Unofficial English Translation of the Judgment of the Court

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| Personne désignée c. R. | | | | | 2022 QCCA 406 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | MONTREAL | | |
| No.: | 500-10-007758-228 | | | | |
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| DATE: | March 23, 2022 | | | | |
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| CORAM: | | THE HONOURABLE | | MARIE-FRANCE BICH, J.A.  MARTIN VAUCLAIR, J.A.  PATRICK HEALY, J.A. | |
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| Named Person | | | | | |
| APPELLANT – Accused | | | | | |
| v. | | | | | |
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| Her Majesty the Queen | | | | | |
| RESPONDENT – Prosecutrix | | | | | |
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| JUDGMENT  Redacted Public Version | | | | | |
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1. On February 28, 2022, the judgment of the Court was rendered and signed. Due to informer privilege, the Court consulted the parties to receive their comments on a proposed redaction.
2. After this consultation, additional redacting and a few purely stylistic corrections were made. The new version attached to this judgment is the product of this process. The original version of the judgment of February 28, 2022, and the version thus corrected remain under seal. The public version is redacted.

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|  | | PATRICK HEALY, J.A. |
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| Counsel for the appellant | | |
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| Counsel for the respondent | | |
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| Date of hearing: | — — — — — | |

**SCHEDULE**

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| Her Majesty the Queen | | | | | |
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| JUDGMENT OF FEBRUARY 28, 2022 | | | | | |
| **(PUBLIC, CORRECTED, AND REDACTED VERSION)** | | | | | |
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1. The appellant[[1]](#footnote-1) appeals against a conviction rendered — —— - [date] by the Honourable — — — — — — — — — —,district of — — — , ensuing from the dismissal of an abuse of process motion by a judgment rendered on — — — — — - [date].

Introduction

1. On — — [date], the — — — — — — — — — — — — — — — — — — -[Z] claimed to be the victim of a crime in progress, namely, — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — [nature of the crime and one aspect of the *modus operandi*]*.* The appellant, Named Person (“NP”), knew — — — — — — — — — — — — — — . At the request — — — — — — — — — — — — — — — — - NP — — — — — — — — — — — — — — — — — — - [details about the victim and NP’s general involvement].
2. In fact, the parties agree on the general framework involving NP — — — — — — — — — — — — — — [NP’s involvement]. NP was therefore party to the crime — — — — — — — — — — — — — — — — — — — [one aspect of the *modus operandi*]. For the purposes of the appeal, the crime in question will be referred to as file X.
3. — — — — - [time elapsed] later, as will be more fully explained, NP became a police informer.[[2]](#footnote-2) Then, in a reversal of the situation, after having revealed the offence to the police, NP was charged with participating in the offence in file X, and convicted. At trial, NP claimed that the charges brought against [him or her] constituted, in the circumstances, an abuse of process. NP failed to convince the judge. On appeal, NP argued that the trial judge’s conclusion was wrong.
4. The proposed appeal explores the agreement between an informer and the police. More specifically, does it presuppose a promise or rather, the absence of a promise of protection against being charged for confessed crimes?
5. To complete the arguments presented on this question, the Court asked the parties for additional comments on the relevance of the principles set out in *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554, *Churchill Falls (Labrador) Corp. v. Hydro‑Québec*, [2018] 3 SCR 101, and *R. c. Talon*, 2006 QCCS 3029, to assess the agreement between the police and NP. The panel received the written observations of the parties and the appellant’s reply.

Preliminary remarks on the secret trial

... In Canada, as in any truly democratic society, the courts are expected to be open, and information is expected to be available to the public. However, from time to time, the safety or privacy interests of individuals or groups and the preservation of the legal system as a whole require that some information be kept secret.

*Named Person v. Vancouver Sun,* [2007] 3 S.C.R 253 at para. 1 (emphasis added).

1. As in *R. v. Bacon*, 2019 BCCA 458 and 2020 BCCA 140, both in first instance and on appeal, the parties requested to proceed *in camera*, without the case even appearing on the roll. The Court of Appeal for British Columbia expressed many concerns about this situation: *Bacon*, 2020 BCCA 140 at paras. 68–70. These concerns are shared.
2. Of course, s. 486 *Cr. C.* authorizes the exclusion of the public. First, the starting point is that, at a minimum, a file be opened and a case be placed on the roll. Second, the provision requires that various factors be weighed. A minimum of publicity is required for this exercise, as is consistent with the logic of the *Regulation of the Court of Québec*, CQLR c. C-25.01, r. 9, and s. 6 thereof in particular. The Court agrees with the remarks of the Court of Appeal for British Columbia when it writes:

[70] Such secrecy in the court process is an anathema. A court should not hide the fact a hearing is proceeding. Listing a case as an *in camera* proceeding provides slim information to the public but it is not nothing. In the minimum, doing so informs the public that the court, which is their court, is grappling with the case listed. It allows the public to keep track of the closed proceedings and it allows for applications to the court in respect of the closure: e.g., *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835. In our respectful view, proceedings that do not allow for that minimal degree of oversight should not occur.

1. The importance of the open court principle in this country cannot be overstated. As the Supreme Court has noted, this principle “encompasses more than a singular requirement that justice not be carried out in secrecy” since the openness of the courts is especially important so that the public is “convinced of the probity of the actions of judges”: *Endean v. British Columbia*, [2016] 2 S.C.R. 162 at paras. 83–84. These observations are just as applicable in the context of criminal trials, if not more so.
2. In *Mentuck*, the Court had the opportunity to discuss, in *obiter*, the importance of the right to a “public hearing” protected under s. 11(d) of the *Charter*. The Court remarked that for an accused, this right “ensures that the judicial system remains in the business of conducting fair trials, not mere show trials or proceedings in which conviction is a foregone conclusion. The supervision of the public ensures that the state does not abuse the public’s right to be presumed innocent, and does not institute unfair procedures. See Dagenais, *supra*, at p. 883”. It also vindicates an accused who is acquitted, otherwise “the accused has little public answer”: *R. v. Mentuck*, [2001] 3 R.C.S. 442, at paras. 53–54.
3. In this case, the parties agreed to proceed *in camera*.[[3]](#footnote-3) To clearly describe the nature of what took place, the pleonasm [translation] “in complete and total secrecy” much better illustrates the parties’ choice for the appellant’s trial, which was approved by the trial judge. In addition, no official number appears on the trial judge’s lengthy judgment, the witnesses were examined out of court, the parties asked the judge to decide on the basis of transcripts in a secret hearing, and the judgment was kept secret. In sum, no trace of this trial exists, except in the memories of the individuals involved.
4. This extraordinary nature of the proceeding did not go unnoticed by the trial judge who cited *Named Person v. Vancouver Sun*, [2007] 3 S.C.R 253 at the outset and explained that the claim of informer privilege, which in his view was clear, justified not sending the media prior notice.
5. The motion to extend the time limit to appeal was granted, once again under seal of total secrecy, all while taking care to defer [translation] “to the panel that will hear the appeal the question of ordering that the hearing be held open court at any time”. An appeal record was opened at the same time as the usual proceeding. The hearing took place in absolute secrecy.
6. In the Court’s opinion, after reviewing the record, this manner of proceeding was exaggerated and contrary to the fundamental principles governing our legal system. A record was therefore opened at the court office, subject to an order to keep it under seal.
7. The Court is of the opinion that although trials must protect certain information disclosed at trial, a procedure as secretive as the one in this case 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. As Kasirer J., for a unanimous court, recalled, “[l]imits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view”: *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 30.
8. While it is true that informer privilege must be absolutely protected, except where the innocence of an accused is demonstrably at stake, as the Supreme Court has noted in several judgments, including *R. v. Basi*, [2009] 3 S.C.R. 389 at para. 37, the trial itself must be public, subject to specific non-publication orders or partial *in camera* orders.
9. Accordingly, these reasons were written to be public, subject to redaction, since the matter involves important principles concerning police treatment of informers.
10. Accusing an informer of the crime he or she discloses has its share of problems; in particular, it inevitably results in the violation of the accused’s right to a public trial and in the violation of the media’s rights.

The context

1. The police investigation — — — — - began after a general complaint and grounds to believe that crimes — — — — — — — — - were committed — — — — — — — — [nature of the crime and police department].
2. NP — — — — — — — — — — — — — — - is also — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — -Thus, regardless of — — — — — — — — — — — — — — — — — — — — — — — — — - [NP’s general situation].
3. Around — — — — — - [date], the police investigation therefore became interested in — — — — — [subject of interest in which] NP — — — — — — — — — — [connection between NP and the subject of interest]. Two police officers, A —[[4]](#footnote-4) and B — went — — — — — to interrogate NP as a witness. Police officer A —, although he noted that NP appeared nervous in their presence, found that nothing much was gained from this meeting, which lasted about 45 minutes, other than general information — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — - [subject of first conversation]. Police officer A — left his card and contact information with NP at the end of the interview, in case NP had any information for him.
4. Shortly after this meeting, NP discussed the subject with another officer from the same police force, police officer C —, — — — — — — — — — — — — — — — — — — — — — — — — — — — - [the context]. Police officer C — then met with police officer A — who told police officer C — that he wanted NP to cooperate.
5. Later, police officer A — learned from police officer C — that NP had given police officer C — a letter describing — — — — — — — — — — — — — — — — — — [nature of the crime]. On — — — — [date], police officer C — gave this document to his colleague A — and, knowing that the police department wanted to recruit NP, police officer C — organized a meeting between NP and police officer A —.
6. This meeting, the purpose of which was to recruit NP as an informer, took place — — — — — — — [date]. Police officer C — introduced everyone and then left the meeting, leaving NP with police officers A — and B —. The meeting took place in a police minivan. The three drove to a parking lot next to a park, where they stopped. At that time, the police officers’ objective was to get NP to cooperate as a human source. NP expressed concerns, wanting [his or her] cooperation with the police to remain secret.
7. It was during this meeting that the initial explanations were given to NP on the role and limits of a police informer. Police officer A — testified on the explanations given. Here is the passage cited by the respondent in the respondent’s brief. It constitutes the essence of what police officer A — said to NP:

[translation]

But I explained informer privilege that what is, uh what an informer says to the police remains confidential, we protect the informer’s identity and then … — — [that NP] will not have to testify regarding, NP’s statements, NP’s statements uh to the police. I explained also explained the difference between an agent who will probably have to testify and who, who acts, who acts uh according to instructions of the police. Uh I went over a bit, each time I meet a source I go over the, the main points. I talked in particular about, about the confidentiality of a relationship uh I spoke about the importance of, of, of not acting uh according, of not acting as a police agent.

So it is really to report, it’s eyes ... the example that I gave is it’s eyes, ears of the police, so to report what comes to their attention. Uh I, I talked about the fact that they must not participate in, in crimes. Uh that they do not have immunity, uh its the \_\_\_\_\_, the, the, the, I give the main points of common practice usually to human sources, especially the, the employer-employee relationship, I said that there is no employer-employee relationship if a person decides to — — — — — — — — — — — — —- [police department] cooperate with — — — [us; police department].

And uh I… the, the, the conversation ended on uh, on something like we’ll call each other, we’ll be in touch, I think that — — — — — — — — — — — — — - [period] and I don’t know if it was — — — — — — — - [NP] — — — — — — — — — — — - [period] or us… so, basically, we left it at that and it was anyway about a month before we were in contact again, to talk.

Q.: At this meeting uh when ...did... uh was the subject of the truthfulness of the statements that NP might make to you discussed?

A: Hmm I couldn’t tell you.

Q: Did the subject of immunity come up in any way whatsoever at this meeting?

A: Uh maybe not, maybe not using the word immunity but I always refer to, to a gesture. For example, what I often say to sources is that if you participate uh in criminal act, you will be, you will be charged like anyone else. I say these things without necessarily using the word immunity but I talk about the fact that if a source is, is, is involved in a crime but the source does not have immunity.

[Blank space in original;

other emphasis added.]

1. NP had to think about the idea of becoming an informer. —  — —— — — — — [temporal reference]. A month went by before the next contact, a meeting held on — — — — — — - [date]. Police officer A — cannot recall who initiated it. At least — — — — — — [number of events] relevant to the investigation were discussed, but the details of file X were not.
2. This second meeting, which lasted about 75 minutes and took place in a municipal park. The participants sat at a picnic table. NP met with police officer A — and his superior, police officer D —, who came along because police officer B — was absent. This was the only time police officer D — interacted with NP.
3. Police officer A — remembers little about that meeting, reporting very generally that he again ensured that NP understood that their relationship must remain confidential, that, as an informer, NP did not benefit from any immunity (even though that term was not used) for crimes [he or she] would commit, and that there was no employer-employee relationship between NP and the police department.
4. Police officer D — testified in more detail about the meeting and about what he understood from the explanation given to NP on NP’s role as informer, aspects that concern the appeal. Here is what he said, first during direct examination:

[translation]

Q: And uh, at this meeting uh, uh, who spoke to — [NP]?

A: It was — [police officer A] who ma … mainly spoke to …— [NP]. I remember, uh, uh, one intervention uh, from memory I would say it lasted about five minutes with — [NP] where I explained to NP the importance and, the essential point, of telling the truth and the whole truth in a source relationship. Uh, I explained why ——————— [NP] is a police informer — [NP] does not have the right to silence and ——————————————————— [what NP] said … told us but cannot be used against [NP] ——————————————————— [NP] understood but I really wanted to insist upon it because I introduced myself as the supervisor and lead investigator uh, and that we were hap … happy to have NP with us to uh, clarify certain things. But I remember having really uh, stressed that point, there the im… the importance of telling the truth.

Q: During this meeting, did the question of immunity come up at any time whatsoever?

A: No, never. Uh, never immunity, uh, uh...

Q: I’m not saying that this was promised to NP but was the subject of, of immunity was, was discussed in any way?

A: Not, not that I remember uh...

Q: O.K.

A: It did not even come close to immunity. But as I said just... all I, all I said to — [NP] that given that — [that NP] did not have the right to silence in a source relationship and well everything that — [that NP] told us could not be used against [NP] —. Uh, immunity uh, I am aware that it is the prerogative of uh, the prosecutors.

1. Then, in cross-examination, he explained:

[translation]

Q: O.K. What did you explain to NP regarding NP’s role and your role?

A: NP’s role had already been explained by uh [police officer B] — and — [police officer A], they had already explained to NP uh what a human source was for the — [police department] and what [NP] —— could uh, what NP could expect from that relationship. They explained the parameters to NP as is always done uh before entering into a relationship. So, we explain the rules of the game. What I do is not really that, it is more, I recall very well having stressed the, the importance of telling the truth and basically of fully explaining what happened.

Q: Hmm, hmm.

A: And that environment was, was secure and why, why was it secure etc…

Q: O.K. Did you tell NP uh ——— [that NP] had to tell you everything, — [that NP] could tell you everything uh even — [if NP] had done things that were wrong?

A: Yes, definitely.

Q: Uh so you, and am I right in saying that you told NP that what you were interested in knowing was not— [whether NP] had done wrong things but — [that NP] tell you so and that you get all the facts?

A: That I kn…

Q: But that is to say that, you were not interested in, — prosecuting — [NP], that is to say that — [NP] was not the target of your, of your investigation and you wanted — [NP] to give you information ?

A: Yes, definitely.

[Emphasis added.]

1. Incidentally, NP did not yet have a source number but NP was a *de facto* source in the eyes of the police. — — — — — -[date], a request for a source number was filed with the police department. This verification process, the parameters of which are unclear, was under way and validated NP’s candidacy as a [translation] “coded” informer. — — — — — — — [date], a source number was officially assigned to NP. NP’s handlers were police officers A — and B —.
2. The next contact was another meeting between NP and police officers A — and B —. It took place on — — — — — — [date] in a hotel room. This was the second meeting as an informer and the first after the official recognition of this status by the police department. It lasted about 90 minutes. Nine subjects were discussed, specifically — — — — — — — — — — — — — - [subjects discussed] other elements of interest.
3. Police officer A — explained that — — — — [subject of the discussion] were discussed and that, for the first time, NP provided information on file X which, at the risk of repetition, absolutely was not on the investigators’ radar. This the only file in which NP revealed [his or her] personal involvement.
4. NP explained to the police — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — ————————————————————— — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — [NP’s detailed involvement in file X].
5. There is no need to go into further detail. It may be concluded from NP’s description of file X at that time that NP was clearly a participant within the meaning of the criminal law. Police officer A — ultimately admitted this in cross-examination.
6. Police officer A — in fact acknowledged that, when he received this information, NP’s version was already arousing his suspicions and raising questions about NP’s actual role. However, police officer A — did not ask NP any questions to understand NP’s exact role or to find out and understand the context of the matter, for example, the manner in which — — — — — — — — — — — — — — — — — — — — — — — [*modus operandi*] or the circumstances in which — — — — — — — — — — — — — — — — — — — — — — — — — — — — [*modus operandi*].
7. Police officer A — knew, however, that NP was explaining to him that he had participated in file X, a crime. Here is his testimony:

[translation]

Q : So if we, we, we summarize, you knew after — — — — — — — — — — — — — — — — — — — — — - [date on which NP had been involved] in this — — — — — — — - [nature of the crime] is this right?

A: Uh, Maître, I want to just point out one thing.

Q: Yes.

A: I wasn’t trying to connect [NP] — — — — — — — — — — — — — — -, at the time, all that I knew was — [that PD] acted, somehow, — — — — — — — — — — — — — - [nature of the crime] — — — — — — [circumstance of NP’s involvement]. That’s all that I can say based on my notes.

Q: I understand in relation to your notes. Except that what I am saying to you is that after — — — — — — — — — — — — — — — — — [date on which you knew that NP was involved] in this situation?

A: — [That NP was] involved in the situation, yes.

Q: So, that there was [a crime] — — — — — — — — — — — — — -?

A: Yes, you could say that.

Q: — — — — — — — — — — - [That NP had been solicited] — — — — — — — — — [circumstances of NP’s involvement]?

A: Yes.

Q: — — — — — — — — — — — — — — - [involvement]?

A: Correct.

Q: So, so you knew this?

A: Yes.

…

Q: So. Is it accurate to say that in your notes and in the discussion you had, no questions were put to — [NP] on the exact role — [that NP] had played is this matter? Am I right?

A: At that time uh, no, there was no other question \_\_\_\_\_...

Q: O.K. No question about — — — — — — — — — — — — — — — — — — - [*modus operandi*]? Is that correct?

A: Yes, \_\_\_\_\_, we did not ask.

Q: Or by who — — — — — — — — — - [*modus operandi*]? Is that correct?

A: Correct.

Q: How — — — — — — — — — - [*modus operandi*]? Is that correct?

A: Correct.

Q: And how — — — — — — — — — — — [*modus operandi*]?

A: Correct.

Q: Except that — [NP] had confessed to you — — — — — — — — — — — - [involvement] ?

A: — — — — — — — — — — — — — — [involvement] yes.

[Underlined blank spaces in the original.]

1. Police officer A — finally admitted that, at that time, NP was self-incriminating — — — — — — — — — — — — — — — — — - [nature of the crime], in these circumstances, — — — — — — — — [nature of the crime]. Police officer D — also understood that, based on these same facts, it was possible to believe that crime had been committed.
2. However, nothing was done. No steps, no warning. The relationship continued.
3. On — — — — — [date], a third meeting took place, which lasted about 45 minutes, in a unmarked car. Police officers A — and B — learned more about NP’s involvement in file X, specifically — — — — — — — — — — — — — — — — — — — — — — - [*modus operandi*]. Once again, there was no particular reaction.
4. However, during the meeting, the police officers learned that NP — — — — — — — — — — — — — — — — [action that might compromise NP’s status]. They then did not hesitate and they [translation] “set the record straight concerning… — — — — —— — — — [NP’s status]”. Police officer A — nevertheless acknowledged that, at the time, this did not weaken the relationship of trust or lead to the belief that — —— — —— [action that might compromise NP’s status] justified ending the informer relationship; the only concern police officer A — had was — —— — [NP’s status] of NP.
5. On — — — — — [date], police officer A — spoke to NP on the telephone to reassure NP that none of the proposed investigative steps in — — [other event] would jeopardize NP’s identity.
6. However, police officer A — did not perform a similar verification for the investigation he initiated into file X in the days that followed, — — — — — — — — — — — — — [date]. Police officers A — and B — then decided to investigate the information received from NP and, more specifically, the meetings in — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — [specific steps of the investigation]. Police officer A — left his card with — — — — — — — — — - [person met]. The investigators understood from these meetings that NP was indeed describing a crime — — — — — — — — — — — — — — — — — — — — — — — .
7. As a result, the next day, — — — — — — - [date], police officer A — spoke to NP on the telephone, explaining that NP had to reveal [his or her] true involvement in file X and more specifically whether NP — — — — — — — — — — [*modus operandi*]. Spontaneously, NP refused, saying that [he or she] did not remember. The conversation then turned to another aspect of the investigation.
8. Once again, police officer A — testified that he had not felt the need to meet with NP to clarify things.
9. On — — — — — — — — [date], — [W] communicated with the police. They obtained a version that described NP’s role in file X — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — [nature of the crime and *modus operandi*]. He stated that NP — — — — — — — — — — — — — [NP’s involvement]. NP — — —— — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — - [nature of the crime and *modus operandi*]. Police officers obtained a — — — — — — — — [from W]. — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — [statement describing NP’s involvement], but — — — [W places PD] definitively at the centre of the crime with greater involvement than NP had suggested up to that point.
10. The police officers said that they were in shock. After consulting the Crown, — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — -, [administrative steps] the police department decided to terminate the informer relationship with NP for two reasons: a lack of transparency (having lied or not told the whole truth) and having — — — — — — — — — — — — — — — — — — — — — — [action that might compromise NP’s status].
11. NP learned through — — — — that the police had received information — — — — — — — [identity] — — — — — — — — - [date] NP contacted police officer A —. NP was nervous and called the police officer back on — — — — — — — - [date], — — — — — — — — — — — — [information that might compromise NP’s status].
12. The last meeting took place on — — — — — - [date], when the police had already decided to terminate the informer relationship with NP. It began without any mention of this decision and was the longest meeting the police officers had with NP, lasting two hours and twenty minutes.
13. The meeting took place in a hotel room. NP first provided the police officers with information — — —— — — [other event]. Next, once they had this information, the police officers questioned NP about file X and asked NP to comment on certain evidence. — — — — — — — — — — — — — — — — — — — — — — — — — — — — - NP, who then acknowledged [his or her] full involvement, that is, that [he or she] had participated in — — — — — — — — — — — — — — — — — — — — — - [investigative steps and nature of the crime].
14. At the end of the meeting, the police officers informed NP that their relationship was over and that NP was left with essentially two options: waive informer privilege and testify against the other participants in file X, — —— — — — — — [identity] or face charges. As stated above, NP was charged.

The abuse of process motion and the judgment

1. At trial, the appellant focused on a motion seeking a stay of proceedings. The motion raised two aspects: the violation of the right to be tried within a reasonable time and abuse by the State in laying the charges. The first aspect is no longer at issue on appeal.
2. Regarding the other aspect, the appellant alleged that the police committed several faults, leading to the conclusion that their conduct constituted an abuse of process within the meaning of the law.
3. NP claimed that the police officers acted contrary to their positive duty to protect their source’s identity. According to the NP’s submissions, they put NP’s identity at risk by approaching — — — — — — — - [identity] without first obtaining the whole picture from NP. And yet, they knew enough to have reasonable grounds to believe that NP had participated in the crime at issue in file X. They also knew that in pushing their investigation — — — — — — — — — — [identity], they were creating a dangerous and impossible situation for their informer.
4. In these circumstances, NP faulted the police officers for using two pretexts for terminating the informer relationship. First, the police officers improperly relied on a lie about NP’s involvement in file X. Second, they wrongly accused NP of violating [his or her] obligation — — — — — — — — — — — — [action that might compromise NP’s status].
5. By unilaterally deciding to put an end to their cooperation, and by the way they did so, the police entrapped NP. Their manipulations placed NP before an impossible choice: reveal [his or her] cooperation and testify, or face charges.
6. Since NP was charged, [he or she] argued, in the alternative, that the use of the evidence derived from information provided by NP was abusive and rendered the trial unfair. NP asked that it be excluded.

The judgment

1. The judge dismissed the abuse of process motion and correctly summarized the applicable law, citing in particular *R. v. Babos*, [2014] 1 S.C.R. 309.
2. In summary, the judge recalled that a stay of proceedings for abuse is the most draconian remedy in criminal law. In principle, cases that give rise to this remedy are rare and must be clear. The judge next recalled the two categories of abuse of process, namely, the main category, which covers state conduct that compromises trial fairness, and the residual category, which concerns conduct that does not threaten trial fairness but risks undermining the integrity of the judicial process. The party that raises it bears the onerous burden of proving it; the task is difficult by definition.
3. In assessing situations under the residual category, the necessity of staying the proceedings must be weighed against that of holding a trial despite the contested conduct. Consequently, consideration should be given to the possibility that remedies other than a stay of proceedings could allow the justice system to sufficiently dissociate itself from the misconduct. The more egregious the conduct, however, the harder it will be for the justice system to dissociate itself from it and nevertheless prioritize the necessity of holding a trial (rather than order a stay of proceedings). When the conduct shocks the community’s conscience or offends its sense of fair play and decency, society’s interest in a full trial on the merits is unlikely to prevail in the balancing process.

The lack of immunity

1. The judge recalled the important role of sources in police investigations, citing *R. v. Scott*, [1990] 3 S.C.R. 979 at 994. The law recognizes that the identity of a source enjoys absolute protection. The judge rightly noted, however, that the law does not automatically recognize or grant a source immunity with respect to criminal offences committed. The judge concluded that the police officers had never promised such immunity and that the appellant could not reasonably have understood otherwise.

The source did not tell the truth

1. The judge concluded that NP was clearly warned that it was necessary to tell the truth. NP undertook to do so and did not respect this undertaking. In this regard, the judge accepted that [translation] “the distortions between the information provided and the facts revealed by the investigation did not concern peripheral details of the matter, but important elements”. Consequently, given the various statements made by NP, the police officers were justified in understanding that NP had not told the whole truth. These distortions are not explained by memory problems, as NP claims, since the quality of the information provided in other — — — — — — - [events] did not have this problem. The judge therefore rejected this explanation and ruled that NP intended to hide [his or her] true role in file X.

Investigation without complete information

1. The judge saw no fault in the way the investigation of file X was conducted. When police receive information from a source, the law requires them to assess the reliability of the information, citing *R. v. Garofoli*, [1990] 2 S.C.R. 1421. They therefore had a duty to verify the reliability of the information provided by NP, especially considering that it was the first time NP had cooperated. That being so, the judge concluded that the exploratory visit at the home of — — — — — — - [identity] by the police was justified, as were the verifications performed in another file, file Y.
2. The judge did not believe that these steps violated the obligations set out in *R. v. Leipert*, [1997] 1 S.C.R. 281. In that judgment, the Supreme Court of Canada explained that the Crown must assess the risks associated with disclosing information provided by a source before sharing it with third parties. The judge was of the opinion that the police officers did not disclose or share such information.
3. Ultimately, according to the judge, the police officers did not have the obligation [translation] “to verify with this informer the risks of the informer being identified in each avenue of investigation they intended to follow ... which would leave the informer in control of the police investigation”. They had to take precautions to prevent NP’s identity from being revealed, and it was not revealed.

Pretexts to terminate the informer relationship

1. Last, the judge was not convinced that the police officers used pretexts to terminate the relationship. They relied upon a violation — — — — — — [action that might compromise NP’s status] by NP and NP’s lie about [his or her] involvement in file X. These grounds were real and NP did indeed violate the initial agreement. In this regard, according to the judge, it matters little that the police officers did not immediately terminate their collaboration after learning of the violation — — — — — — [action that might compromise NP’s status].
2. The judge concluded that NP had voluntarily provided the information [translation] “as the result of a clearly well thought-out decision to cooperate with them”. This information did not result from a violation of NP’s rights, particularly the right to silence. The judge recalled that the police officers did not promise NP any immunity.
3. The judge accepted that NP had revealed file X’s very existence, but the charge was in no way proved by any of NP’s statements. The evidence was based on the testimony of — — — — — — - [identity]. Nothing in the case involves NP’s conscription, and consequently, the fairness of NP’s trial is preserved.
4. Thus, according to the judge, on the first aspect of abuse of process, the appellant did not demonstrate that the police, through their conduct, undermined the fairness of the trial.
5. On the second aspect of abuse of process, the judge was not convinced that the police officers’ conduct caused prejudice to the integrity of the justice system. The only problem concerns the last meeting with NP, when the police had NP speak before informing [him or her] that the cooperation was over. The judge did not approve of this approach, but noted that a lack of judgment does not transform an error into an abuse of process under the residual category, citing *R. v. Dumont-Chamberland*, 2017 QCCA 429 at para. 50, upheld in *Thébaud c. R*., 2019 QCCA 724 at para. 40.
6. The judge therefore refused both the stay of proceedings and the exclusion of the derivative evidence. — — — — — — — — — — — — — — — — — — — — [subsequent proceedings].

Grounds of appeal

1. NP’s brief raises several grounds:

**First ground**

The judge committed a palpable and overriding error in concluding that the evidence proved that the appellant lied to the investigators.

**Second ground**

The judge committed a palpable and overriding error in concluding that the investigators did not implicitly promise the appellant that [he or she] would not be prosecuted for [his or her] participation in past offences the existence of which [he or she] disclosed as an informer.

**Third ground**

The judge committed a palpable and overriding error in concluding that the investigators acted in good faith, whereas their actions instead demonstrated a will to entrap the appellant by leading the appellant to renounce [his or her] status as an informer and to testify against — — — — — — — — — — — — — — — — [identity] or, at the very least, revealed an unacceptable recklessness towards the appellant’s status as an informer.

**Fourth ground**

The judge erred in law in concluding that the derivative evidence used to prosecute the appellant was not obtained by conscripting the appellant and in not excluding this evidence.

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1. For the following reasons, the Court will deal only with the second ground, which properly defines the prosecution’s fundamental problem. This ground raises the critical nature of agreements between the State and an informer. With respect for the trial judge, in this case, it leads to a stay of proceedings.
2. The Court therefore considers that there is no need to rule on the first ground, which, as presented, is certain to fail. The appellant claims that [he or she] did not lie to the police officers, as they claimed as a pretext to terminate the appellant’s informer status. With respect, in the ground advanced there is an unnecessary semantic debate that has more to do with the intensity of the intention behind the falsity of the facts that NP reported. The respondent is correct in stating that the judge found a lack of candor, as opposed to a deliberate lie. That said, the circumstances establish that this determination is free from error and supports the inference that NP did not tell the whole truth in [his or her] initial statements.
3. According to the appellant’s theory, the third ground raises a scheme by the police to entrap NP. According to the Court, the fact that the police allegedly wanted to entrap NP merely amplifies an already unacceptable result that offends the community’s sense of fair play and decency. As shall be seen, holding a trial despite this conduct is already irremediably prejudicial to the integrity of the justice system, without any need to conclude that there was entrapment.
4. The Court is also of the opinion that there is no need in the circumstances to rule on the fourth ground, the exclusion of the evidence. It would even be inappropriate to do so, given the minor importance of the argument in the pleadings and the brief. In addition to the usual exclusion mechanism under s. 24(2) of the *Charter*, the Supreme Court has recognized that the exclusion of evidence is also a remedy under s. 24(1) of the *Charter*: *R. v. Bjelland*, [2009] 2 S.C.R. 651. At trial, this conclusion was an alternative, little argument was directed to it, and the judge did not deal with it. On appeal, the appellant’s brief is silent on the exclusion of evidence, except to repeat it as an alternative conclusion.

Standard of review

The judgment on the stay of proceedings

1. The power to review a discretionary judgment is limited. A stay of proceedings is one of the remedies that fall within the purview of this power. Thus, the courts have noted on many occasions that:

[15] The trial judge’s choice of remedy under s. 24(1) of the *Charter* is discretionary. However, the trial judge must exercise that discretion judicially. An appellate court will intervene where the trial judge has misdirected him or herself or where the trial judge’s decision is so clearly wrong as to amount to an injustice (see *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at paras. 117–18).

*R. v. Bjelland*, [2009] 2 S.C.R. 651 at para. 15. See also: *R. v. Bellusci*, [2012] 2 S.C.R. 509 at para. 17; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at para. 87; *R. c. Brouillette*, 2016 QCCA 858 at para. 5; *R. c. Brind'Amour*, 2014 QCCA 33 at paras. 50–52.

1. The general rules governing abuse of process are not at issue in this appeal, and the Court considers it unnecessary to revisit them, as the judge summarized them well.

Analysis

Implicit immunity for a past crime

The positions of the parties

1. NP faults the judge for not understanding [his or her] argument properly and for concluding that the police officers never promised [him or her] immunity. The appellant agrees that [translation] “immunity from prosecution can be granted only by the prosecution and not by the police”, but argued that this was not the real issue.
2. According to NP, the police officers never clearly explained that if [translation] “[he or she] revealed [his or her] personal participation in a crime, [he or she] could be charged with that crime”. It was in this sense that there was an implicit promise of immunity if NP disclosed a crime that [he or she] had committed and in which the police were interested. This would make sense and would flow from informer privilege, to encourage cooperation with the police. NP had no interest in disclosing the existence of file X if [he or she] could be charged with it. In the circumstances, therefore, NP faults the State for bringing file X before the courts and for charging [him or her].
3. For the respondent, the police officers made only two promises to NP: to protect NP’s identity and not use NP’s statements as evidence against [him or her]. There was no promise of immunity, even implicit, that included any protection for the offences about which NP was disclosing information. The two promises were kept. NP’s identity was always protected, and [his or her] statements were not used in evidence. The judge was correct to conclude that NP did not have any immunity. The judge correctly dismissed NP’s motion for abuse of process.

The importance of informers

1. As stated in the introduction, the Court requested additional submissions from the parties. The Crown, in its submissions, reiterated that the State kept its promises to NP. However, the Crown admitted that, in the alternative, if [translation] “the evidence establishes, as the appellant claims, that the parties agreed that NP would not be prosecuted in relation to any offence in connection with the information NP provided, and that the State therefore did not honour its undertakings, this would constitute an abuse of process and the appropriate remedy would be a stay of proceedings. The appeal should then be allowed” (R.B., supplementary, at 8).
2. Recourse to informers is widespread, but it confers an exceptional status. The informer has a special relationship with the authorities. According to the case law, a source’s importance increases when the police department assigns a “code” after a validation process, attesting to a certain recognition that distinguishes him or her from another more occasional or anonymous informer: *R. v. Greffe*, [1990] 1 S.C.R. 755 at 776, recalling *R. v. Debot* (1986), 30 C.C.C. (3d) 207, 219 (C.A.O.), aff.’d [1989] 2 R.C.S. 1140; *R. c. Brûlé*, 2021 QCCA 1334 at para. 174.
3. This relationship and the underlying agreement must be free from ambiguity. This encourages individuals to cooperate with the police by providing them with information. It is a systemic reason that promotes clear agreements. Vague agreements can only discourage people from cooperating.
4. The Supreme Court has often recalled the fundamental importance of informers to the police and the criminal justice system as a whole, since they assist in criminal investigations and the arrest of offenders, thereby favouring the maintenance of public order: *R. v. Leipert*, [1997] 1 S.C.R. 281 at para. 10; *R. v. Durham Regional Crime Stoppers Inc.*, [2017] 2 S.C.R. 157 at paras. 1, [12](https://canlii.ca/t/h68g1#par12), [17](https://canlii.ca/t/h68g1#par17) ; *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253 at para. [16](https://canlii.ca/t/1t55d#par16) ; *R. v. Barros*, [2011] 3 S.C.R. 368 at para. [30](https://canlii.ca/t/fnk5s#par30).
5. The importance of informer privilege finds expression in the absolute protection of his or her identity. The rule is adopted to achieve two interrelated objectives: to protect the source’s safety, and to encourage others to divulge information to the authorities: *R. v. Leipert*, [1997] 1 S.C.R. 281 at para. [9](https://canlii.ca/t/1fr42#par9) ; *R. v. Barros*, [2011] 3 S.C.R. 368 at para. 28; *R. v. Durham Regional Crime Stoppers Inc*., [2017] 2 S.C.R. 157 at paras. 11-12.
6. The public interest in privilege takes precedence over the administration of justice, in order to maintain “an efficient police force and an effective implementation of the criminal law”: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 at 97.
7. The use of informers is an accepted compromise to ensure the efficiency of criminal investigations and the arrest of offenders. It is a compromise because the informer does not always have clean hands. It is not uncommon for an informer to be a person involved in the criminal world and known to the police, hence the sensitivity of agreements with them.
8. An informer may violate the law, ethics, or morality in divulging information to the police. This has no impact on informer privilege: *Solicitor General of Canada, et al. v. Royal Commission (Health Records),* [1981] 2 S.C.R. 494.
9. In this last judgment, Martland J. quoted an English judgment to emphasize that an informer’s conduct is not determinative. Martland J. went on to explain that “the rule can operate to the advantage of the untruthful or malicious or revengeful or self‑interested or even demented police informant as much as of one who brings information from a high­­­­‑minded sense of civil duty. Experience seems to have shown that though the resulting immunity from disclosure can be abused the balance of public advantage lies in generally respecting it”: *Solicitor General of Canada, et al. v. Royal Commission (Health Records)*, [1981] 2 S.C.R. 494 at 538, citing *D. v. National Society for the Prevention of Cruelty to Children*, [1978] A.C. 171 at 233.
10. In *Hiscock*, Lebel J.A., as he then was, highlighted this last judgment, and note the following regarding informers:

[translation]

 The informer plays a role which is often important, sometimes essential, in police action and the application of criminal law.  His actions sometimes take place in very grey zones. The commission of certain crimes is tolerated, apparently, in the interest of more effective applications of justice.  The informer is permitted to make personal profit. According to the Supreme Court of Canada in *Solicitor General, supra,*his identity is protected even when he commits unlawful or tortious acts. It should be noted, however, that they remain tortious acts committed in the service of the government.  In *Solicitor General*information was gathered by the police from doctors or hospital employees in Ontario, in violation of these persons’ obligation of professional secrecy. The police informer certainly acted improperly.  However, he did not step outside the boundaries of his role.  The information was illegally gathered, but with a view to the general purpose of the application of the law, even though it involved acts that the law or, at the very least, morality disapproved of.

*R. c. Hiscock*, 1992 CanLII 2959, [1992] R.J.Q. 895 at 911–912.

1. LeBel J. then set out the obvious limits of the privilege by recalling that:

[translation]

The informer’s privilege cannot be interpreted and applied so as to grant a licence to commit criminal offences solely in the interests of the accused. It is natural to cover up illegal, even criminal offences provided that they remain oriented towards the application of the law. If one were to accept the appellant’s argument, the privilege invoked would be completely diverted from its goal, since it was used for an end and interests which are contrary to those which justify it in Canadian public law.

*R. c. Hiscock*, 1992 CanLII 2959, [1992] R.J.Q. 895 at 912.

1. Later, in 2017, Moldaver J., writing for the Supreme Court, cited *Hiscock* and recalled that informers often operate in morally grey zones and that people who engage in misconduct in the course of providing information to the police may still be entitled to informer privilege”: *R. v. Durham Regional Crime Stoppers Inc*., [2017] 2 S.C.R. 157 at para. 19.
2. Moldaver J. continued:

[20] By contrast, in *Hiscock*, the police informer was acting with the intention of furthering his own personal criminal activity. In these circumstances, Justice LeBel noted that interpreting informer privilege to exclude the wiretap evidence would

grant [the accused] a license to commit criminal offences solely in the interests of the accused. . . . . If one were to accept [the accused’s] argument, the privilege invoked would be completely diverted from its goal, since it was used for an end and interests which are contrary to those which justify it in Canadian public law. [p. 330]

[21] Likewise, in *Named Person*, LeBel J., in dissent, but not on this point, stated:

I concluded [in *Hiscock*] that the privilege should not be interpreted and applied so as to authorize the commission of criminal acts in the sole interest of the accused and therefore could not be used by the accused as they proposed to use it . . . . The opposite interpretation would have endorsed an abuse of the privilege, given its objective. [para. 111]

[22] I agree with Justice LeBel’s observations in *Hiscock* and *Named Person.*

*R. v. Durham Regional Crime Stoppers Inc*., [2017] 2 R.C.S. 157 at paras. 20–22.

1. Thus, Moldaver J. noted that “informer privilege cannot be interpreted to apply where it would compromise the very objectives that justify its existence”: *R. v. Durham Regional Crime Stoppers Inc.,* [2017] 2 S.C.R. 157 at para. 17.

The importance of the terms of the agreement

1. It quickly became apparent that the scope of the cooperation agreement was at the heart of the parties’ concerns. At the risk of repetition, the panel requested the parties’ comments on *R. c. Talon*, 2006 QCCS 3029, where the Superior Court was faced with a similar problem. The parties were also asked to consider the general principles of contractual equity, as reflected in *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554 and *Churchill Falls (Labrador) Corp. v. Hydro‑Québec*, [2018] 3 S.C.R. 101.
2. It will be recalled that, in *Talon*, the informer had entered a cooperation agreement with the State, which expressly included immunity from prosecution and other measures of protection in exchange for testimony against his accomplices. The circumstances are obviously different, but the case still resonates here, since like this case it involved interpreting the scope of a condition of the agreement. Some background is in order here.
3. In 1994, before signing the cooperation agreement, Talon had to admit his involvement in crimes he had participated in over his lifetime, known or unknown to the authorities, in exchange for immunity from prosecution. He was careful, however, not to disclose two murders he had committed in 1978 and 1986. It was counsel for an accomplice who revealed these facts to the Crown. After discussion with Talon, the Crown amended the contract to include these two murders and maintained its undertakings towards him. In the criminal proceeding against the accomplices, Talon was cross‑examined on these murders.
4. In 1996, after publishing a biography, Talon spoke about these two murders in a television interview with a journalist.
5. In 2004, the daughter of one of the victims made a complaint and Talon was subsequently charged. It was common ground that the State had no evidence concerning these murders.
6. During his trial, Talon argued abuse of process. Justice Sophie Bourque had to consider the scope of the agreement between Talon and the government to determine [translation] “whether the Prosecution may use the 1996 confessions against Marcel Talon, or whether they are protected by the 1994 agreement”: *R. c. Talon*, 2006 QCCS 3029 at para. 36. To decide, the judge considered the rules of contractual interpretation in arts. 1425 *et seq.* of the C.C.Q. to assess the terms of the contract, as well as the behaviour of the parties and the inequality between the parties: *R. c. Talon*, 2006 QCCS 3029 at para. 87.
7. In *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554 and *Churchill Falls (Labrador) Corp. v. Hydro‑Québec*, [2018] 3 S.C.R. 101, the Supreme Court explained the obligation to inform and reiterated the general duty of good faith in obligations.
8. The respondent finds that it is not easy to import civil law contractual notions and apply them to agreements between an informer and a police force. Clearly, such agreements arise in unique contexts and it would be reckless to strictly apply the law of obligations to them.
9. Moreover, according to the respondent, this issue, which was raised by the panel, is a new issue in appeal. Such an issue may be considered only if the evidence in the appeal record allows it and the failure to do so could result in an injustice: *R. v. Mian*, [2014] 2 S.C.R. 689 at paras. 41 and 51. The respondent considers that this is not the case. According to the respondent, the evidence does not allow the Court to define the parameters of the relationship between the government and the informer, which is a vast and complicated subject, and doing so is not strictly necessary to decide the appeal.
10. The appellant agrees that the appeal does not need to define all of the parameters of the relationship between the government and an informer. However, in the appellant’s view, the comments solicited by the panel do not raise a new basis for deciding the appeal within the meaning of *Mian*. The case law identified by the Court falls squarely within the argument in the second ground of appeal dealing with the implicit promise (A.B., supplementary, in reply, at para. 6).
11. According to NP, the police officers failed in their obligation to inform because they [translation] “never ... informed the appellant that if [he or she] revealed the commission of an offence in which [he or she] was involved, the appellant could be charged if the person with whom [he or she] had committed the offence confirmed the appellant’s participation” (A.B., supplementary, at para. 6). Moreover, the meaning of independent evidence was never explained to NP. The police officers never explained to NP that if they discovered new evidence of [his or her] participation in crime [he or she] had previously reported, NP would be charged with that crime.
12. The Court agrees with the appellant that the principles of good faith and the obligation to inform complete the second ground of appeal and are not new issues on appeal.

The need for a clear agreement

1. It must be recalled that the status of informer can arise from an express or implicit promise. In *R. v. Named Person B*, [2013] 1 S.C.R. 405, the Supreme Court, *per* Abella J., stated the following:

[18] In *R. v. Barros*, [2011] 3 S.C.R. 368, this Court held that “not everybody who provides information to the police thereby becomes a confidential informant” (para. 31). The Court was clear, however, that “the promise [of protection and confidentiality] need not be express [and] may be implicit in the circumstances” (para. 31, citing *Bisaillon v. Keable*, [1983] 2 S.C.R. 60). The legal question is whether, objectively, an implicit promise of confidentiality can be inferred from the circumstances. In other words, would the police conduct have led a person in the shoes of the potential informer to believe, on reasonable grounds, that his or her identity would be protected? Related to this, is there evidence from which it can reasonably be inferred that the potential informer believed that informer status was being or had been bestowed on him or her? An implicit promise of informer privilege may arise even if the police did not intend to confer that status or consider the person an informer, so long as the police conduct in all the circumstances could have created reasonable expectations of confidentiality.

*R. v. Named Person B*, [2013] 1 S.C.R. 405 at para. 18 (Emphasis added); *R. v. Barros*, [2011] 3 S.C.R. 368 at para. 31; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 at 105.

1. Police conduct may therefore provide a person in the situation of a potential informer with reasonable grounds to believe that he or she will be protected, or that his or her status as an informer will be recognized. The Supreme Court explains that, when a person can implicitly and reasonably understand from police conduct or statements that this privilege has been granted, it is the State’s role to dispel this impression. The State must be explicit if it wants to claim that there was no agreement.
2. The Court considers that the same is true in other aspects of the relationship with an informer, such as protection against crimes the informer may reveal when reporting on his or her accomplices. Failing that, the agreement can be understood to contain a promise that is reasonably consistent with the objectives that justify the existence of informer privilege. In other words, if the State allows doubt to persist and does not clarify its position in due course, when objectively there are grounds to believe that the status has been granted to the potential informer, a court may find that the privilege exists.
3. The Court agrees with the respondent and recognizes that the rules surrounding police informants were developed at common law: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60. It is therefore not a matter of strictly applying the contractual obligations of the *Civil Code of Québec* to the agreements. Nevertheless, these obligations remain relevant to such agreements.
4. As the respondent wrote, [translation] “informer privilege obviously involves the existence of a synallagmatic agreement” (R.B., supplementary, at para 34), citing Fish J. in *Basi*. In that case, Fish J. described the *bargain* between the police and the informer:

a police officer...guarantees protection and confidentiality to a prospective informer in exchange for useful information that would otherwise be difficult or impossible to obtain. In appropriate circumstances, a bargain of this sort has long been accepted as an indispensable tool in the detection, prevention and prosecution of crime.

*R. v. Basi*, [2009] 3 S.C.R. 389 at para 36; see also *R. v. Durham Regional Crime Stoppers Inc*., [2017] 2 S.C.R. 157 at paras. 11 and 12.

1. The respondent next cites *Barros*, in which Binnie J. wrote:

[32] A claim to informer status is always open to challenge by the defence. The Crown is better able to meet that challenge if it can point to clear evidence of informer status being conferred explicitly rather than after-the-fact supposition. Keeping in mind that informer’s privilege was created and is enforced as a matter of public interest rather than contract, it might be argued that in a situation of serious potential danger, the informer privilege (or other public interest privilege) might apply even in the absence of the contract-type elements of offer and acceptance. However, that question does not arise on the facts of this case and I say no more about the issue.

*R. v. Barros*, [2011] 3 S.C.R. 368 at para. 32.

1. Unlike the respondent, however, the Court understands that the Supreme Court’s reservations concerning the limits of contractual rules in such matters are intended to strengthen privilege rather than exclude the general rules of contract, which, again, are derived primarily from common sense and fairness, taking into account the parties and the particular circumstances.
2. The meeting of the minds of the parties to the agreement rests on the parties’ reasonable understanding of their respective obligations. There is no reason to set aside the general rules governing the formation of contracts which, again, are fundamentally the expression of the rules of fairness and good faith. For example, it would be shocking if an agreement entered into on the basis of a fraud committed by the State failed to provoke a judicial reaction. It would rightly be denounced, and substantial conclusions would result from it. The same is true when an agreement with an informer is obtained in a situation where decisive information is lacking but the State is in possession of this information or may reasonably ensure the informer obtains it by suggesting, for example, that he or she consult a lawyer.
3. Nothing in the common law sets aside the obligation to inform when entering into an agreement with an informant. The civil law obligation to inform is not foreign to the criminal law.
4. Recent case law has examined informer privilege predominantly from the perspective of protecting the informer’s identity. The system aims to use solid protection to encourage people with information relevant to an investigation to share it with State agents. It would be counterproductive, however, for the justice system to accept that the police can propose vague agreements, concluded without much formality, and then repudiate them on the basis of what they alone understood from the initial agreement, without regard to what their counterparts could have legitimately and reasonably understood.
5. As Bourque J. correctly pointed out in *Talon*:

[translation]

[140] The weight of the government's word is such that it must be considered to be indisputable and beyond suspicion. In the interests of justice, the government’s word must inspire unwavering confidence in all citizens, and this is all the more true when the government has gone to the trouble of making commitment, in writing, through five of its representatives from three different authorities.

…

[148] The small number of decisions dealing with the government’s failure to keep its word demonstrates the importance the government itself places in upholding its promises. Indeed, it testifies to the high level of trust that the community can safely place in the government. It also makes any alleged failure that much more serious, and the response undertaken to restore the confidence shaken by any observed failure that much more necessary.

*R. c. Talon*, 2006 QCCS 3029 at paras. 140 and 148.

The obligation to inform

1. *R. v. Named Person B* illustrates that the State has an obligation to inform and that ambiguities may benefit the informer. The outcome of that case, determined by the majority, rested on “the consequences of the information vacuum” because he was never clearly told that he was not a police informer: *R. v. Named Person B*, [2013] 1 S.C.R. 405 at paras. 1–2.
2. It is noted that, in that case, that the informer for one police force provided information to a second police force, believing that he still benefited from the status of informer. The Court recognized that “the SQ’s [the second police force] failure to clarify his status may have given rise to a reasonable belief in informer status, whether or not he actually asked a specific question like, “Will I be treated as a police informer in the event of failure to conclude a cooperating witness contract?”: *R. v. Named Person B*, [2013] 1 S.C.R. 405 at para. 39.
3. The ambiguity resulted from the attitude of the police force with respect to the informer’s status, essentially arising from the confusing process that led to the agreement: *R. v. Named Person B*, [2013] 1 S.C.R. 405 at para 41. Moreover, the police officers gave several reassurances to reinforce his view that he had this status*: R. v. Named Person B*, [2013] 1 S.C.R. 405 at para. 44.
4. Thus, regardless of whether or not the source expresses concerns, the State must inform him or her. Ultimately, it was the police force’s failure to properly inform the source that made it “possible that someone in [the source’s] circumstances could reasonably believe that the confidentiality he was promised by the first police force continued when they transferred him*...”:* *R. v. Named Person B*, [2013] 1 S.C.R. 405 at para. 49.

Impact on the Charter-protected interests of the informer

1. This case eloquently demonstrates the importance of the State’s obligation to inform. Although this aspect was not specifically pleaded and is therefore not part of the Court’s basis of intervention, it is important to recall the constitutional dimension of the informer contract.
2. In such cases, it is well established that the waiver of a constitutional right will ony be valid only if the Crown establishes that the waiver is informed and expressed in full knowledge of the facts, based in particular on what the State representative may tell that person and the fact that he or she must be aware that there is no requirement to waive a right: *R. v. Bartle*, [1994] 3 S.C.R. 173 at 203 ; *R. v. Borden*, [1994] S.C.R. 145, 162 ; *R. v. Singh,* [2007] 3 S.C.R. 405 at para. 31-32*.* *R. v. Cole*, [2012] 3 S.C.R. 34 at para. 78.
3. A person in NP’s situation who undertakes the role of informer potentially waives several constitutional rights. Such a decision therefore has heavy consequences for a person who, like NP, agrees to speak to the authorities.
4. As this case eloquently demonstrates, NP waived the right to remain silent, the right to counsel, the right to a public trial, and the right to make full answer and defence.
5. First, the police officers admitted that they never informed NP of the right to silence, and the evidence does not establish that they suggested that NP consult counsel. Of course, NP was not a suspect at that particular time, but considering the special relationship NP was committing to, there was a risk that NP would self-incriminate, and the police officers knew it. This may have also appeared expedient to them, given on the one hand NP’s willingness to disclose information, and on the other the police objective of advancing an investigation — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — — - — — — — — — — — — — — — — [nature of the crime].
6. — — — — [duration] cooperation — — — — — — — — [duration] with NP made it possible to advance some investigations. However, this case clearly illustrates the dangers, since NP’s revelations, according to the evidence and the understanding of NP’s handlers, incriminated NP. NP’s conduct defies all logic, as will be seen in paragraph [144] below. Had NP known that [he or she] would be charged with the crime, NP would not have said anything. In the context of NP’s relationship with the police officers, NP was led to believe that [he or she] could divulge [his or her] participation without provoking any consequences.
7. As for public trials, the procedure followed in this case deprived NP of one. As stated in the introduction to this judgment in the preliminary remarks, a secret trial is an aberration. Even partial secrecy is justified only in exceptional circumstances; otherwise, it constitutes a violation of a fundamental right that is dear to our justice system. Accordingly, absolute secrecy is likely never justifiable.
8. Moreover, NP no longer had the right to make full answer and defence. Without risking exposing [his or her] participation as an informer, NP could not call witnesses, including alleged accomplices, to contradict the complainant and the evidence in general and establish [his or her] true role or raise a doubt in this regard. Privilege and the procedure thus forced NP to base [his or her] defence solely on [his or her] version, or place himself or herself in danger. This affects of the fairness of the trial.

Brief review of the facts

1. Before discussing the judge’s error in not ordering a stay of proceedings, the salient facts of this case must be recalled.
2. Clearly, the situation in this case is very different from other cases such as *Talon* or *Named Person B*, discussed above. The agreement here was verbal, not written. A reading of the testimony reveals that the police officers’ notes are summary and contain no specific details of what was said during the meeting with NP. The agreement itself appears highly informal. In addition, as the respondent notes, NP did not testify. Given the evidence, however, this is not decisive.
3. The police “handlers” testified on approximately what they said to NP, several times basing their accounts on their [translation] “usual” way of approaching and recruiting a source. The parameters of the cooperation were summarily explained to NP, were never negotiated, and were presented to him in a minivan and on a park bench, even though precautions were taken by following the police department’s validation and source code assignment process.
4. — — — — — [date], the police officers met with the appellant with the objective of recruiting [him or her] as a human source and, at the time, they promised to keep the appellant’s identity secret. The respondent added that NP was also informed [translation] “that if, as an informer, [he or she] is involved in a crime, NP will not have immunity and that, if [he or she] is caught, NP may be charged just like anyone else” [R.B. at para 18, emphasis added]. This was the only clarification on what was explained to NP in the minivan, with the objective of recruiting NP as an informer.
5. The respondent relies on the only witness to the meeting, police officer A —,the most complete and relevant excerpts of whose testimony are reproduced above, at paragraph [25]. As these excerpts reveal, the status of informer was discussed for the first time, along with a lot of other information. Police officer A — stated that he usually informs a source that he or she must not be involved in crimes, and that if a source is caught in a criminal act, he or she will be charged.
6. At the time, NP’s involvement in file X had come to an end several years earlier. It is striking to note that police officer A — left an obvious ambiguity regarding the temporal aspect applicable to the criminal acts covered by the “warning”. For example, police officer A — did not specify to NP that, if [he or she] was involved in a crime that [he or she] reported, [he or she] would be charged if the investigation, independent of [his or her] information, supported charges against [him or her]. This should have been explicit. This information would have had the benefit of being clear and direct. It is reasonable to believe that an experienced investigator knows that potential informers do not always have clean hands.
7. The evidence clearly establishes that this ambiguity persisted during the next meeting, when the informer relationship crystalized. At this second meeting, during which NP offered several pieces of relevant information, police officer D —, who accompanied police officer A —, testified as to what he understood from the instructions given to NP. Excerpts are reproduced above, at paragraph [29]. Immunity was not discussed with NP, because police officer D — knew that immunity is the prosecution’s prerogative. The police officer strongly insisted that NP tell the truth and repeated that anything NP said could not be used against [him or her] – which, to a layperson, certainly creates the impression that this means that [he or she] cannot be prosecuted – without telling NP that, on the contrary, evidence might be obtained thanks to [him or her] that might then be used against NP. Police officer D — confirmed that he explained to NP that [he or she] had to say everything even if [he or she] had done things that were wrong, since NP was not the object of the investigation.
8. Last, there is police officer A’s — lack of reaction when he initially received the first information regarding file X and started to understand that NP was definitely not telling the whole truth about [his or her] involvement in file X, as the excerpts from police officer A’s — testimony reproduced above at paragraph [37] establish, and what police officer A — and police officer D — understood from the revelations (see paragraph [38]). Their conduct is incomprehensible.

The judge’s error

1. At paragraph 16 of the judgment, the judge summarized the meeting on — — — — — — — - [date], during which the explanations of the role of informer and its parameters were presented to the appellant:

[translation]

[16] … Police officer A explained to [him or her] how informer cooperation works. Police officer A explained informer privilege, specifically, that [his or her] statements would be given to the police, that [he or she] would not have to testify regarding those statements, and that [his or her] identity would remain confidential. Police officer A also told [him or her] that [he or she] would only have to report the information that comes to [his or her] attention and that [he or she] must not commit a crime, in which case [he or she] would be charged. Police officer A thus explained to [him or her] that [he or she] did not have immunity, without necessarily using the term immunity. The applicant wanted to give this proposal some thought.

[Emphasis added]

1. This summary is consistent with the reasonable understanding of the testimony of police officer A —, that is, that the appellant must not commit crimes in the future and that if [he or she] did, charges would be laid. The judge wrote, however, at paragraphs 73 and 100 of the judgment:

[translation]

[73] This rule of law protects the identity of the informer. It provides no immunity with respect to criminal offences committed by the informer. Moreover, the police officer did not promise any immunity to the applicant. On the contrary, — — — — — — — — — [date], from the first meeting with the applicant at which the police officers discussed [his or her] cooperation as an informer, the applicant was specifically informed that [he or she] did not have any immunity. The applicant could not have reasonably understood that [he or she] had immunity of any kind.

[100] The information provided by the applicant did not arise from a lack of respect for [his or her] rights, and more particularly the right to silence. The information had been voluntarily provided to the police officers as the result of a clearly well thought-out decision to cooperate with them. Although the police officers had told the applicant that [his or her] statements would not be used against [him or her], the applicant knew that the police officers wanted to obtain information to investigate — — — — — — — — — — — — — — — — — — — — —— — - [nature of the crime]. The applicant therefore knew that the information [he or she] provided would be used by the police officers in investigations. The applicant therefore cannot complain that the police officers used the information [he or she] provided in their investigation. Recall that the police officers had told the applicant to tell the truth, the whole truth, and had informed the applicant that [he or she] did not have any immunity.

[Emphasis added.]

1. Regarding the next meeting, which police officer D — attended, the judge said little and did not analyze the testimony of this police officer, who had nevertheless touched on crucial elements of the issue in dispute, namely, the quality of the information provided and the reasonable understanding that a person could have had of the “bargain” reached between NP and the police officers.
2. The judge did not analyze the evidence from the perspective of the obligation to inform, explained above; this consequently limited the judge’s observation to the lack of immunity that accompanies informer privilege. Strictly speaking, on this aspect, the judge is correct, and this is why it is important that the police fully inform their recruit of the issues relating to this immunity. In this case, it was reasonable for NP to think, based on [his or her] contact with the police officers, that [he or she] could freely disclose file X without being charged because [he or she] had to tell the truth, the investigation did not concern [him or her], and nothing [he or she] said could be held against [him or her]. The conduct of the police officers throughout their relationship with the NP was consistent with this understanding.
3. With respect, the judge erred in his ruling on the lack of a formal promise of immunity. The references to this notion in the testimony are merely an intellectual shortcut to translate a legal reality understood by jurists and police officers. Indeed, both police officer A — and police officer D — admitted that they never used this term. The judge should have ruled on the information actually communicated to NP.
4. In reality, police officer A — was not clear in his warning on the temporal scope of the appellant’s criminal involvement, and he gave no real explanation likely to be understood by a layperson of a police informant’s lack of immunity. That information was obviously crucial to NP’s decision to reveal file X, about which the police officers knew nothing at the time, as their investigation was focused on other ———————————— [events]. Otherwise, why did NP reveal its existence? Police officer D — was aware that informer status does not guarantee immunity, since immunity can be granted only by the Crown, but he never explained the notion to NP. His testimony confirms that a reasonable person placed in NP’s situation would understand that [he or she] could disclose [his or her] past criminal involvement, that this would not be held against [him or her], and that it was not of interest to the investigation. The judge did not comment on this testimony at all.
5. Ultimately, the judge’s own understanding at paragraph 16 of the judgment that only future crimes were concerned is reasonable.
6. The police officer’s explanations on the parameters of the cooperation were unfortunately very ambiguous. Through their statements, they implied that NP had to admit all of the facts even if this implicated [him or her] in a crime, that nothing would be held against [him or her], and that the investigation was not interested in what [he or she] may have done. Through their conduct – and particularly, their lack of reaction when NP started to reveal bits of information regarding [his or her] participation in file X – they reassured NP in this understanding. Moreover, the last meeting demonstrates that the police officers had a definite appetite for the information that NP held, without consideration for the consequences on NP’s rights. The judge himself criticized them for this. Letting NP self-incriminate without saying anything and without warning [him or her] of the withdrawal of [his or her] informer status, while knowing that NP would provide them with the means to prove [his or her] cooperation in the crime, allowed NP to reasonably believe that [he or she] could speak to them in confidence.
7. In the Court’s view, with respect for the contrary opinion, NP could not reasonably understand that [he or she] would be accused of file X if [he or she] opened up to the police officers. A reasonable person in the circumstances would have thought that [he or she] would not be prosecuted for past crimes. With the greatest respect for the judge, based on the evidence adduced, his conclusion is unreasonable.
8. This conclusion not only leads to an injustice, it also gives the impression that a casual approach is tolerated in the source recruitment process. This seriously undermines the important objective of encouraging persons to provide information to the police and, consequently, undermines the integrity of the legal process. A more rigorous approach is clearly more adapted to the important role of informers in the justice system.
9. The State’s responsibility is great when it recruits human sources. Admittedly, it is not always possible or practical to exhaustively negotiate the terms of a detailed contract.[[5]](#footnote-5) The methods of approaching a source and entering into agreements, like investigative methods in general, may require a less formalistic and more flexible approach, and must be left to the discretion of the State and, more specifically, the police. However, like any investigative method, some practices are better than others. One of the better ones is certainly to make sure that all the necessary information is communicated when an agreement is entered into with an “informer” candidate, so that he or she agrees in full knowledge of the facts and that the police officers keep detailed notes on this agreement: *Wood v. Schaeffer*, [2013] 3 S.C.R. 1053 at para. 67; *R. c. Zalat*, 2019 QCCA 1829 at para. 34.
10. In this case, the police department took pains to validate NP’s candidacy in an internal process that took some time. The record does not explain why a more formal approach was not used with NP at the same time to ensure that [he or she] understood the limits of the protection offered and the possible consequences of [his or her] anticipated revelations. Obviously, the risk of such an approach might have been that they would lose the cooperation they sought if NP understood that [he or she] would be tightening the noose around [his or her] own neck without the possibility of an “immunity” agreement.
11. In any event, if the failure to properly inform the candidate does not prevent the State from benefiting from the information obtained, the State cannot benefit from ambiguities in its agreement with the informer to turn it against him or her.
12. In addition, depending what he or she is told, a candidate can certainly implicitly understand that he or she will be held harmless from his or her misdeeds that may arise in the investigation. It is of little importance to the candidate whether this “immunity” falls under the police power or not. This is clearly the case here.
13. The fact that charges were laid in the circumstances is plainly offensive. The fairness of the trial was certainly compromised by the limits imposed on the right to make full answer and defence. That being said, such State conduct risks undermining the integrity of the legal process.

**FOR THESE REASONS, THE COURT:**

1. **ALLOWS** the appeal;
2. **STAYS** the conviction;
3. **ORDERS** a stay of proceedings;

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|  | | MARIE-FRANCE BICH, J.A. |
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|  | | MARTIN VAUCLAIR, J.A. |
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|  | | PATRICK HEALY, J.A. |
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| Counsel for the respondent | | |
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1. In the original French version, the masculine or feminine gender was used solely to match the gender with the terms used without regard for NP’s gender. [↑](#footnote-ref-1)
2. In this judgment, the words “informer”, “informant”, “source” and “human source” are equivalent terms used to refer to police informer status at common law. For greater clarity, this judgment in no way deals with the specific regime set out at ss. 25.1 *et seq.* of the *Code*. [↑](#footnote-ref-2)
3. In *R. c. Hiscock*, 1992 CanLII 2959, [1992] RJQ 895, it is stated that the trial was held as a strict *in camera* hearing at the request of the parties. The precise reason why is not clear from the judgment, except that Hiscock claimed at trial to be an informer, whereas the facts instead revealed that he maintained a relationship with the police for the purpose of advancing his own criminal activities. In these circumstances, therefore, the judge refused to allow him to benefit from the privilege, which explains why the Court was able to discuss it openly in its judgment. [↑](#footnote-ref-3)
4. The redaction following the identification of the police officers A, B, C, or D hides their names. [↑](#footnote-ref-4)
5. By these comments, the Court is merely recognizing the variety of relationships between a source and a police department. They should not be interpreted as setting out definitive parameters. The subject is rich in nuances: Anne-Marie Boisvert, *La protection des collaborateurs de la justice: éléments de mise à jour de la politique québécoise*, final report submitted to the Minister of Public Safety: Québec, 2005. [↑](#footnote-ref-5)