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Supreme Court of Canada Reprimands Québec Court of Appeal's Use of "Secret Trial"

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In a unanimous decision recently released in *Canadian Broadcasting Corp. v Named Person*, the Supreme Court of Canada (SCC) allowed, in part, the appeal from the Court of Appeal of Québec (QCA), which had sealed virtually all the information in the QCA's records in order to protect the identity of a police informer (Named Person) who had been convicted of undisclosed criminal offences. The SCC confirmed that the test outlined in *Named Person v Vancouver Sun (Vancouver Sun)* is the proper procedure to follow to protect informer privilege, and that a trial judge has a broad discretion to balance this privilege with the open court principle. However, the SCC held that the QCA should have also ordered a partial lift of the sealing order on the appeal record to make public a redacted version of the trial judgment. The SCC, in unusual fashion, admonished the QCA for its use of the expression "secret trial" to describe the events at issue, noting that this had needlessly alarmed the Canadian public and misrepresented the true nature of the proceedings.

Decision

Facts

The appeal arose out of the conviction of Named Person, who had been forced to either renounce their informer privilege and cooperate by testifying in court or face charges personally. Having refused to waive the protection offered by informer privilege, Named Person was charged with undisclosed criminal offences. As the only defence, Named Person brought a motion for a stay of proceedings on abuse of process grounds. At the parties' joint request, the hearing was held *in camera* to protect Named Person's status as a police informer. The trial judge convicted Named Person in an unpublished judgment that bore no court file number.

Named Person appealed the conviction to the QCA, which allowed the appeal and entered a stay of proceedings in Named Person's favour. A court file was opened in the QCA and a redacted version of its reasons was made public on March 23, 2022, almost a month after judgment had been rendered. Only then did the media organizations and the public learn of the "secret trial". Four motions were then brought by members of the media requesting that the QCA review and set aside the sealing order it had issued upon releasing its judgment on the appeal. The then chief judge of the Court of Quebec also intervened to submit additional evidence. On July 20, 2022, the QCA dismissed the review motions and upheld the sealing of all information that might tend to identify Named Person.

The Media's Position

The media argued before the SCC that the confidentiality orders issued by the QCA did not meet the requirements of the procedure laid out in the *Vancouver Sun* decision, which never contemplated the possibility that a court case could exist without even a file number. The *Vancouver Sun* decision requires the application of a two-step analysis: (i) determining the existence and scope of informer privilege; and (ii) the appropriate measures to protect it. The media argued, in particular, that the application of this two-step analysis should, in every case, lead trial judges to issue a notice to interested third parties, especially the media, advising them that informer privilege had been claimed and that it would entertain submissions on the appropriate measures to protect it, giving due consideration to the open court principle. The media further submitted that giving notice to interested third parties should be a duty imposed on judges, which would provide a safeguard from judges exercising their discretion in a way to remove the file from public view. The judge also argued that the QCA's use of the "secret trial" expression had misled the public.

Analysis

In a unanimous judgment, the SCC rejected most of the media's proposals, finding that they would turn disclosure into a systematic and inflexible rule that might unduly limit a trial judge's discretion and jeopardize the protection of informer privilege.

The SCC reaffirmed that the two-step analysis laid down in *Vancouver Sun* remained the proper procedure to follow and that the trial judge retained the necessary discretion in each case to determine the best means to protect informer privilege while accommodating the open court principle to the greatest extent possible. At the first step, an *in camera* hearing is held to establish the existence of informer privilege. If necessary, this hearing can be held *ex parte*. At the second step, with informer privilege established, the court would use its broad discretionary powers to determine which measures are necessary to allow the case to proceed without breaching the privilege—all the while accommodating, to the greatest extent possible, the fundamental open court principle.

The SCC endorsed the procedure used in the Ontario case of *R v B(A)* to create a parallel court file that is completely separate from the public proceeding in which informer privilege is initially invoked. The file provides sufficient information to interested third parties about the existence of the *in camera* hearing without revealing the informant's identity—for example, by using pseudonyms.

The SCC deemed it necessary to clarify that Named Person was not convicted following a “secret criminal proceeding” and that the QCA's use of “secret trial” was misleading and inappropriate. The SCC stated that in Canada, the concept of a secret trial does not exist and that any comparison of hearings held totally *in camera* to a “secret trial” is wrong and undermined public confidence in the justice system.

Conclusion

The SCC's decision highlights the importance of informer privilege and the open court principle as two fundamental values of the Canadian justice system.

On the one hand, informer privilege is a legal principle that plays a critical role in the administration of justice. It is predicated on the idea that individuals who provide information to law enforcement agencies should be able to do so with the assurance of confidentiality. This privilege is essential because it encourages informants to come forward, without fear of retribution or harm, with information that can be vital in solving crimes or preventing future ones. The protection of informers is not only a matter of personal safety but also a matter of public interest.

On the other hand, under the open court principle, as a general rule every person 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.

The SCC emphasized both the need for a nuanced and context-specific approach to balance these two foundational values in each case and the crucial role of judicial discretion in achieving this balance. While these principles are clear, their application can be fraught with difficulty.

Finally, the SCC's decision serves as a reminder of the responsibility of the judges, courts and media to use accurate and appropriate language to describe the nature and scope of the proceedings and to avoid sensationalizing or misrepresenting the facts.

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