it refused to make public a redacted version of the trial judgement. The SCC remanded the case to the Court of Appeal to make public a redacted version of the trial judgement that was included in the appeal record, after consultation with the concerned parties.

Key takeaways

The SCC once again affirmed the importance of the open court principle in maintaining public confidence in the administration of justice even when there are other pressing and countervailing considerations at play. The SCC made it clear that "the very concept of 'secret trial' does not exist in Canada". A proceeding conducted entirely *in camera* without court record is not appropriate nor consistent with the Canadian justice system. While the principle of court openness is balanced against the need for confidentiality when the circumstances require, "it is well established that 'secret trials', those that leave no trace, are not part of the range of possible measures."

In the context of informer privilege, which the SCC described as "nearly absolute", no balancing of interests takes place. The Court reiterated that all information, even the most innocuous, that might tend to identify the informer directly or indirectly must be kept confidential. There is no judicial discretion, and informer privilege is not balanced against any countervailing public interests. Nevertheless, to appropriately balance the confidentiality needed when informer privilege is invoked with the fundamental principle of court openness, procedures should be crafted in such a way as to minimize the incursion on court openness to the extent possible. This may require the court to get "creative" and set in place some administrative arrangements. One approach that would have worked in this case would have been to set up a parallel proceeding to ensure that there was at least a record of the *existence* of the *in camera* proceedings. It remains to be seen if trial judges will accept the court's invitation to invent other "creative" administrative processes to balance confidentiality concerns with protection of court openness in other scenarios.

For more information, please reach out to one of the key contacts listed below.

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