



**SUPREME COURT OF CANADA**

**CITATION:** MediaQMI inc. v. Kamel,  
2021 SCC 23

**APPEAL HEARD:** November  
12, 2020

**JUDGMENT RENDERED:** May  
28, 2021

**DOCKET:** 38755

**BETWEEN:**

**MediaQMI inc.**  
Appellant

and

**Magdi Kamel and Centre intégré universitaire de santé et de services sociaux  
de l'Ouest-de-l'Île-de-Montréal**  
Respondents

- and -

**Fédération professionnelle des journalistes du Québec, Canadian Broadcasting  
Corporation, La Presse Inc. and Ad IDEM/Canadian Media Lawyer  
Association**  
Interveners

**OFFICIAL ENGLISH TRANSLATION**

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,  
Martin and Kasirer JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 73)

Côté J. (Abella, Moldaver, Karakatsanis and Brown JJ.  
concurring)

**JOINT DISSENTING REASONS:**  
(paras. 74 to 143)

Wagner C.J. and Kasirer J. (Rowe and Martin JJ. concurring)

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

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MEDIAQMI INC. v. KAMEL

**MediaQMI inc.**

*Appellant*

v.

**Magdi Kamel and  
Centre intégré universitaire de santé et de  
services sociaux de l'Ouest-de-l'Île-de-Montréal**

*Respondents*

and

**Fédération professionnelle des journalistes du Québec,  
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**Indexed as: MediaQMI inc. v. Kamel**

**2021 SCC 23**

File No.: 38755.

2020: November 12; 2021: May 28.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin  
and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC

*Civil procedure — Openness of court proceedings — Right to access court record — Discontinuance — Retrieval of exhibits — Public body bringing action against former manager alleging misappropriation of public funds — Newspaper publishing company filing motion for access to sealed exhibits in court record — Court authorizing retrieval of exhibits because of discontinuance filed by public body before motion heard — Whether Superior Court judge was obliged to decide application for access to court record before authorizing retrieval of exhibits — Code of Civil Procedure, CQLR, c. C-25.01, arts. 11, 108.*

On October 6, 2016, the Centre intégré universitaire de santé et de services sociaux de l’Ouest-de-l’Île-de-Montréal (“CIUSSS”) brought a legal action against a former manager, alleging misappropriation of public funds. The action was accompanied by an application for a *Norwich* order to obtain the identity of the holder of the four bank accounts to which the money had allegedly been diverted. On October 7, 2016, the Superior Court made the *Norwich* order and ordered that the entire record be sealed, including the four exhibits filed by the CIUSSS in support of its allegations. On March 29, 2017, MediaQMI, a newspaper publishing company, filed a motion to unseal based on art. 11 of the *Code of Civil Procedure* (“C.C.P.”) and s. 23 of the *Charter of human rights and freedoms* (“*Quebec Charter*”) in order to have access to the court record, including the exhibits that might be in it. The hearing of the motion, scheduled for April 5, 2017, was postponed to April 25, 2017. In the meantime,

on April 19, 2017, the CIUSSS discontinued its legal action. It tried to retrieve the exhibits it had filed, but the staff of the court office could not find them. When the motion was heard on April 25, the CIUSSS made an oral request to retrieve the exhibits filed in the court record. MediaQMI opposed that request.

The Superior Court ordered that the court record be unsealed based on the test set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, finding that the evidence was insufficient to depart from the principle of open court proceedings. However, it granted the request to retrieve the exhibits made by the CIUSSS, in accordance with art. 108 *C.C.P.*, because of the discontinuance that had terminated the proceeding. The day after the judgment was rendered, the CIUSSS retrieved its exhibits. The Court of Appeal dismissed MediaQMI's appeal from the conclusion relating to the retrieval of exhibits.

*Held* (Wagner C.J. and Rowe, Martin and Kasirer JJ. dissenting): The appeal should be dismissed.

*Per* Abella, Moldaver, Karakatsanis, **Côté** and Brown JJ.: MediaQMI cannot obtain a copy of the exhibits that were in the Superior Court's record at the time its motion was filed. The right to have access to court records set out in art. 11 *C.C.P.* does not extend beyond what is in these records at the time they are consulted. Once the parties retrieve their exhibits at the end of a proceeding in accordance with art. 108 *C.C.P.*, members of the public will still be able to consult the record but will no longer have access to the exhibits that have been removed from it.

Article 11 *C.C.P.*, which sets out the principle of open proceedings, does not confer a specific right to access exhibits that were once part of court records. That provision gives access to a court record whose content is governed in part by art. 108 *C.C.P.* Thus, the retrieval of exhibits from a record in the circumstances described in art. 108 *C.C.P.*, when an application to consult the record is pending, does not infringe a rule of public order; it simply constitutes the exercise of a right provided for in the *Code of Civil Procedure*. The position that the scope of the principle of open proceedings should be interpreted in light of the charters must be rejected. Whatever protection that principle may have under the charters, the legislature remains free to fix the scope of the principle in the rules it enacts, and it is not the role of the courts to do so in its place. In the civil law context, creating law remains the legislature's prerogative. Accordingly, in the absence of a constitutional challenge, the rules clearly stated in the *Code of Civil Procedure* are what apply. Moreover, except where there is ambiguity that persists even though the contextual approach to interpretation has been applied, courts do not have to interpret statutes so as to make them consistent with the principles and values of the *Canadian Charter of Rights and Freedoms*. This approach also accords with the interpretative provisions of the *Quebec Charter*.

The new *Code of Civil Procedure* that came into force in 2016 sets out the general scheme relating to the public nature of civil justice in arts. 11 to 16 and establishes two distinct rights in art. 11: the right to attend court hearings wherever they are held and the right to have access to court records and entries in the registers of the courts. Article 108 *C.C.P.* makes explicit reference to that general scheme; this is clear

both from the words used by the legislature and from the holistic reading of the *Code of Civil Procedure* called for by its preliminary provision and by s. 41.1 of Quebec's *Interpretation Act*. It therefore seems to be beyond question that art. 108 *C.C.P.* concerns the content of the records contemplated in arts. 11 to 16 *C.C.P.*, that is, the records that are subject to a court's supervisory power and control. That provision thus governs the keeping, retrieval and preservation of the exhibits filed in the record to which art. 11 *C.C.P.* gives access.

The scope of art. 108 para. 2 *C.C.P.* cannot be limited on the basis of passages from parliamentary debates suggesting that the legislature's objective was to reduce the costs associated with the judicial system. Arguments from parliamentary history cannot result in the refusal to apply a clear rule, as doing so would compromise the reader's right to rely on the letter of the law interpreted in its context. Courts do not have to interpret or implement the objective underlying a legislative scheme or provision, but must rather interpret and apply the text through which the legislature seeks to achieve that objective.

In this case, the text of art. 108 para. 2 *C.C.P.* authorizes the parties to retrieve their exhibits by consent in the course of a proceeding, and requires them to retrieve their exhibits once the proceeding has ended. It reiterates, with some modifications, the two rules set out in arts. 83 and 331.9 of the former *Code of Civil Procedure*, which were incorporated when the general scheme for the communication and filing of exhibits was reformed. That 1994 reform was designed to encourage

parties to exchange information with regard to their respective evidence and to communicate their exhibits to one another directly, without first filing them in the court record. It contemplated that exhibits would be filed and kept on the basis of usefulness and necessity. As the successor of that scheme, art. 108 *C.C.P.* revises and unifies the rules on the keeping, retrieval and preservation of the exhibits filed in court records. Insofar as it governs the content of those records, it has a direct impact on the information to which the public can have access under art. 11 *C.C.P.*

Article 11 *C.C.P.* gives the public the right to have access to court records, subject to exceptions for confidential information. This right applies during and after a proceeding. Even after the proceeding has ended, the exhibits can be consulted as long as they remain in the record, but once the parties retrieve them or the court clerk destroys them, they cease to be part of the record to which the public can have access. This conclusion is in keeping with the intention expressed by the legislature through the words of arts. 11 and 108 *C.C.P.*, with the legislative objectives underlying those provisions, with the general scheme of the *Code of Civil Procedure* and with civil law principles of interpretation. It also avoids giving the principle that civil justice is public set out in art. 11 *C.C.P.* a scope that might distort that principle, just as it avoids undermining other important objectives of the *Code of Civil Procedure*, such as the prevention and resolution of disputes. The objective of facilitating the resolution of disputes would surely be undermined if parties who wished to come to an agreement after taking a matter to court could not bring the documents they had filed with the court back into the private sphere.



Because arts. 11 and 108 *C.C.P.* do not give rise to any judicial discretion, the test from *Dagenais* and *Mentuck* should not be applied in this case. That test establishes that the discretion to make an order limiting the openness of proceedings must be exercised within the boundaries set by the *Canadian Charter*, having regard to rights and interests that pull in opposite directions. But where the law fixes the scope of the principle of open proceedings without conferring any discretion on judges, there is no reason to seek a correct balance between competing rights and interests that is within the boundaries set by the *Canadian Charter*.

In this case, MediaQMI's right under art. 11 *C.C.P.* to have access to court records was never compromised. This was because the sealing order that had kept the record confidential until then came to an end when the Superior Court's judgment was rendered. MediaQMI could have consulted the exhibits in issue if it had applied for access to the record during the time when the exhibits were available, since no conservatory measure had been sought by the parties. It did not do so. Only the terms of access to the court record and the content of that record changed between the filing of the motion to unseal and the retrieval of the exhibits. However, that situation was beyond the reach of art. 11 because it fell within art. 108 *C.C.P.* The fact that MediaQMI filed its motion under art. 11 *C.C.P.* prior to the CIUSSS's discontinuance is not determinative and did not give it any acquired right to argue that motion. Nor did it give MediaQMI any right to require that the content of the court record remain unchanged until the motion was decided.

The legal consequence that art. 213 *C.C.P.* attaches to a discontinuance is the termination of the proceeding. Yet the termination of the proceeding entitles the parties to retrieve their exhibits in accordance with art. 108 *C.C.P.* In this case, if MediaQMI wanted to prevent the exercise of that power, it had to contest the discontinuance extinguishing the proceeding. It did not do so. There was therefore nothing that prohibited the CIUSSS from retrieving its exhibits.

*Per Wagner C.J. and Rowe, Martin and Kasirer JJ. (dissenting):* The appeal should be allowed. The case should be remanded to the Superior Court so that it can decide the application for access to the exhibits on the basis of the analytical framework established in *Dagenais* and *Mentuck*, which was affirmed for civil proceedings in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 52, and make the orders it considers necessary.

The parties' control over the course of their case is a guiding principle set out in art. 19 *C.C.P.* This principle extends to the parties' right to agree at any stage of the proceeding to settle their dispute or otherwise terminate the proceeding (para. 3). It does not allow them to override a judge's discretion to ensure compliance with the rule of public order arising from the principle of open proceedings, nor does it allow them to exercise their powers at the expense of the existing and legitimate interests of third persons in seeking the application of that rule. The fact is that when parties decide to have recourse to the civil justice system, which is a public service, they do so knowing that members of the public may exercise their fundamental right to information about

court proceedings. The private resolution of a dispute alone cannot *ipso facto* supplant the principle of open proceedings when invoked in accordance with procedural rules while a proceeding is still under way. This is all the more true in a case in which a judge issued an order limiting the principle of open court proceedings as soon as the legal action was filed, as in this case.

The fundamental principle of open court proceedings, a hallmark of a free and democratic society, is affirmed in art. 11 *C.C.P.*, which provides that anyone may attend court hearings and have access to court records. The public, and in particular the news media, have the interest required to seek the application of this principle. The legislature provides for two specific exceptions to this fundamental principle: first, where the law provides for *in camera* proceedings (art. 15 *C.C.P.*) or restricts access to court records (art. 16 *C.C.P.*), which is notably the case in family matters; second, by giving the court a discretion to make an exception to the fundamental principle of open proceedings if, in its opinion, public order or the protection of substantial and legitimate interests so requires (art. 12 *C.C.P.*). A court seized of an application to limit the openness of court proceedings must exercise its discretion in accordance with the analytical framework developed in *Dagenais*, *Mentuck* and *Sierra Club*, even if the application is unopposed.

The rules on discontinuance flow from the principle that the parties control the course of their case (art. 19 para. 3 *C.C.P.*). To be set up against the other parties, the unilateral discontinuance need only be notified to those parties in accordance with

art. 213 *C.C.P.* However, the principle that the parties control the course of their case is subject to a qualification, developed and consistently applied by the courts: a discontinuance may not prejudice the rights of the other parties or of third persons, including the right to have an application filed prior to the discontinuance decided. Because discontinuance constitutes a voluntary renunciation of a right or claim, it affects only the rights of the renouncing party, that is, the party that discontinues proceedings or waives a right or claim. A discontinuance may therefore be valid yet ineffective against the rights of third persons. It follows that the purpose or effect of a party's discontinuance cannot be to avoid a suit already brought against it.

If the discontinuance of a proceeding cannot be relied on at the expense of third persons' existing legitimate interests or contrary to the rules of public order, then parties cannot avail themselves of art. 108 para. 2 *C.C.P.* in order to remove exhibits from the record after an application has been made under art. 11 *C.C.P.* The control that the parties have over the course of their case must be exercised in compliance with the principles of civil procedure (art. 19 *C.C.P.*). The parties cannot displace a rule of public order, even by mutual consent. Applying the principle that the parties control the course of their case as if it were an end in itself would be contrary to Quebec jurisprudence and to the general scheme of the *Code of Civil Procedure*. It would also conflict with the well-established principle that the *Code's* provisions must be interpreted in harmony with the *Quebec Charter* and the general principles of law. Therefore, the principle that the parties control the course of the case could not

adversely affect MediaQMI's existing and legitimate interests in seeking the application of the rule of public order requiring open court proceedings.

From the moment MediaQMI applied to unseal the record and access the exhibits, a new proceeding began, and it went beyond the strictly private interests of the parties to the principal litigation. The discontinuance filed following the application brought under art. 11 *C.C.P.* could not defeat that new proceeding, which was separate from the principal litigation and related to the proper functioning of the judicial institution, whose legitimacy depends on its openness and in part on media scrutiny. MediaQMI was thus seeking to play its role as a surrogate for the public and to inform readers of what was taking place in the courts, a crucial role in a context where it was alleged that fraud had been committed within a public body responsible for ensuring the proper functioning of regional health institutions. The court had to exercise the discretion conferred on it by art. 12 *C.C.P.* However, the discontinuance would have produced its full effects if MediaQMI had filed its application after the CIUSSS's discontinuance and had sought access to the exhibits when they were no longer in the record. Its appeal would have failed on that basis unless it challenged the constitutionality of art. 108 *C.C.P.*

### **Cases Cited**

By Côté J.

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835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *Cie Immobilière Viger Ltée v. Giguère Inc.*, [1977] 2 S.C.R. 67; *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Pharmascience Inc. v. Binet*, 2006 SCC 48, [2006] 2 S.C.R. 513; *R. v. Clarke*, 2014 SCC 28, [2014] 1 S.C.R. 612; *Michel v. Graydon*, 2020 SCC 24; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Construction Gilles Paquette ltée v. Entreprises Végo ltée*, [1997] 2 S.C.R. 299; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *Canada 3000 Inc. (Re)*, 2006 SCC 24, [2006] 1 S.C.R. 865; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144; *R. v. Rafilovich*, 2019 SCC 51; *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287; *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671; *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623; *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18; *Hong v. Lavy*, 2019 NSSC 271, 46 C.P.C. (8th) 327; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19; *British Columbia (Attorney General) v. Provincial Court Judges'*

*Association of British Columbia*, 2020 SCC 20; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253; *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666; *Classic Fabrics Corp. v. B. Rawe GMBH & Co.*, 2001 CanLII 7221; *L'Espérance v. Atkins*, [1956] B.R. 62; *175809 Canada inc. v. 2740478 Canada inc.*, 2000 CanLII 9254; *Droit de la famille — 092038*, 2009 QCCS 3822, [2009] R.D.F. 646.

By Wagner C.J. and Kasirer J. (dissenting)

*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; *Charland v. Lessard*, 2015 QCCA 14; *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287; *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800; *Homans v. Gestion Paroi inc.*, 2017 QCCA 480; *J.G. v. Nadeau*, 2016 QCCA 167; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592; *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33; *B. (B.) v. Québec (Procureur général)*, [1998] R.J.Q. 317; *Rosei v. Benesty*, 2020 QCCS 1795; *Marcovitz v. Bruker*, 2005 QCCA 835, [2005] R.J.Q. 2482, rev'd on another point 2007

SCC 54, [2007] 3 S.C.R. 607; *Sirius Services conseils en technologie de l'information inc. v. Boisvert*, 2017 QCCA 518; *Horic v. Nepveu*, 2016 QCCS 3921; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); 3834310 *Canada Inc. v. R.C.*, 2004 CanLII 4122; *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Georgiadis v. Angelopoulos*, 2008 QCCS 6890; *Classic Fabrics Corp. v. B. Rawe GMBH & Co.*, 2001 CanLII 7221; 175809 *Canada inc. v. 2740478 Canada inc.*, 2000 CanLII 9254; *L'Espérance v. Atkins*, [1956] B.R. 62; *Graham-Albulet v. Albulet*, [1977] C.A. 323; *Barzelex Inc. v. M.E.C.S. International Inc.* (1989), 29 Q.A.C. 63; *Constructions Panthéon inc. v. Clinique Altermed inc.*, 2015 QCCA 50; *Taran Furs (Mtl) inc. v. Tuac, local 501*, 2005 CanLII 11669; 7006098 *Canada inc. v. Sobeys Canada inc.*, 2020 QCCS 897; *Berenbaum v. Berenbaum Reichson*, 2014 QCCA 1630; *Entreprises de béton Fern Leclerc Ltée v. Bourassa*, [1990] R.D.J. 558; *Droit de la famille — 092038*, 2009 QCCS 3822, [2009] R.D.F. 646; *Wetherall v. Macdonald* (1903), 9 R. de J. 381; 9163-5771 *Québec inc. v. Bonifier inc.*, 2017 QCCA 1316; *Ditomene v. Syndicat des enseignants du Cégep de l'Outaouais (SECO)*, 2012 QCCA 1296; *Byer v. Québec (Inspecteur général des institutions financières)*, [2000] R.L. 615; *Fers et métaux américains, s.e.c. v. Picard*, 2013 QCCA 2255; *Banque Commerciale Italienne du Canada v. Magas Development Corp.*, [1992] R.D.I. 246; *Portnoff (Syndic de)*, [2000] R.J.Q. 1290.

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*Charter of human rights and freedoms*, CQLR, c. C-12, ss. 3, 9.1, 23, 51, 53.

*Civil Code of Québec*, art. 33.

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*Code of Civil Procedure*, CQLR, c. C-25.01, preliminary provision, arts. 1 to 7, 8 to 28, 49, 107, 108, 205, 206, 213, 214, 220, 246 to 252.

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APPEAL from a judgment of the Quebec Court of Appeal (Marcotte and Schragger JJ.A. and Samson J. (*ad hoc*)), 2019 QCCA 814, [2019] AZ-51434213, [2019] J.Q. n° 3707, 2019 CarswellQue 3871 (WL Can.), affirming a decision of Gagnon J., 2017 QCCS 4691, [2017] AZ-51434213, [2017] J.Q. n° 14219 (QL), 2017 CarswellQue 9231 (WL Can.). Appeal dismissed, Wagner C.J. and Rowe, Martin and Kasirer JJ. dissenting.

*Mathieu Quenneville* and *Marc-André Nadon*, for the appellant.

*Jonathan Pierre-Étienne* and *Antoun Al-Saoub*, for the respondent Magdi Kamel.

*Dominique Vallières*, for the respondent Centre intégré universitaire de santé et de services sociaux de l'Ouest-de-l'Île-de-Montréal.

*Mark Bantey*, for the intervener Fédération professionnelle des journalistes du Québec.

*Christian Leblanc*, for the intervener the Canadian Broadcasting Corporation, La Presse Inc. and Ad IDEM/Canadian Media Lawyer Association.

English version of the judgment of Abella, Moldaver, Karakatsanis, Côté and Brown JJ. delivered by

CÔTÉ J. —

I. Overview

[1] The importance of the principle of open court proceedings is no longer a matter of controversy today. It will readily be agreed that, as one early author elegantly

stated, justice is [TRANSLATION] “a work of light and not of darkness”: J. Frain du Tremblay, *Essais sur l'idée du parfait magistrat où l'on fait voir une partie des obligations des Juges* (1701), at pp. 139-40. This is not in question here. But however important a principle may be, it is not without limits. This appeal calls upon us to clarify the limits of the openness of court proceedings. What must be determined, in essence, is how far the aspiration for transparency in the judicial process should lead and at what point secrecy can prevail.

[2] In Quebec, the *Code of Civil Procedure*, CQLR, c. C-25.01 (“*C.C.P.*”), gives members of the public the right to have access to court records: art. 11 *C.C.P.*<sup>1</sup> No prior authorization is required: anyone can examine the content of such records. The *Code* also contains a provision dealing with the retrieval of exhibits filed in a court record: art. 108 *C.C.P.* In the course of a proceeding, the parties are *authorized* to retrieve their exhibits if all of them consent; once the proceeding has ended, they are *obliged* to do so, otherwise the exhibits may be destroyed by the court clerk after one year. The question at the centre of this appeal is whether art. 11 *C.C.P.* allows members of the public to consult exhibits that have been retrieved by the parties in accordance with art. 108 *C.C.P.* In my view, the right to have access to court records set out in art. 11 *C.C.P.* does not extend beyond what is in these records at the time they are consulted. This means that once the parties retrieve their exhibits at the end of a

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<sup>1</sup> The relevant statutory provisions are reproduced in an appendix.

proceeding, members of the public will still be able to consult the record but will no longer have access to the exhibits that have been removed from it.

## II. Background

[3] On October 6, 2016, the respondent Centre intégré universitaire de santé et de services sociaux de l'Ouest-de-l'Île-de-Montréal (“CIUSSS”) instituted court proceedings against one of its former managers, the respondent Magdi Kamel. The originating application alleged misappropriation of funds in the amount of \$410,266 and sought the repayment of that sum as well as \$100,000 in damages. It was accompanied by an application for a *Norwich* order to obtain the identity of the holder of the four bank accounts to which that sum had allegedly been diverted between April 1, 2009 and March 31, 2015. The CIUSSS filed four exhibits in support of its applications, including an expert forensic accounting report produced by PwC. On October 7, 2016, the Superior Court made the *Norwich* order and ordered that the entire record be sealed.

[4] Seizures before judgment were carried out at Mr. Kamel’s residences on October 17 and November 22, 2016. The *Journal de Montréal*, a newspaper published by the appellant, MediaQMI, devoted two articles to the seizures on October 31 and December 13, 2016. Wishing to find out the details of the court proceedings, MediaQMI filed its [TRANSLATION] “Motion to unseal” on March 29, 2017 in order to have access to the court record and the exhibits that might be in it. In that motion based

on art. 11 *C.C.P.* and s. 23 of the *Charter of human rights and freedoms*, CQLR, c. C-12 (“*Quebec Charter*”), MediaQMI sought only a single conclusion:

[TRANSLATION] TERMINATE any order whose purpose is to restrict the access of the public and the Applicant to the Court record for file 500-17-095861-160.

[5] The hearing of the motion, scheduled for April 5, 2017, was postponed to April 25, 2017. In the meantime, the CIUSSS discontinued its originating application. It filed a notice of discontinuance on April 19, 2017 and, over the next few days, tried to retrieve the four exhibits filed in support of its application. However, the staff of the court office could not find the record.

[6] On April 21, 2017, Mr. Kamel applied to the Superior Court for authorization to withdraw the originating application from the court record or, in the alternative, for an order preventing the public from having access to it. The CIUSSS did not oppose Mr. Kamel’s application, but MediaQMI indicated its opposition on April 24, 2017.

[7] On April 25, 2017, Gagnon J. heard MediaQMI’s motion *in camera*. At the hearing, counsel for the CIUSSS made an oral request to retrieve the exhibits filed in the court record, emphasizing that the expert forensic accounting report produced by PwC was private. MediaQMI opposed that request to retrieve the exhibits. Gagnon J. took the case under advisement after extending the sealing order until his judgment was rendered. No other conservatory measure was sought by any of the parties.



### III. Judicial History

#### A. *Quebec Superior Court, 2017 QCCS 4691 (Gagnon J.)*

[8] Gagnon J. rendered his decision on July 20, 2017. After noting that MediaQMI was neither a party to the litigation nor, strictly speaking, an intervenor, he decided the motion to unseal on the basis of the test set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 (“*Dagenais/Mentuck* test”). Finding that the evidence was insufficient to depart from the principle of open court proceedings, he observed that the mere desire to avoid embarrassment for Mr. Kamel and negative publicity for the CIUSSS did not justify keeping the record confidential. He therefore ordered that the record be unsealed.

[9] With regard to the oral request to retrieve the exhibits, Gagnon J. stated that the rights of journalists and the media do not override the application of the ordinary rules of the *Code of Civil Procedure*. He added that the efficiency of civil procedure is based in part on out-of-court settlements and discontinuances. As soon as a proceeding ends, he wrote, the parties have complete freedom to retrieve all exhibits from the record and to shield them from public scrutiny; indeed, art. 108 *C.C.P.* requires them to do so. Because the proceeding in this case had been terminated by a discontinuance, Gagnon J. authorized the CIUSSS to remove its exhibits from the court record. Counsel for the CIUSSS retrieved them the day after the judgment was rendered, on July 21, 2017. After reading MediaQMI’s notice of appeal, he sent its

counsel an email written [TRANSLATION] “[w]ithout prejudice” in which he confirmed, “without any admission, that we are keeping a copy of the exhibits . . . until the appeal is decided or settled”: A.R., at p. 82.

B. *Quebec Court of Appeal, 2019 QCCA 814 (Marcotte and Schragar J.J.A. and Samson J. (ad hoc))*

[10] The three Quebec Court of Appeal judges wrote separate reasons to dispose of MediaQMI’s appeal from the conclusion relating to the retrieval of exhibits.

[11] Citing *Lac d’Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, Samson J. noted that Quebec courts may not create positive rules of civil procedure, much less rules that would be contrary to the *Code of Civil Procedure*. In his view, MediaQMI’s motion was ancillary to the litigation between Mr. Kamel and the CIUSSS. By terminating the proceeding, the discontinuance had also resulted in a loss of jurisdiction over that ancillary motion. Since the parties controlled the course of their case, the CIUSSS could retrieve its exhibits as soon as the discontinuance was filed. The *Dagenais/Mentuck* test did not apply, because that test presupposes a discretion that did not exist in this case. First, there was no longer any litigation between the parties; second, art. 108 *C.C.P.* confers no discretion. Samson J. was therefore of the view that the appeal should be dismissed.

[12] Schragar J.A. arrived at the same result, but for different reasons. In his opinion, discontinuance creates a legal fiction that puts the parties back in the position

they were in prior to the court proceedings; it takes exhibits out of the public domain and returns them to the private sphere. The justification for dismissing MediaQMI's application lies in the fact that there were no active court proceedings and that the documents were private; it does not lie in art. 108 *C.C.P.* Schragger J.A. described that provision as being purely procedural and intended to reduce the costs associated with court records; as a result, he did not regard it as a valid basis for a decision to deny access to the exhibits. The *Dagenais/Mentuck* test could not apply in the absence of active court proceedings. Schragger J.A. nonetheless observed, in *obiter*, that that test might permit access to documents relating to litigation that had ended in the limited case where the purpose of the motion was to scrutinize the judicial process as such, but this was not the case here: MediaQMI was seeking information about the parties themselves, not about the judicial process that had led to the discontinuance.

[13] In her dissenting reasons, Marcotte J.A., like her colleague Schragger J.A., found that art. 108 *C.C.P.* sets out an administrative rule whose purpose is to declutter court records; such a rule cannot be used to circumvent the fundamental principle of open court proceedings. In her view, the Superior Court judge had erred by disregarding the fact that the motion to unseal had been filed before the CIUSSS's discontinuance, that is, before the end of the proceeding. In light of the importance of the principle of open proceedings and the specific context of the motion, which concerned litigation relating to the management of public funds, Marcotte J.A. found that the Superior Court judge should have determined whether the exhibits were confidential before authorizing the CIUSSS to retrieve them. She would therefore have referred the case

back to the Superior Court so that it could decide that issue on the basis of the *Dagenais/Mentuck* test.

#### IV. Parties' Arguments

[14] It is important to note from the outset that MediaQMI is not challenging the constitutionality of art. 11 or art. 108 *C.C.P.* Nor is it contesting the CIUSSS's discontinuance. In this Court, it essentially argues that the scope of the principle of open proceedings must be analyzed in light of s. 2(b) of the *Canadian Charter of Rights and Freedoms* and the analogous guarantees set out in the *Quebec Charter*, and that its application for access to exhibits should therefore be decided on the basis of the *Dagenais/Mentuck* test. Relying on the legislative history of art. 108 *C.C.P.*, it argues that this provision does not override the exercise of its constitutional rights. It maintains that the CIUSSS's discontinuance and the subsequent retrieval of the exhibits in issue did not make its application for access to the exhibits obsolete: the filing of its motion to unseal allegedly crystallized its rights by giving it an acquired right to argue its application. According to it, art. 11 *C.C.P.* guarantees a right of access to exhibits that is not limited to what is found in the court record concerned. In oral argument, it qualified the acquired rights argument by stating that the principle of open proceedings protects the right to have applications for access to exhibits decided even several years after a proceeding has ended (transcript, at pp. 21-22). Applying the *Dagenais/Mentuck* test to the facts of the case, MediaQMI takes the position that there is no reason for the

exhibits in issue to be confidential, and it therefore asks the Court to declare that they are public and to order the CIUSSS to provide it with a copy of them.

[15] The CIUSSS argues that the public nature of a court record does not necessarily mean that exhibits will continue to be part of it. The right to consult records is limited to what is contained within the records at the time they are consulted. That content is circumscribed by the guiding principle of procedure that the parties control the course of their case as well as by art. 108 *C.C.P.* The CIUSSS takes the view that art. 108 *C.C.P.* creates an exception to the principle of open proceedings given that it is an instance where “the law . . . restricts access . . . to certain documents filed in a court record” (art. 11 para. 2 *C.C.P.*). As art. 108 *C.C.P.* confers no discretion on a judge, it follows that the *Dagenais/Mentuck* test does not apply.

[16] Mr. Kamel argues that the position taken by MediaQMI implies the creation of a new procedural rule that would be contrary to the rules set out in the *Code of Civil Procedure*. He submits that the preliminary provision of the *Code* and the principles of statutory interpretation prevent art. 108 *C.C.P.* from being reduced to a purely administrative provision; the words of that article are clear, and the legislature would have used different language if it had intended to limit the freedom of parties to retrieve their exhibits. Mr. Kamel adds that because MediaQMI was never a party to the proceeding, it cannot contest the discontinuance or the consequences it may have had for its rights. Like the CIUSSS, he argues that art. 108 *C.C.P.* determines the

outcome of the application for access to exhibits and makes the *Dagenais/Mentuck* test inapplicable.

## V. Issues

[17] This appeal raises two questions:

- A. What is the extent of the right conferred by the *Code of Civil Procedure* to have access to the content of court records?
- B. Is MediaQMI entitled to have access to the exhibits that were in the court record at the time it filed its motion?

## VI. Analysis

- A. *What Is the Extent of the Right Conferred by the Code of Civil Procedure to Have Access to the Content of Court Records?*

[18] Article 11 *C.C.P.* sets out the principle of open court proceedings and gives members of the public the right to “have access to court records and entries in the registers of the courts”. This provision guarantees access to court records and to what they contain at the time they are consulted, aside from confidential information. Where an exhibit is retrieved from a record pursuant to art. 108 *C.C.P.*, it generally returns to the private sphere. Article 11 *C.C.P.* therefore does not confer a specific right to access exhibits that were once part of court records. A number of considerations favour this

interpretation: the text, object and scheme of the *Code of Civil Procedure*, the legislative history, the guiding principles of civil procedure, and practical considerations relating to the resolution of disputes.

[19] In their reasons, my colleagues suggest that the result I reach would make it possible for parties to circumvent the principle of open court proceedings, which they characterize as being of public order. That criticism is unfounded. Article 11 *C.C.P.* gives access to a record whose content is governed in part by art. 108 *C.C.P.* The retrieval of exhibits from a record in the circumstances described in art. 108 *C.C.P.*, when an application to consult the record is pending, does not “infring[e] a rule of public order” (reasons of the Chief Justice and Kasirer J., at para. 123); it simply constitutes the exercise of a right provided for in the *Code of Civil Procedure*. With great respect for my colleagues’ view, emphasizing the importance of the principle of open proceedings is not sufficient to extend its implications beyond what is authorized by law. Fundamental though it may be, this principle remains circumscribed by the limits set out in the *Code of Civil Procedure*. Specifically, it does not give members of the public the right to have access to exhibits that have been removed from a court record in accordance with art. 108 *C.C.P.*

[20] In the context of Quebec civil procedure, it is therefore impossible, in my view, to give the principle of open proceedings the interpretative scope given to it by MediaQMI and my colleagues without also rewriting several rules expressly set out in the *Code of Civil Procedure*. But as former Chief Justice Fauteux wrote,

[TRANSLATION] “[t]he Constitution contemplates only one system for making laws, not two systems that can function simultaneously, in a diverging manner”: *Le livre du magistrat* (1980), at p. 125. Whatever protection the principle of open proceedings may have under the charters, the legislature remains free to fix the scope of that principle in the rules it enacts. It is not the role of the courts to conduct that exercise in its place. Accordingly, in the absence of a constitutional challenge, the rules clearly stated in the *Code of Civil Procedure* are what apply.

(1) Interpretation of the *Code of Civil Procedure*

[21] In *Lac d’Amiante*, the Court noted that in Quebec, “[t]he fundamental law concerning civil procedure is the law enacted by the National Assembly . . . in a code that is expressed in general terms”: para. 35. In the civil law context, creating the law remains the legislature’s prerogative: *ibid.* The courts perform “only . . . a secondary or interstitial function” in this regard by making rules of practice or exercising the inherent or ancillary powers provided for in arts. 25 and 49 *C.C.P.*: paras. 36-38.

[22] This delimitation of the role of judges reflects a specifically civilian conception of the separation of judicial and legislative functions: *Lac d’Amiante*, at paras. 37-39; L. LeBel, “La méthode d’interprétation moderne: le juge devant lui-même et en lui-même”, in S. Beaulac and M. Devinat, eds., *Interpretatio non cessat — Mélanges en l’honneur de Pierre-André Côté* (2011), 103, at p. 112; Fauteux, at pp. 123-26. This conception dates back at least to Montesquieu, who described judges as “the mouth that pronounces the words of the law”: *The Spirit of Laws* (1777), vol. 1,



at p. 208. That is an eloquent turn of phrase, though too rigid; the inclination today would rather be to view judges as giving life to the dead letter of the law: P. B. Mignault, “Le Code Civil de la Province de Québec et son Interprétation” (1935), 1 *U.T.L.J.* 104, at p. 111. Apart from exceptional situations in which civil law judges are called upon to state the law that emerges from the interstices of the *Code*, their creative activity involves [TRANSLATION] “discover[ing] the potentialities of the [statutory] language” and “thus complet[ing] the legislature’s work”: L. LeBel, “La loi et le droit: la nature de la fonction créatrice du juge dans le système de droit québécois” (2015), 56 *C. de D.* 87, at pp. 92-93; *Cie Immobilier Viger Ltée v. Giguère Inc.*, [1977] 2 *S.C.R.* 67, at pp. 75-77. In so doing, they must avoid two opposite pitfalls: [TRANSLATION] “counter[ing] the letter with the spirit, and the spirit with the letter” (H. F. d’Aguesseau, *Discours de M. le chancelier d’Aguesseau* (new ed. 1822), vol. 1, at p. 287, cited in Fauteux, at p. 14).

[23] The Quebec legislature has reiterated these principles relating to the role of judges in a preliminary provision whose normative value is now well established: *Lac d’Amiante*, at para. 40; *Prud’homme v. Prud’homme*, 2002 SCC 85, [2002] 4 *S.C.R.* 663, at para. 30; L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations*, vol. 1, *Articles 1 à 309* (5th ed. 2020), at pp. 1-5. The third paragraph of that provision sets out the framework within which the *Code of Civil Procedure* must be interpreted:

This Code must be interpreted and applied as a whole, in keeping with civil law tradition. The rules it sets out are to be interpreted in the light of

the specific provisions it contains or of those of the law, and in the matters it deals with, the Code compensates for the silence of the other laws if the context so admits.

[24] The preliminary provision also states that the *Code of Civil Procedure* “governs” procedure before the courts “in harmony with the Charter of human rights and freedoms”. In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789, this Court commented on a similar provision in the *Civil Code of Québec*, stating that “[t]he interpretation of legislation must draw on [the] principles” set out in that *Charter*: para. 20. But there is a difference — and it is a significant one — between an interpretation *that draws* on certain principles and an interpretation *that deviates*, in the name of those principles, from the legislative intent clearly expressed in the wording of a law.

[25] The charters are instruments that protect rights and freedoms; they are not large Procrustean beds designed to stretch laws to the desired size. On the contrary, they preserve the legislature’s autonomy by means of justificatory provisions like s. 1 of the *Canadian Charter*: T. A. Cromwell, S. Anstis and T. Touchie, “Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretation” (2017), 95 *Can. Bar Rev.* 297, at p. 322. In Quebec, the legislature made this very clear by enacting ss. 9.1 and 51 of the *Quebec Charter*:

**9.1.** In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, State laicity, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

**51.** The Charter shall not be so interpreted as to extend, limit or amend the scope of a provision of law except to the extent provided in section 52.

[26] It is also important to note that in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, this Court rejected the argument that courts should interpret statutes so as to make them consistent with the principles or values of the *Canadian Charter*, except to resolve an ambiguity that persists after applying the contextual approach to interpretation:

... a blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction. . . .

...

To reiterate what was stated in *Symes, supra*, and *Willick, supra*, if courts were to interpret all statutes such that they conformed to the *Charter*, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the *Charter* right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret this sort of enactment in light of *Charter* principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result. [Emphasis deleted; paras. 64 and 66.]

(See also *Pharmascience Inc. v. Binet*, 2006 SCC 48, [2006] 2 S.C.R. 513, at para. 29; *R. v. Clarke*, 2014 SCC 28, [2014] 1 S.C.R. 612, at paras. 12-15.)

[27] This approach accords with the interpretative provisions of the *Quebec Charter*, including s. 53:

**53.** If any doubt arises in the interpretation of a provision of the Act, it shall be resolved in keeping with the intent of the Charter.

There is therefore no doubt that the *Quebec Charter* can be used to interpret the *Code of Civil Procedure* in appropriate circumstances. However, this possibility is not an invitation to ignore the language of the statute and the intention expressed in it.

(2) The Principle of Open Court Proceedings in Quebec Civil Procedure

[28] Quebec has had four codes of civil procedure, those of 1867, 1897, 1965 and 2016. The codification of the principle of open court proceedings dates back to the *Code of Civil Procedure*, S.Q. 1897, c. 48, which provided that only “sittings of a court or of a judge” were public, other than in exceptional cases where secrecy was necessary: art. 16. The 1897 codifiers drew inspiration from similar provisions found in the French and Genevan codes of civil procedure: O. P. Dorais and A. P. Dorais, *Code de procédure civile de la province de Québec, comprenant les observations spéciales des commissaires chargés de la révision et modification du Code de procédure civile du Bas-Canada* (1897), at p. 97. It is noteworthy that those provisions

focused primarily on the public nature of oral argument: *Code de procédure civile* (France), 1806, art. 87; *Loi sur la procédure civile du canton de Genève*, 1837, s. 84. Like its predecessor, the *Code of Civil Procedure*, CQLR, c. C-25, enacted in 1965 (“former *Code of Civil Procedure*” or “former *C.C.P.*”), stated that “sittings of the courts” were public: art. 13. Section 23 of the *Quebec Charter*, enacted in 1975, was along the same lines, although it extended the application of the principle beyond the courts.

[29] The open court principle was originally extended to court records not by legislation, but by the rules of practice made in the exercise of the power conferred on the courts by art. 47 of the former *Code of Civil Procedure*. The Quebec Superior Court had made rules authorizing the public to have access to its records and registers during business hours, subject to exceptions relating to confidential documents: *Rules of practice of the Superior Court of Québec in civil matters*, R.R.Q. 1981, c. C-25, r. 8, rules 2 and 3. The Court of Québec had adopted rules of practice to the same effect: *Regulation of the Court of Québec*, CQLR, c. C-25, r. 4, ss. 3, 4, 18 and 19. It was clear at the time that this right of access concerned the physical court records in which parties filed their exhibits and from which they retrieved them once a proceeding had ended.

[30] In its 2001 report, the Civil Procedure Review Committee made note of the change to the principle of openness introduced by the courts’ rules of practice:

[TRANSLATION] The importance of the open court principle in the administration of justice, both for parties and for the public, justifies continuing to codify it and structuring its application, including to specify

the criteria for limiting or excluding it. All of the rules on the subject should also be harmonized, including those made by various courts concerning access to and the keeping and consultation of their records, such as section 3 of the *Rules of practice of the Superior Court of Québec in civil matters*. These fundamental matters in the administration of justice should be dealt with by the code. In this regard, it is appropriate here to draw inspiration from the rules of practice in force while updating them to take account of information technologies or adding to them to ensure better protection of information.

On another note, the current wording of article 13 of the *Code* with respect to the openness of proceedings is imprecise given that, according to the majority opinion in the case law, the term “*audiences*” in the French version refers only to the trial. Yet the public nature of justice encompasses the whole of the proceeding and the record. [Emphasis added.]

(*Une nouvelle culture judiciaire* (2001), at pp. 42-43)

The Committee therefore recommended “[s]tating that civil justice is public, both with regard to the proceeding and with regard to the record”: p. 43.

[31] In 2016, a new *Code of Civil Procedure* came into force. In arts. 11 to 16, it sets out the general scheme relating to the public nature of civil justice. Article 11 incorporates the Committee’s recommendation and frames the principle of open proceedings as a twofold principle involving two distinct rights. It gives members of the public the right to “attend court hearings wherever they are held” and the right to “have access to court records and entries in the registers of the courts”. The legislature thus followed the courts’ lead by including in art. 11 *C.C.P.* a right to access records similar to the one provided for in the rules of practice, but it did not go so far as to create a specific right to access the exhibits filed in the course of a proceeding.

[32] The *Code of Civil Procedure* also indicates that the law may “restric[t] access to the court records or to certain documents filed in a court record”: art. 11 para. 2 *C.C.P.* Article 12 *C.C.P.* states, for example, that a court may make an exception to the principle of open proceedings if “public order . . . requires . . . that access to a document . . . be prohibited or restricted”. In addition, there are exceptions to the principle for records involving sensitive matters and for certain documents filed in a sealed envelope: art. 16 *C.C.P.*

[33] This last point, which relates to the form in which documents must be filed, is echoed in art. 108 para. 1 *C.C.P.*, which requires parties to file exhibits and other documents that contain personal and confidential information in a form that protects the confidentiality of that information. The explicit reference to the general scheme relating to the public nature of civil justice set out in arts. 11 to 16 *C.C.P.* is clear from the text of art. 108 *C.C.P.* This is confirmed by the parliamentary record and the commentary of the Minister of Justice: National Assembly of Quebec, Standing Committee on Institutions, “Étude détaillée du projet de loi n° 28 — Loi instituant le nouveau Code de procédure civile”, *Journal des débats*, vol. 43, No. 79, 1st Sess., 40th Leg., October 29, 2013, at pp. 73-77; Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), at pp. 106-8.

[34] This reference to the general scheme is clear both from the language used in art. 108 and from the holistic reading of the *Code of Civil Procedure* called for by the third paragraph of its preliminary provision and by s. 41.1 of the *Interpretation Act*,

CQLR, c. I-16. The term “*dossier*” (record or case) is used many times in the French version of the *Code of Civil Procedure* and generally refers to the court record, except where it is used metonymically to refer to the court proceeding associated with that record: see, for example, art. 19 *C.C.P.* (the parties control the course of their *dossier* (case)) or art. 205 *C.C.P.* (a judge who grants an application for recusation must withdraw from the *dossier* (case)). Article 108 para. 2 *C.C.P.* refers to documents filed “*au dossier*” (in the record). In this specific case, the *dossier* in question can only be the court record mentioned in art. 107 *C.C.P.* to which the general scheme set out in arts. 11 to 16 *C.C.P.* applies.

[35] It therefore seems to be beyond question that art. 108 *C.C.P.* concerns the content of the records contemplated in arts. 11 to 16 *C.C.P.*, that is, the records that are subject to a court’s supervisory power and control. As I will explain, art. 108 *C.C.P.* governs the keeping, retrieval and preservation of the exhibits filed in the record to which art. 11 *C.C.P.* gives access.

(3) Rules Set Out in Article 108 *C.C.P.*

[36] Schragger and Marcotte J.J.A. accepted MediaQMI’s argument that significantly limited the scope of art. 108 *C.C.P.* on the basis of certain passages from parliamentary debates, including statements made spontaneously in answer to questions raised before a committee of the whole House and statements made by opposition members. In her dissenting reasons, Marcotte J.A. wrote the following:



[TRANSLATION] . . . the scope of article 108 *C.C.P.* must be brought back to its context, which is that this article reiterates the rule previously set out in article 331.9 of the former *Code of Civil Procedure*, which was enacted to reduce the costs of the judicial system and to streamline court records. This is certainly a laudable goal, but it still cannot justify circumventing the fundamental principle that court proceedings are public. [para. 54]

(See also the reasons of Schragger J.A., at para. 42.)

[37] With respect, some nuance is required. No rule of statutory interpretation justifies neutering a legal rule stated in clear terms on the basis of statements made during parliamentary debates. Otherwise, more weight would be given to spontaneous individual statements than to the text enacted by the legislature, each word of which must be presumed to have been chosen with care. This Court has said repeatedly that “statutory interpretation entails discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute’s scheme and objects”: *Michel v. Graydon*, 2020 SCC 24, at para. 21; see also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. Parliamentary debates can certainly inform the interpretation process, but they must not make us forget the caveats our Court has attached to the admission of this type of extrinsic evidence: *Construction Gilles Paquette ltée v. Entreprises Végo ltée*, [1997] 2 S.C.R. 299, at para. 20; *Rizzo Shoes*, at para. 35; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 47.

[38] The information obtained from parliamentary debates is particularly useful when it “confirm[s] that the interpretation given is correct”: *Construction Gilles Paquette*, at para. 20; see also *Canada 3000 Inc. (Re)*, 2006 SCC 24, [2006] 1 S.C.R.

865, at para. 57, and P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at pp. 466-68. This is a matter of predictability in the law. As one author notes, “arguments from parliamentary history must not result in the refusal to apply a clear rule, as doing so would unduly compromise the reader’s right to rely on the letter of the law interpreted in its context”: Côté, at pp. 467-68. With respect, the approach proposed by MediaQMI, and accepted by Schragar and Marcotte J.J.A., does the exact opposite of that recommendation.

[39] In these circumstances, I think it is appropriate to highlight that courts do not have to interpret — let alone implement — the objective underlying a legislative scheme or provision; what they must interpret is the text through which the legislature seeks to achieve that objective. The objective may be defined at various levels of abstraction: care must therefore be taken not to define it too generally by remembering that the goal of the interpretative exercise is to find harmony between the words of the statute and the intended objective, not to achieve the objective “at all costs”: *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 174 (per Cromwell J.). In addition, this exercise may bring several objectives into play at the same time, all of which must be taken into account: *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at paras. 82-83; *R. v. Rafilovich*, 2019 SCC 51, at paras. 29-30. In my view, this is the case of art. 108 C.C.P. I will explain.

[40] It is inaccurate to say that art. 108 *C.C.P.* merely “reiterates the rule previously set out in article 331.9 of the former *Code of Civil Procedure*”: C.A. reasons, at para. 54. It does much more than that. The first and third paragraphs of art. 108 *C.C.P.* are new law: *Commentaires de la ministre de la Justice*, at p. 107. The second paragraph reiterates not one rule, but two complementary rules: those set out in arts. 83 and 331.9 of the former *C.C.P.*

[41] Under art. 83 of the former *C.C.P.*, exhibits had to remain in the record until the end of the proceeding, but it was possible to take them out “with the consent of the opposite party or the authorization of the clerk”. Retrieval of exhibits with the clerk’s authorization did not make its way into the new *Code of Civil Procedure*. As for retrieval with consent, the consent of *all* the parties is now required. Apart from this, the rule has not changed: exhibits must remain in the record until the end of the proceeding. Once the proceeding has ended, however, it is no longer necessary for exhibits to remain in the record. Article 331.9 of the former *C.C.P.* set out a second rule: it required parties to retrieve their exhibits within one year after the end of the proceeding, failing which the exhibits would be destroyed. This second rule is found in virtually the same form in art. 108 *C.C.P.*

[42] Article 331.9 of the former *C.C.P.* was enacted in 1994 as part of Bill 24, *An Act to amend the Code of Civil Procedure*, 3rd Sess., 34th Leg. That bill, which also affected art. 83 of the former *C.C.P.*, reformed the general scheme for the communication and filing of exhibits and introduced mechanisms for the retrieval and

destruction of exhibits. First, it encouraged parties to exchange information with regard to their respective evidence and to communicate their exhibits to one another directly, without first filing them in the court record. Second, it contemplated that, from then on, exhibits would be filed and kept on the basis of usefulness and necessity. It therefore delayed the filing of exhibits until the date closest to the start of the trial when the court would need them, and it provided for the streamlining of records when keeping the exhibits no longer served any purpose in the proceeding: arts. 331.7 and 331.9 of the former *C.C.P.*; see also National Assembly of Quebec, “Adoption du principe — Projet de loi 24 — Loi modifiant le Code de procédure civile”, *Journal des débats*, vol. 33, No. 30, 3rd Sess., 34th Leg., June 1, 1994.

[43] That scheme, of which arts. 83 and 331.9 of the former *C.C.P.* were two key components, was incorporated in substance into the new *Code of Civil Procedure*. Its effect was to eliminate the role of the court office and court record as an intermediary between the parties for forwarding their respective exhibits. In doing so, it made the parties and their lawyers more accountable for the conduct of the proceeding and the fairness of the debate: Civil Procedure Review Committee, at p. 138; *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287, at para. 26. It thus gave effect to two principles that were later made guiding principles of civil procedure: the parties’ control over the course of their case (art. 19 *C.C.P.*) and their duty to cooperate and to keep one another informed (art. 20 *C.C.P.*).

[44] The scope of arts. 83 and 331.9 of the former *C.C.P.* should not be narrowed on the ground that the legislature's underlying objective was purportedly to reduce the costs associated with the judicial system. An objective defined in such a general manner is, in fact, of quite limited assistance for the purposes of statutory interpretation: a very large part of civil procedure could be said to be intended to reduce the costs of the judicial system. While economic considerations related to the storage of court records may have motivated the enactment of art. 331.9 of the former *C.C.P.*, the fact remains that the legislature inserted that provision into a general scheme designed to increase the parties' responsibility, and lessen that of the courts, for the communication, filing and preservation of exhibits.

[45] As the successor of the scheme introduced by Bill 24 in 1994, art. 108 *C.C.P.* is anything but a "purely procedural (if not mechanical)" measure that can be displaced by the principle of open proceedings: C.A. reasons, at para. 42 (per Schragger J.A.). On the contrary, it revises and unifies the rules on the keeping, retrieval and preservation of the exhibits filed in the court record to which art. 11 *C.C.P.* gives access. It also deals, albeit incidentally, with the filing of exhibits, although most of the rules on that subject have been grouped together in arts. 246 to 252 *C.C.P.* Insofar as it governs the content of court records, art. 108 *C.C.P.* has a direct impact on the information to which the public can have access under art. 11 *C.C.P.*

[46] I note in passing that the Civil Procedure Review Committee recommended the creation of a computerized system for storing court documents and

records: p. 107. Had it been implemented, that recommendation might have made it possible for the public to have access to documents that had been retrieved from court records under art. 108 *C.C.P.* However, nothing ever came of the recommendation. It would be an encroachment on the sphere of the legislature to implement it indirectly by ordering a party to a proceeding that has ended to provide a copy of the exhibits retrieved by that party to a member of the public who wishes to consult them.

(4) Respective Scope of Articles 11 and 108 *C.C.P.*

[47] The exhibits filed in a court record are intrinsically related to the evidence the parties intend to adduce in support of their allegations: H. Reid, with S. Reid, *Dictionnaire de droit québécois et canadien* (5th ed. 2015), at p. 474, “*pièce*” (exhibit); S. Guillemard and S. Menétray, *Comprendre la procédure civile québécoise* (2nd ed. 2017), at pp. XVIII, “*pièce*” (exhibit), and 234. Just as the parties control the course of their case and have control of their evidence, they necessarily also have control of their exhibits: art. 19 *C.C.P.*; *Imperial Oil*, at para. 25. They can therefore retrieve them at any stage of the proceeding, subject to the consent of the other parties; the *Code of Civil Procedure* does not require any prior authorization from the court. Article 108 *C.C.P.* thus implicitly recognizes that, even after they are filed in the court record, exhibits remain the property of the parties. Indeed, if the filing of exhibits transferred ownership to the court, the *Code* would not allow the parties to retrieve them at any stage of the proceeding, and it certainly would not require the parties to retrieve them once the proceeding has ended. While the exhibits are in its possession, the court merely has

“custody” of them: *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671, at pp. 681-82. This is why it does not keep the exhibits in its records indefinitely.

[48] Article 11 *C.C.P.* gives the public the right to have access to court records with the documents and exhibits they contain at the time they are consulted, subject to exceptions for confidential information. It gives “access to exhibits” only to the extent that they are in the record. Where parties are slow to retrieve their exhibits at the end of a proceeding, the exhibits will remain accessible to the public until they have been retrieved from the record or destroyed by the court clerk. But once the exhibits have been retrieved or destroyed, the public no longer has access to them.

[49] The conclusion at which I arrive is in keeping with the intention expressed by the legislature through the words of arts. 11 and 108 *C.C.P.*, with the legislative objectives underlying those provisions, with the general scheme of the *Code of Civil Procedure* and with civil law principles of interpretation. It also avoids giving the principle that civil justice is public set out in art. 11 *C.C.P.* a scope that might distort that principle, just as it avoids undermining other important objectives of the *Code of Civil Procedure*, such as the prevention and resolution of disputes: preliminary provision, para. 2, arts. 1, 9 para. 2 and 19 para. 3 *C.C.P.*

[50] In civil matters, parties generally go before the courts because they need [TRANSLATION] “the operation of social constraints” to enforce their rights and resolve their conflict: H. Motulsky, *Principes d’une réalisation méthodique du droit privé (La*

*théorie des éléments générateurs des droits subjectifs*) (1948), at p. 35 (emphasis deleted). But the *Code of Civil Procedure* does not chain parties to the proceedings they have initiated; on the contrary, it reminds them that they may, at any time, settle their dispute and thereby terminate a proceeding: art. 19 para. 3 *C.C.P.* It therefore subordinates the judicial resolution of disputes to the restoration of social peace: preliminary provision, para. 2; S. Guillemard, “Réflexions autour des sept premiers articles du *Code de procédure civile*”, in S. Guillemard, ed., *Le Code de procédure civile: quelles nouveautés?* (2016), 123, at pp. 128-29.

[51] Several considerations may lead to the resolution of a dispute brought before a court. One of them is a desire for confidentiality: Sup. Ct. reasons, at para. 119. As my colleague Abella J. once noted, a climate of confidentiality “promotes settlements”: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, at para. 12. Article 4 *C.C.P.* recognizes this as well. The objective of facilitating the resolution of disputes would surely be undermined if parties who wished to come to an agreement after taking a matter to court could not bring the documents they had filed with the court back into the private sphere. When parties decide to terminate a proceeding, they must be free to retrieve their exhibits. Indeed, the *Code of Civil Procedure* requires them to do so.

[52] Exhibits filed in a court record may reveal various aspects of parties’ private lives, but they are accessible to the public nonetheless. The fact that civil justice is public means that those who bring court proceedings must waive, in part, their right



to privacy: *Lac d'Amiante*, at para. 42. However, they waive that right temporarily. By arguing that any application for access to exhibits removed from a record should be decided on the basis of the *Dagenais/Mentuck* test, even when the exhibits in question were removed several years earlier, MediaQMI seeks instead to make the waiver a permanent one.<sup>2</sup> It would impose a burden as heavy as it is unjustified on those who were parties to litigation that has now ended and who would like to preserve the confidentiality of the exhibits they have retrieved. If by chance a journalist or member of the public applied for access to those exhibits, the parties would in fact be required to show that confidentiality is “necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk” and — given that the two branches of the test are cumulative — that the salutary effects of confidentiality outweigh its deleterious effects on freedom of expression and the public interest in open proceedings: *Mentuck*, at para. 32; see also *Dagenais*, at p. 878.

[53] That position is inconsistent with the legislative intention reflected in art. 11 *C.C.P.*, with the general scheme of the *Code of Civil Procedure* and with the objective of facilitating the resolution of disputes. It also strikes me as unworkable in light of the situation contemplated by art. 108 para. 2 *C.C.P.* in which the court clerk

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<sup>2</sup> In support of their position, MediaQMI and the interveners drew our attention to some cases from common law jurisdictions, including *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18 (C.A.), and *Hong v. Lavy*, 2019 NSSC 271, 46 C.P.C. (8th) 327. Without expressing any opinion on the merits of those decisions, I note that they are readily distinguishable from this case. Both of them were rendered in a context in which there was no statutory or regulatory provision that controlled access to exhibits and the content of court records, as arts. 11 and 108 *C.C.P.* do.

may destroy exhibits that are not retrieved after one year. The principle of open proceedings would thus vary in scope depending on whether or not exhibits have been destroyed.

[54] In my view, the position advanced by MediaQMI must be rejected. The right to have access to court records set out in art. 11 *C.C.P.* is not meant to ensure perpetual access to exhibits that were in a court record at some point. Openness as conceived of by the *Code of Civil Procedure* does not relate to the parties and the private exhibits through which they intend to prove their arguments. It is first and foremost a guarantee of [TRANSLATION] “due process, the impartiality of judges and the proper conduct of proceedings”: R. Perrot, *Institutions judiciaires* (1978), at p. 366, cited in N. Fricero, “Audience et débats”, in *JurisClasseur France — Procédure civile*, by P. Carillon and R. Perrot, eds., 2020, fasc. 800-50, at No. 17 (available on Lexis/Nexis). In this regard, it is closely related to judicial accountability: *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at pp. 183-84.

[55] It is true that, with the advent of the *Canadian Charter*, judges relied on freedom of expression and freedom of the press to give the openness of proceedings a new dimension involving public access to information held by courts: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at paras. 18-26; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at paras. 36 and 52; S. Menétrey, “L’*évolution des fondements de la publicité des procédures judiciaires internes et son impact sur certaines procédures*

arbitrales internationales” (2008), 40 *Ottawa L. Rev.* 117, at pp. 130-39. But whatever its scope, the principle of open court proceedings has limits. This Court has recognized, for example, the confidential nature of examinations on discovery (*Lac d’Amiante*, at paras. 75-77) and the constitutionality of limits on filming and taking photographs in courthouses and on using audio recordings of court proceedings: *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19. The secrecy afforded to judicial deliberations is also well established: *British Columbia (Attorney General) v. Provincial Court Judges’ Association of British Columbia*, 2020 SCC 20, at para. 66; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952, at p. 966. As three authors note:

[TRANSLATION] It is fair to acknowledge that the principle of openness does not clearly apply at every stage of a trial. For example, it is difficult to see what safeguard a high degree of openness could provide when parties draft their application or when judges deliberate. At certain times during a trial, secrecy even comes to be thought of as preferable by far if the aim is to make justice more impartial. On this point, everyone agrees that, at its various stages, the justice system can live with a certain lack of openness and can even involve some secrecy.

(R. Perrot, B. Beignier and L. Miniato, *Institutions judiciaires* (18th ed. 2020), at p. 442)

[56] To summarize, art. 11 *C.C.P.* gives the public the right to have access to court records, subject to exceptions for confidential information. This right applies during and after a proceeding. It allows the public to consult the exhibits filed in the record, but only if they are in the record at the time it is consulted. The content to which it gives access is governed in part by art. 108 *C.C.P.* That provision authorizes the parties to retrieve their exhibits by consent in the course of a proceeding, and requires

them to retrieve their exhibits once the proceeding has ended. Even after the proceeding has ended, the exhibits can be consulted as long as they remain in the record. But once the parties retrieve them or the court clerk destroys them, they cease to be part of the record to which the public can have access.

[57] Articles 11 and 108 *C.C.P.* do not give rise to any judicial discretion. This is why the *Dagenais/Mentuck* test should not be used to decide an application under art. 11 *C.C.P.* That test was developed in a very different context from the one in question here, a context in which a comprehensive scheme enacted by Parliament served as a framework for the principle of openness. *Dagenais* established that the discretion to make an order limiting the openness of proceedings must be exercised within the boundaries set by the *Canadian Charter*: p. 875. To determine the correct balance between the competing constitutional rights engaged by this type of order — in that case, ss. 2(b) and 11(d) of the *Canadian Charter* — the Court proposed a two-part test designed to reflect the substance of the test in *R. v. Oakes*, [1986] 1 S.C.R. 103: *Dagenais*, at p. 878. Subsequent decisions have fleshed out the test without changing the context in which it applies, that is, where a discretion must be exercised and the court has to seek a correct balance between rights and interests that pull in opposite directions: *Mentuck*; *Sierra Club*; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592. In the absence of such a discretion, the test simply does not apply: *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, at paras. 35-36; *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65, at para. 13. This is because where the law fixes the scope of the principle of

open proceedings without conferring any discretion on judges, there is no reason to seek a correct balance between competing rights and interests that is within the boundaries set by the *Canadian Charter*. Given that the constitutionality of arts. 11 and 108 *C.C.P.* has not been challenged, it is unnecessary to say any more on the subject.

[58] That being said, I will add that the concern expressed by Schragger J.A. seems entirely legitimate to me: C.A. reasons, at paras. 43-44. I am of the view that if a motion, supported by persuasive evidence, called the very integrity of the judicial process directly into question in a context where exhibits had been retrieved from a record, a different conclusion about the application of the *Dagenais/Mentuck* test might be necessary. But such a motion could not be based solely on art. 11 *C.C.P.*; it would have to be based on provisions that confer a discretion, such as those dealing with the courts' inherent powers: arts. 25 and 49 *C.C.P.*; *Lac d'Amiante*, at para. 37. Because this question does not arise in the present case, however, I will refrain from providing any definitive answer to it. It is sufficient to note that civil procedure is "flexible": *Bisailon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 63. It therefore does not lack resources to deal with situations that are contrary to the fundamental principles of our justice system.

[59] Now that the respective scope of arts. 11 and 108 *C.C.P.* has been defined, these provisions should be applied to the facts of this case.

B. *Is MediaQMI Entitled to Have Access to the Exhibits That Were in the Court Record at the Time It Filed Its Motion?*

[60] MediaQMI filed its “Motion to unseal” on March 29, 2017. At that time, it did not know what was in the record for the litigation between Mr. Kamel and the CIUSSS; it was also unaware of the existence of the exhibits of which it now seeks a copy, precisely because of the sealing order it was applying to lift. Its motion was not heard until April 25, 2017. In the meantime, the CIUSSS discontinued its application and tried to retrieve its exhibits. The only reason it was unable to do so was that the staff of the court office could not find the record.

[61] That combination of circumstances prompted the CIUSSS, at the hearing on April 25, 2017, to make the oral request that led to this appeal. The Superior Court’s judgment [TRANSLATION] “authorizes the CIUSSS to remove Exhibits P-1 to P-4 from the record”: para. 137. That conclusion certainly had the merit of clarifying the state of affairs, but it was not, strictly speaking, necessary in law. As I have explained, the rules set out in art. 108 para. 2 *C.C.P.* do not require any authorization from a court.

[62] The CIUSSS’s discontinuance terminated the proceeding and restored matters to the state they were in before the application was brought: art. 213 *C.C.P.* This means that [TRANSLATION] “[t]he parties’ rights are as they were, as if no court proceeding had taken place”: H. Maillette, “Incidents qui mettent fin à l’instance”, in *JurisClasseur Québec — Collection droit civil — Procédure civile I* (2nd ed. (loose-leaf)), by P.-C. Lafond, ed., fasc. 21, at No. 9. Because the proceeding had been terminated, the documents and real evidence filed as exhibits no longer had to remain in the Superior Court’s record: this is what follows from reading *a contrario* the first

of the two rules set out in art. 108 para. 2 *C.C.P.* The second of those rules requires the parties to retrieve their exhibits within one year. The CIUSSS did not wait that long. Since it was unable to retrieve its exhibits when it filed its discontinuance, it did so the day after the Superior Court's judgment was rendered.

[63] As counsel for the CIUSSS acknowledged in oral argument, the record and the exhibits in it were accessible to the public during the time between the rendering of Gagnon J.'s judgment and the CIUSSS's retrieval of its exhibits (transcript, at p. 55). This was because the sealing order that had kept the record confidential until then came to an end when that judgment was rendered. I therefore do not agree with Schragger J.A. that the effect of the discontinuance was to put the CIUSSS's exhibits back in the private sphere through the legal fiction of restoring matters to their former state: C.A. reasons, at para. 37. That position is contradicted by the undisputed fact that, in spite of the discontinuance, the exhibits remained accessible to the public between the date Gagnon J. rendered his judgment and the date they were retrieved from the record; that position would also create an undesirable imbalance in the way that different methods of terminating a proceeding affect the openness of records and of their content. It is unclear why exhibits relating to a proceeding terminated by a discontinuance would be confidential even before the parties retrieved them, whereas exhibits relating to a proceeding terminated in a context not involving the legal fiction of restoring matters to their former state, such as the context of a settlement under art. 220 *C.C.P.*, would remain public until they were retrieved by the parties.

[64] In this case, therefore, MediaQMI could have consulted the exhibits in issue if it had applied for access to the record during the time when the exhibits were available, since no conservatory measure had been sought by the parties. MediaQMI did not do so. I agree that these rather unusual circumstances seem to make this case look like a race against time. But that is not a consequence of the parties' speed in going to the office of the Superior Court. It is a consequence of the rules in the *Code of Civil Procedure*. The situation would have been the same if the CIUSSS had waited weeks before retrieving its exhibits and MediaQMI had gone to the court office to consult the record after the exhibits had already been retrieved. This is because the right to "have access to court records" set out in art. 11 *C.C.P.* gives access to the public content of those records and to the exhibits that are in them *at the time they are consulted*; it does not give general access to everything that was ever part of the records.

[65] MediaQMI's right to "have access to court records" was never compromised. Only the terms of access to the court record and the content of that record changed between the filing of the "Motion to unseal" and the retrieval of the exhibits. However, that situation was beyond the reach of art. 11 because it fell within art. 108 *C.C.P.*

[66] Like MediaQMI, my colleagues characterize the "Motion to unseal" as an "application for access to exhibits". In their view, the fact that such an application was filed prior to the CIUSSS's discontinuance is determinative in the analysis. I disagree. This alone cannot give MediaQMI any [TRANSLATION] "acquired right to argue its



demand”<sup>3</sup> (A.F., at p. 17) within the *Dagenais/Mentuck* framework. I note as well that MediaQMI’s application has already been argued, albeit not within the legal framework it would like. But this is the case only because the *Dagenais/Mentuck* test did not apply in the absence of any judicial discretion.

[67] Asserting an acquired right is not enough to make one magically appear. The filing of a motion under art. 11 *C.C.P.* does not give the moving party any right to require that the content of the court record remain unchanged until the motion is decided. Although my colleagues accept MediaQMI’s arguments on this point, they do not identify any concrete, individualized legal situation that would have enabled MediaQMI to acquire a right to argue its application on the basis of the *Dagenais/Mentuck* test and, correspondingly, a right to require that the content of the court record be frozen on the day the application was filed. As I understand their reasons, they argue rather that because of that pending application, the CIUSSS’s discontinuance could not be invoked against MediaQMI, which was not a party to the

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<sup>3</sup> This expression, which my colleagues adopt, comes from the very specific context of *Classic Fabrics Corp. v. B. Rawe GMBH & Co.*, 2001 CanLII 7221 (Que. C.A.). In that commercial case, a Quebec company had tried to sue a German company, but the Quebec courts had declined jurisdiction based on the rules of private international law. The German company had countered by suing the Quebec company in Quebec, but had filed a discontinuance after the Quebec company tried to amend its defence to add a cross demand. The discontinuance would have prevented the Quebec company from having its claim decided by the Quebec courts. Because this was unquestionably prejudicial to the rights and advantages to which the state of the proceedings had given rise in its favour, the Quebec company applied to set aside the discontinuance. The Court of Appeal ruled in its favour; it set aside the discontinuance and allowed the cross demand to be added. Those were the unusual — to say the least — circumstances that led the court to speak of an [TRANSLATION] “acquired right to argue its demand, which the [German company] could not prejudice through a discontinuance of its action” (para. 39). I see nothing in that decision that would establish that any incidental application, even one that is brought by a person who is not a party to the proceeding and that is unconnected with the parties’ arguments on the merits, confers a real acquired right to argue the application notwithstanding the filing of a discontinuance.

proceeding, with the result that the proceeding did not end *with regard to MediaQMI* and that the parties could not raise the effects of art. 108 *C.C.P. against it*.

[68] With respect, it seems to me that my colleagues' position takes some concerning liberties with the statutory language. It takes a roundabout path to avoid the legal consequence attached by the *Code of Civil Procedure* to a notice of discontinuance filed with the court office and notified to the parties. This legal consequence, *which is not conditional on the absence of pending applications*, is the termination of the proceeding: art. 213 *C.C.P.* Yet the termination of the proceeding entitles — indeed requires — the parties to retrieve their exhibits: art. 108 *C.C.P.* The legal consequence from which the power to retrieve the exhibits in the record arises can therefore be avoided only by contesting the discontinuance itself.

[69] Again with respect, my colleagues' line of reasoning is essentially based on decontextualized quotations from decisions that are contrary to the position they adopt: reasons of the Chief Justice and Kasirer J., at paras. 109-15 and 139. They disregard the legal consequence of a discontinuance, *even though MediaQMI never applied to set it aside*, on the ground that a unilateral act of renunciation cannot adversely affect the rights of others. But the sources they rely on for this novel proposition instead establish *that an application to set aside a discontinuance can be made* if the rights of others are adversely affected. If alleging some kind of prejudice were enough to negate the extinctive effect of a discontinuance on a proceeding, it would not have been necessary to contest the prejudicial discontinuances in those cases.

In my view, my colleagues' reasoning makes all of the jurisprudence flowing from *L'Espérance v. Atkins*, [1956] B.R. 62, superfluous and, at the same time, rewrites art. 213 *C.C.P.* to dissociate the notice of discontinuance from its legal consequences for the proceeding under way. I note that their reasoning is also contrary to French law, under which persons who are not parties to a proceeding must seek to have a discontinuance set aside if they wish to prevent it from extinguishing the proceeding.<sup>4</sup> N. Fricero, "Désistement", in *JurisClasseur France — Procédure civile*, by P. Carillon and R. Perrot, eds., 2018, fasc. 800-40, at No. 105 (available on Lexis/Nexis). Finally, even if it were assumed that MediaQMI could show that its rights were adversely affected because it was unable to consult the exhibits in issue, this would not have resulted *from the discontinuance itself*: the discontinuance had no effect on the rights conferred on MediaQMI by art. 11 *C.C.P.* It would instead have resulted *from the retrieval of the exhibits that followed the discontinuance*. This is why, even if, for the

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<sup>4</sup> French law conceives of discontinuance as [TRANSLATION] "an offer made by the plaintiff to the defendant, who accepts it, to stop the trial without waiting for the judgment": J. Vincent and S. Guinchard, *Procédure civile* (27th ed. 2003), at p. 878 (emphasis deleted). In principle, the plaintiff is free [TRANSLATION] "in any matter" to discontinue an application: art. 394 of France's *Nouveau Code de procédure civile*. But the plaintiff's unilateral manifestation of will is not sufficient to extinguish the procedural legal relationship created between the parties by the plaintiff's judicial application; the discontinuance must also be "perfected" by the defendant's acceptance. However, acceptance is "not necessary if the defendant has not pleaded any defence on the merits or peremptory exception at the time of the plaintiff's discontinuance": art. 395. In cases where acceptance is required, it may be refused only for a legitimate reason: art. 396. Where there are several parties or interveners, the procedural legal relationship is extinguished only for those who have accepted the discontinuance: Fricero, "Désistement", at No. 106. Persons who are not participating in the proceeding, and whose acceptance is therefore not required by France's *Code de procédure civile*, cannot prevent a perfected discontinuance from extinguishing the procedural legal relationship. But if the discontinuance adversely affects their rights, they can seek to have it set aside: *ibid.*, at No. 105. Unlike French civil procedure, Quebec civil procedure does not distinguish between a discontinuance that has been "perfected" and one that has not. It regards a discontinuance as extinguishing the proceeding, but it allows the discontinuance to be set aside if there is prejudice to the rights of a party (*Atkins; 175809 Canada inc. v. 2740478 Canada inc.*, 2000 CanLII 9254 (Que. C.A.)) or a third person (such as a child in whose interests a judge must rule under art. 33 of the *Civil Code of Québec: Droit de la famille — 092038*, 2009 QCCS 3822, [2009] R.D.F. 646).

purposes of discussion, my colleagues' reasoning were to be accepted, it would not lead to the conclusion that the CIUSSS's discontinuance prejudiced MediaQMI's rights.

[70] In short, the discontinuance of a proceeding is not a unilateral act of renunciation like any other. Because it is a way of forgoing a trial, it nullifies the parties' procedural legal relationship arising from the judicial application. This explains why a defendant or intervener can contest a discontinuance that is prejudicial to it. The situation is different for a third person whose rights and interests are not affected by the parties' arguments on the merits. *Prima facie*, the extinguishment of the procedural legal relationship has no effect on that person. If prejudiced by it for any reason, the third person may apply to set aside the discontinuance. In this case, if MediaQMI wanted to prevent the exercise of the power given by art. 108 *C.C.P.* to the parties to a terminated proceeding, it had to contest the discontinuance extinguishing the proceeding. It did not do so. There was therefore nothing that prohibited the CIUSSS from retrieving its exhibits.

[71] I also note that my colleagues do not explain how remanding the case to the Superior Court "so that it can decide the application for access to the exhibits in accordance with the applicable law" (that is, in their view, in accordance with the *Dagenais/Mentuck* test) would help MediaQMI access exhibits that were retrieved from the record the day after the Superior Court's judgment was rendered: para. 143. In light of the *Code of Civil Procedure*, and given that MediaQMI's motion was based

on a provision giving it the right to have access to a court record, I fail to see how the motion would enable it to consult exhibits that had in fact already been retrieved from the record in accordance with art. 108 *C.C.P.* Although counsel for the CIUSSS agreed as a courtesy to keep a copy of the exhibits until the case was over, he did so “[w]ithout prejudice” and “without any admission” (A.R., at pp. 82 and 85): this did not create any legal fiction that would make it possible to proceed as if the exhibits had never been retrieved. Finally, I note that my colleagues’ position departs from what MediaQMI has asked this Court to do, which is to declare that the exhibits that were once in the record are public and to order the CIUSSS to provide it with a copy of them. I agree with Schragger J.A. that MediaQMI is confusing the access to information mechanisms and the principle of open proceedings: C.A. reasons, at para. 44.

[72] I therefore conclude that MediaQMI cannot obtain a copy of the exhibits that were in the Superior Court’s record at the time its “Motion to unseal” was filed.

## VII. Conclusion

[73] For these reasons, I would dismiss the appeal with costs.

English version of the reasons of Wagner C.J. and Rowe, Martin and Kasirer JJ.  
delivered by

I. Introduction

[74] We have had the advantage of reading the reasons of our colleague Côté J. We agree with her that the right to have access to court records arising from the principle of open court proceedings, which is set out in art. 11 of the *Code of Civil Procedure*, CQLR, c. C-25.01 (“*C.C.P.*”), does not confer a right to access exhibits once they have been validly removed by the parties or destroyed by the court clerk. However, with respect, we differ with her on the outcome of this appeal. Our disagreement concerns the time at which it should be determined whether the exhibits are in the court record. In our opinion, the state of the record must be assessed at the time the appellant asserted its right to have access to the exhibits.

[75] In this case, the respondent Centre intégré universitaire de santé et de services sociaux de l’Ouest-de-l’Île-de-Montréal (“CIUSSS”) — the plaintiff in the principal litigation — filed a judicial application alleging misappropriation of public funds by the respondent Magdi Kamel. In a proceeding conducted *ex parte*, that is, in the absence of the other party, the CIUSSS obtained an order from a judge sealing its application and the exhibits filed in support of it. The appellant, a publisher of daily newspapers and not a party to the principal litigation, applied for access to the exhibits, relying on art. 11 *C.C.P.* and freedom of the press. It did so while the exhibits were in the court record. The CIUSSS subsequently discontinued its judicial application.

[76] While the law authorizes a plaintiff to discontinue an action at any time, we are of the view that such a procedure cannot allow the plaintiff to circumvent an

application already brought against it for access to sealed exhibits. From the moment the appellant applied to unseal the court record and have access to the exhibits, the litigation took on a different colour. A second proceeding arose, connected to but distinct from the principal litigation. It not only concerned the plaintiff, the defendant and their private dispute, but was also of concern to the public and, it should be emphasized, the judiciary itself. If the plaintiff's discontinuance had the effect of preventing the appellant from having access to the court record, it would interfere with the proper functioning of the judicial institution, the legitimacy of which depends on its openness and, as we know, on media scrutiny. Once the appellant applied to unseal the record, the exhibits covered by its application were necessarily part of that new proceeding, which meant that the parties no longer had control over them while the matter was being argued.

[77] Said respectfully, this appeal cannot be reduced to a routine application of a rule set out in the *Code of Civil Procedure*; it concerns matters well beyond the strict confines of art. 108 *C.C.P.*, which allows parties to litigation to remove their exhibits from the court record on certain conditions. The dispute highlights the need to reconcile competing principles: first, the openness of court proceedings (art. 11 *C.C.P.*), a rule of public order to which courts may make exceptions (art. 12 *C.C.P.*), and second, the parties' "control [over] the course of their case" (*maîtrise de leur dossier*), including the power to terminate a proceeding at any time (art. 19 *C.C.P.*). Where a member of the public — here, the publisher of the daily newspapers *Le Journal de Montréal* and *Le Journal de Québec* — challenges a sealing order and seeks access to a court record,

prior to a discontinuance and while the exhibits are still in the record, these two principles must be reconciled. In our view, the plaintiff's ability to discontinue an action cannot deprive the appellant, in the circumstances of this case, of its right to argue its motion for access to the exhibits in the record and, if the court grants that motion, of its right to have access to the record. The parties' control over the course of their case may not be exercised contrary to the existing and legitimate interests of a third person, let alone contrary to a rule of public order requiring that civil justice administered by the courts be public.

[78] Accordingly, for the reasons that follow, we would allow the appeal and remand the case to the Superior Court so that it can decide the merits of MediaQMI's application for access to exhibits on the basis of the analytical framework established in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, which was affirmed for civil proceedings in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522.

## II. Background

[79] On October 6, 2016, the CIUSSS filed a legal action seeking an award of \$510,266 against one of its former managers, Mr. Kamel, for alleged misappropriation of public funds earmarked for health services. In its judicial application, the CIUSSS alleged that Mr. Kamel had used a [TRANSLATION] "scheme" to steal public funds intended for health care from the CIUSSS and the hospital it ran. Among other things, the CIUSSS stated the following:



[TRANSLATION] By virtue of the position he held and the trust placed in him, Kamel fraudulently obtained reimbursement for personal expenses unrelated to the activities of [St. Mary's Hospital Center], thereby misappropriating a total of \$410,266 during the period of April 1, 2009 to March 31, 2015 (“**Period**”), by taking advantage of loopholes in the implementation of the CIUSSS/SMHC policies on the reimbursement of expenses, as can be seen more fully from the PwC report (see section 4 for a summary of PwC’s findings);

Two main *modus operandi* were used by Kamel: (A) expense claims with no voucher attached, and (B) expense claims with certain vouchers attached that, upon analysis, proved to be unfounded;

(A.R., at p. 37)

[80] In its application, the CIUSSS stated that it had hired the PwC firm to get to the bottom of the irregularities alleged against Mr. Kamel. Claiming reimbursement of the amounts supposedly stolen by Mr. Kamel, the CIUSSS filed four exhibits in support of its application, including a confidential forensic accounting investigation report prepared by PwC.

[81] It should be noted that Mr. Kamel was initially suspended and that he ultimately resigned from his managerial position with the CIUSSS before the proceedings were filed. His resignation letter was also one of the exhibits filed in support of the CIUSSS’s application.

[82] In connection with its action, the CIUSSS filed an application for a *Norwich* order against a financial institution in order to obtain bank records concerning Mr. Kamel. The fraud allegations made against Mr. Kamel were based mainly on the forensic accounting investigation report prepared by PwC. We note that the CIUSSS is

a legal person established in the public interest and “is responsible for ensuring the development and smooth operation of th[e] local health and social services networks” (*Act to modify the organization and governance of the health and social services network, in particular by abolishing the regional agencies*, CQLR, c. O-7.2, s. 38) — crucial services provided to the public in Quebec.

[83] On October 7, 2016, the Superior Court made a *Norwich* order. It ordered that the entire record be sealed for a period of 120 days, which was later extended until April 18, 2017.

[84] On March 29, 2017, the appellant filed an application for access to the court record entitled [TRANSLATION] “Motion to unseal”, relying in part on art. 11 *C.C.P.* Noting that it published daily newspapers in Montréal and Québec, the appellant stated in its motion that it was “entitled to have access to the Court’s record, in accordance with art. 11 of the *Code of Civil Procedure* and s. 23 of the *Charter of human rights and freedoms* [CQLR, c. C-12 (“*Quebec Charter*”)], pursuant to the principle of accessibility of the Court’s records, the openness of court proceedings, and freedom of the press and its corollary, news gathering” (A.R., at p. 50).

[85] The conclusions sought by the appellant were set out as follows:

[TRANSLATION]

GRANT this Motion;

TERMINATE any order whose purpose is to restrict the access of the public and the Applicant to the Court record for file 500-17-095861-160.

WITHOUT LEGAL COSTS unless this Motion is contested. [Emphasis added.]

(A.R., at p. 51)

[86] The appellant specified at para. 7 of its motion that it was seeking access to the record, including the exhibits *filed in it*:

[TRANSLATION] . . . obtain access to the Court's record, including but not limited to the Originating Application, the various pleadings that followed, and the exhibits that may have been filed by the parties. [Emphasis added.]

(A.R., at p. 50)

The objective behind the conclusions sought is therefore plain.

[87] The notice of presentation indicated that the motion was to be heard on April 5, 2017. On that date, counsel for the CIUSSS asked the Superior Court to postpone the hearing to April 18, the date on which the order sealing the record and making it confidential was to expire. Because counsel for the appellant was not available on April 18, the respondents and the appellant agreed that the matter would be argued on April 25 and the order was renewed until that date.

[88] On April 19, 2017 — more than three weeks after MediaQMI filed its motion to unseal and to obtain the pleadings and exhibits — the CIUSSS discontinued

its judicial application. During the days that followed, the CIUSSS tried unsuccessfully to remove the exhibits filed in the court record, but the record could not be found.

[89] Two days later, on April 21, 2017, Mr. Kamel applied to withdraw the originating application or, in the alternative, to have it sealed. That proceeding was not contested by the CIUSSS, but MediaQMI opposed it, relying once again on the open court principle and freedom of the press.

[90] The matter was heard on April 25, 2017. At that time, the CIUSSS made a request to retrieve the exhibits, notably Exhibit P-1, the forensic accounting investigation report by PwC. The appellant objected to that request, noting that the purpose of its motion was not only to unseal the record but also to obtain the exhibits that were in it at that time. At the hearing, counsel for the appellant expressly reiterated the request for access to the exhibits:

[TRANSLATION] With respect, what I am telling you is . . . that a right was crystallized. The exhibits are in the record. We were there, [we] applied in a timely manner while the exhibits were in the record. It would be unfair to turn around today and say: “Well, I’m removing the exhibits” even though we had . . . we have a constitutional right to access.

(A.R., at p. 165)

[91] On July 20, 2017, the Superior Court judge ordered that the record be unsealed. However, the judge did not decide the appellant’s application for access to exhibits, as he found that parties have [TRANSLATION] “complete freedom to remove all exhibits from the record and to shield them from public scrutiny” once a proceeding

is terminated by a discontinuance (2017 QCCS 4691, at para. 119 (CanLII)). He therefore authorized the CIUSSS to remove the exhibits filed in the record, but held that, under the *Code of Civil Procedure*, the originating application had to remain in the record (para. 121). On July 21, 2017, the CIUSSS removed the exhibits from the court record. Counsel for the CIUSSS kept a copy of the exhibits until such time as the appellant's appeal was decided or settled (A.R., at pp. 82-85).

[92] The majority of the Court of Appeal dismissed MediaQMI's appeal (2019 QCCA 814). Marcotte J.A., dissenting, would have allowed the appeal, set aside the judgment of the Superior Court and referred the case back to that court so that it could decide the application for access to exhibits.

### III. Applicable Legal Framework

#### A. *Parties' Control Over the Course of the Case and Openness of Proceedings*

[93] This appeal provides the Court with an opportunity to consider the interplay between some general principles of Quebec civil procedure. The principles in question in this case are as follows: first, the principle that the parties have control over the course of their case, including the essential right to resolve their disputes in private, free from public scrutiny; second, the principle of open court proceedings, a principle of public order based on the transparency of justice and, correlatively, on public access to what takes place in the courts. When there is tension between these principles, as in

this case, it will of course be important to identify a manner in which they might be reconciled.

[94] The *Code of Civil Procedure* contains principles that circumscribe the application and interpretation of the rules it sets out. In 2001, the Civil Procedure Review Committee proposed that the principles of the precedence of substantive law over procedure, the adversarial process, control over the course of cases and proceedings, judicial intervention to ensure the orderly conduct of proceedings, the openness of proceedings and the proportionality of proceedings be grouped together [TRANSLATION] “[t]o emphasize them and ensure their primacy” (*Une nouvelle culture judiciaire* (2001), at p. 38, cited in *Charland v. Lessard*, 2015 QCCA 14, at para. 169 (CanLII)). These principles are now gathered together in arts. 8 to 28 *C.C.P.* under the title “Principles of procedure applicable before the courts”, which has four chapters: mission of the courts, public nature of procedure before the courts, guiding principles of procedure, and rules of interpretation and application of the *Code*.

[95] The parties’ control over the course of their case is a guiding principle set out in art. 19 *C.C.P.* The parties thus have a [TRANSLATION] “circumscribe[d]” freedom to choose the appropriate proceedings and the grounds of fact and law they will raise (Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), art. 19; *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287, at para. 25). This principle extends to the parties’ right to agree “at any stage of the proceeding” to settle their dispute or otherwise terminate the proceeding

(para. 3). They may therefore decide to remove their dispute from the judicial arena in order to resolve it privately.

[96] This ability to withdraw a case from the courts is consistent with the general approach taken by the *Code of Civil Procedure*, which places a [TRANSLATION] “spectacularly” high value on private civil justice (C. Piché, “La disposition préliminaire du *Code de procédure civile*” (2014), 73 *R. du B.* 135, at p. 152). As its preliminary provision indicates, the *Code of Civil Procedure* “is designed to provide, in the public interest, means to prevent and resolve disputes”, and it sets out general principles in this regard in arts. 1 to 7. In this way, the legislature expressly recognizes that when parties enter into a dispute prevention and resolution process by mutual agreement, civil justice is possible, even desirable, without the intervention of the courts. Facilitating the resolution of disputes is a public objective of undeniable importance, both for the parties and for our overburdened justice system (*Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800, at para. 32; L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations*, vol. 1, *Articles 1 à 390* (5th ed. 2020), at p. 9). Private dispute resolution processes have several advantages, including [TRANSLATION] “their confidentiality, their more informal nature, their flexibility, better conflict management by the parties, lower costs and the possibility of arriving at individualized solutions” (P.-C. Lafond, “Introduction”, in P.-C. Lafond, ed., *Régler autrement les différends* (2nd ed. 2018), 1, at p. 20; see also M. Thériault, “Le défi du passage vers la nouvelle culture juridique de la justice participative” (2015), 74 *R. du B.* 1, at pp. 9-12).

[97] However, the parties' control over the course of their case is not absolute: it cannot be exercised contrary to rules of public order or to the existing and legitimate interests of third persons. In exercising this power, the parties must "comply with the principles, objectives and rules of procedure" (art. 19 para. 1 *C.C.P.*). The latitude given to the parties in conducting the proceeding is therefore limited by the general principles of civil procedure, including the rules found in the *Code of Civil Procedure*, which confer on judges a role as [TRANSLATION] "protectors of the judicial process and the various parties' rights" (J. Plamondon, "Les principes directeurs et le nouveau *Code de procédure civile* (art. 17 à 24 C.p.c.)", in S. Guillemard, ed., *Le Code de procédure civile: quelles nouveautés?* (2016), 27, at pp. 38-39). As Professor Piché notes, the *Code of Civil Procedure* [TRANSLATION] "gives the judge's duties priority over the parties' rights" (p. 166). Having chosen to go before the courts, the parties must therefore comply with the established rules and principles.

[98] The parties' control over the course of their case, for example, is subject to the "duty of the courts to ensure proper case management and the orderly conduct of proceedings" (art. 19 para. 1 *C.C.P.*). The courts are therefore required to play an active role in the management of cases, thereby incidentally limiting the parties' control over the conduct of a proceeding (F. Bachand, "Les principes généraux de la justice civile et le nouveau *Code de procédure civile*" (2015), 61 *McGill L.J.* 447, at p. 458; *Homans v. Gestion Paroi inc.*, 2017 QCCA 480, at paras. 92-93 (CanLII)). The principle of proportionality set out in art. 18 *C.C.P.* is also a good example of a restriction on [TRANSLATION] "the parties' freedom to conduct their case as they see



fit” (*J.G. v. Nadeau*, 2016 QCCA 167, at para. 40 (CanLII); see also Y.-M. Morissette, “Gestion d’instance, proportionnalité et preuve civile: état provisoire des questions” (2009), 50 *C. de D.* 381, at p. 412). In short, the parties can have only [TRANSLATION] “incomplete” control over the course of the case given the interplay between that control and the competing and divergent principles set out in the *Code of Civil Procedure* (see D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at No. 1-164). S. Guillemard and S. Menétrey conclude from this that, especially since the enactment of the new 2016 *Code of Civil Procedure*, [TRANSLATION] “a kind of dilution” of the power given to the parties to control the course of their case may be observed, in comparison with the “lead role” they had prior to the revision (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at No. 100).

[99] Similarly, the parties’ control over the course of their case does not allow them to override the judge’s discretion to ensure compliance with the rule of public order arising from the principle of open proceedings, nor does it allow them to exercise their powers at the expense of the existing and legitimate interests of third persons in seeking the application of that rule. This fundamental principle is affirmed in art. 11 *C.C.P.*, which provides that anyone may attend court hearings and have access to court records. This principle also guarantees rights protected in ss. 3 and 23 of the *Quebec Charter* and s. 2(b) of the *Canadian Charter of Rights and Freedoms* (see, e.g., *Lac d’Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, at para. 62; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010]

2 S.C.R. 592, at para. 87). As the Court reiterated in *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33, the openness of court proceedings is an important hallmark of a free and democratic society such as ours (para. 24).

[100] In the chapter entitled “Public nature of procedure before the courts”, the legislature provides for two specific exceptions to this fundamental principle. First, art. 11 para. 2 *C.C.P.* states that an exception to this principle applies if the *law* provides for *in camera* proceedings (art. 15 *C.C.P.*) or restricts access to court records (art. 16 *C.C.P.*), which is notably the case in family matters (see Ferland and Emery, at Nos. 1-108 and 1-109). In the absence of a constitutional challenge, these limits on openness in family matters may not be disturbed. Second, art. 12 *C.C.P.* provides for a so-called “judicial” exception by codifying the principles established by this Court in *Sierra Club*, thereby giving the court a discretion to make an exception to the fundamental principle of open proceedings “if, in its opinion, public order . . . or the protection of substantial and legitimate interests [so] requires” (see *Commentaires de la ministre de la Justice*, art. 12).

[101] Important though it may be, the parties’ control over the course of their case does not extend so far as to allow them to directly or indirectly shield the content of their record from public scrutiny and thereby circumvent the fundamental principle of open proceedings. As Baudouin J.A. explained in *B. (B.) v. Québec (Procureur général)*, [1998] R.J.Q. 317 (C.A.), this principle is of public order and [TRANSLATION]

“the courts, the guardians of public order, have not only the right but the strict duty to intervene *proprio motu* to uphold it” (p. 320). This is why parties cannot agree to take part in judicial proceedings anonymously or to have a record sealed. Such an agreement could not bind the court and oblige it to disregard a rule of public order (see, e.g., *Rosei v. Benesty*, 2020 QCCS 1795, at paras. 97-100 (CanLII); *Marcovitz v. Bruker*, 2005 QCCA 835, [2005] R.J.Q. 2482, at paras. 109-10, rev’d on other grounds, 2007 SCC 54, [2007] 3 S.C.R. 607). A court seized of an application under art. 12 *C.C.P.* to limit the openness of court proceedings must exercise its discretion in accordance with the analytical framework developed in *Dagenais*, *Mentuck* and *Sierra Club*, even if the application is unopposed (see, e.g., *Mentuck*, at para. 38; *Sirius Services conseils en technologie de l’information inc. v. Boisvert*, 2017 QCCA 518, at para. 4 (CanLII); *Horic v. Nepveu*, 2016 QCCS 3921, at para. 166 (CanLII)).

[102] The public, and in particular the news media, have the interest required to seek the application of the principle of open proceedings set out in art. 11 *C.C.P.*, and thereby put the rights guaranteed by the Quebec and Canadian charters into play. As Cory J. noted in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, “members of the public have a right to information pertaining to public institutions and particularly the courts” (p. 1339). As “surrogates for the public”, the media therefore play a vital role in the exercise of this right (p. 1360, per Wilson J., citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), at p. 573). For example, in *3834310 Canada Inc. v. R.C.*, 2004 CanLII 4122 (Que. C.A.), the Court of Appeal recognized that the interests of the press are affected by a judgment authorizing

a party to institute a proceeding anonymously. The appellant, a daily newspaper publisher, could avail itself of the rules on revocation of a judgment on application by a third person (art. 349 *C.C.P.*), because the impugned judgment affected its interests with respect to the openness of proceedings and the public's right to be informed (paras. 13, 18 and 33).

[103] When parties decide to have recourse to the civil justice system, which is a public service, they do so knowing that members of the public may exercise their fundamental right to information about court proceedings. It is true that public scrutiny may encourage parties to prevent or resolve a dispute, including by withdrawing a case from the courts. However, this form of incentive alone cannot *ipso facto* supplant the principle of open proceedings when invoked in accordance with procedural rules while a proceeding is still under way. On the other hand, where parties opt for a private resolution process, the principle of open proceedings does not apply and, as a general rule, the confidentiality “of anything said, written or done during the process” must be preserved (art. 4 *C.C.P.*).

[104] It is important to emphasize that the fundamental principle of open proceedings is not concerned solely with scrutiny of judicial action, as the respondents argue, but also extends to the subject matter of disputes. Article 11 *C.C.P.* expressly provides that “[a]nyone may . . . have access to court records and entries in the registers of the courts”. In *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65, this Court in fact explained that “[a]ccess to exhibits is a corollary to the

open court principle” (para. 12). The media and members of the public do not have to justify their presence at court hearings or their desire to consult a court record. The burden of satisfying the criteria set out in *Dagenais*, *Mentuck* and *Sierra Club* lies on the party applying for an order to limit the principle of open proceedings (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 71).

[105] In short, it is true that the parties control the course of their case and that they may terminate a proceeding at any time. However, this power exists in a context where civil justice before the courts is, in principle, open and where the public and the media can seek the application of this fundamental principle during the course of a proceeding.

B. *Article 213 C.C.P.: Discontinuance and Its Limits*

[106] The principle that the parties’ control over the course of their case may not be exercised contrary to the rules of public order and the existing and legitimate interests of third persons is also based on the jurisprudence relating specifically to the effect of a discontinuance, which is dealt with in the *Code* as an incidental proceeding that terminates a civil action.

[107] Article 213 *C.C.P.* provides that a plaintiff’s discontinuance of an application terminates the proceeding and “restores matters to their former state”. In

principle, art. 213 *C.C.P.* therefore entitles a party to discontinue a judicial application unilaterally at any time (see, e.g., *Georgiadis v. Angelopoulos*, 2008 QCCS 6890, at para. 8 (CanLII), per Gascon J.). The rules on discontinuance flow from the principle that the parties control the course of their case (art. 19 para. 3 *C.C.P.*). To be set up against the other parties, the unilateral discontinuance need only be notified to those parties in accordance with art. 213.

[108] This being the case, it is often said, and properly so, that the right of discontinuance is not absolute (see, e.g., *Classic Fabrics Corp. v. B. Rawe GMBH & Co.*, 2001 CanLII 7221 (Que. C.A.), at para. 38). First of all, when a plaintiff discontinues an application, it does so only for itself; in the case of a joint application, art. 214 *C.C.P.* provides that the other plaintiff may continue the proceeding. We would add that, as a general rule, a discontinuance has no effect on a cross-application made by the defendant. The Court of Appeal explained this in *175809 Canada inc. v. 2740478 Canada inc.*, 2000 CanLII 9254, before the recent reform of civil procedure:

[TRANSLATION] Technically, “[d]iscontinuance replaces matters in the state in which they would have been had the suit to which it applies not been commenced” (art. 264 *C.C.P.*). This is an outcome that cannot be achieved where the proceeding sought to be discontinued is itself a source of damages. While a litigant may be authorized to discontinue an action at any time, this procedure cannot be used to avoid a suit already brought against it. A claim for damages is analogous to a cross demand. It subsists notwithstanding the discontinuance of the principal action. [Emphasis added; para. 6.]

[109] The principle that the parties control the course of their case is therefore subject to a qualification, developed and consistently applied by the courts: a

discontinuance may not prejudice the rights of the other parties or of third persons, including the right to have an application filed prior to the discontinuance decided. In *L'Espérance v. Atkins*, [1956] B.R. 62, Pratte J. explained this qualification by saying that a discontinuance involves a renunciation by the plaintiff of *its own rights*. As a result, it may not be effected to the prejudice of third persons' rights:

[TRANSLATION] The word “discontinuance” conveys the idea of renouncing some right or withdrawing a case or proceeding. But because only one's own rights can be renounced, the discontinuance of a proceeding that has given rise to rights for others should not be permitted: discontinuance may not be effected to the prejudice of third persons' rights. [Emphasis added; p. 66.]

[110] In *Graham-Albulet v. Albulet*, [1977] C.A. 323, at p. 324, the Court of Appeal confirmed the existence of this intrinsic limit on the effects of a discontinuance:

[TRANSLATION] Discontinuance is therefore a renunciation of a right, an advantage, which presupposes that this right, this advantage, belongs to the person who purports to renounce it, for it is not possible, through a unilateral act, to renounce for others and deprive them of a right or advantage they possess. [Emphasis added.]

[111] This qualification of the effects of a discontinuance makes sense. Discontinuance constitutes a [TRANSLATION] “voluntary renunciation of a right, of a claim” (H. Reid, with S. Reid, *Dictionnaire de droit québécois et canadien* (5th ed. 2015), at p. 206, “*désistement*” (discontinuance)). The renunciation of a right allows the holder to relinquish the right if it is no longer wanted, which presupposes that the holder has full disposition of the right it intends to give up (see, generally, M. Lamothe,

*La renonciation à l'exercice des droits et libertés garantis par les chartes* (2007), at p. 10). Since this is a unilateral act by the renouncing party, only that party's will is needed for the act to produce legal effects (Lamothe, at p. 10; D. Lluellas and B. Moore, *Droit des obligations* (3rd ed. 2018), at No. 256). If art. 213 *C.C.P.* seems to provide that a plaintiff is free to discontinue an application, this is because, in principle, [TRANSLATION] "those who wish to relinquish a right can do so without the need for anyone's approval, because they are prejudicing only themselves" (see, on the concept of renunciation, P. Raynaud, "La renonciation à un droit: Sa nature et son domaine en Droit civil" (1936), 35 *R.T.D. civ.* 763, at p. 773).

[112] This idea of renunciation shows that a discontinuance affects only the rights of the renouncing party, that is, the party that discontinues proceedings or waives a right or claim. Given that it is not possible to renounce the rights of others, the renouncing party [TRANSLATION] "affects only its own legal sphere through its act, without having any effect on that of others" (Lamothe, at p. 11, fn. 47, citing G. Grammatikas, *Théorie générale de la renonciation en droit civil* (1971), at p. 11; see also F. Dreifuss-Netter, *Les manifestations de volonté abdicatives* (1985), at pp. 31 and 103). In other words, a party may validly renounce a right or claim, but this unilateral act does not affect the rights of third persons. A discontinuance may therefore be valid yet ineffective against the rights of third persons (*Barzelex Inc. v. M.E.C.S. International Inc.* (1989), 29 Q.A.C. 63, at para. 22; *Constructions Panthéon inc. v. Clinique Altermed inc.*, 2015 QCCA 50, at paras. 4, 12 and 15-16 (CanLII); *Taran Furs*



(*Mtl inc. v. Tuac, local 501*, 2005 CanLII 11669 (Que. Sup. Ct.), at paras. 30-32 and 59-60, per Gascon J.).

[113] This principle has been applied on a number of occasions to recognize that courts remain seized of pending incidental applications — including cross-applications — for damages, for dismissal or for a declaration that a judicial application or pleading is abusive, even where the party bringing the initial application later discontinues it (see, e.g., *175809 Canada inc.*, at para. 6; *Constructions Panthéon*, at paras. 10-12; *Taran Furs*; *7006098 Canada inc. v. Sobeys Canada inc.*, 2020 QCCS 897, at paras. 37 and 43 (CanLII)). In such a case, the discontinuance cannot adversely affect the right to argue an application before a court and to have it decided by the court. As Justice Louis-Philippe Pigeon explained, writing extra-judicially, “[e]ven in the realm of procedure, vested rights exist. A person who has instituted proceedings before a court has a vested right to the competence of the court” (*Drafting and Interpreting Legislation* (1988), at p. 79).

[114] *Classic Fabrics* is an instructive example of this limit on the right of discontinuance. The defendant had filed a motion to amend its defence and make a cross demand. The plaintiff had then discontinued its claim and argued that it had terminated the proceeding. The Court of Appeal set aside the discontinuance and held, at paras. 38-39, that it could not adversely affect the defendant’s acquired right to argue its cross demand:

[TRANSLATION] The right of discontinuance is not absolute, however. A party may not use it to prejudice rights or advantages that another party may have acquired under the law or as a result of proceedings instituted.

At the time the appellant served the respondent with its motion to amend its pleading in order to add a cross demand, the state of the proceedings allowed the appellant to present that motion. The appellant had an acquired right to argue its demand, which the respondent could not prejudice through a discontinuance of its action. [Emphasis added.]

(On the acquired right to argue an application, see also *Berenbaum v. Berenbaum Reichson*, 2014 QCCA 1630, at para. 15 (CanLII); *Constructions Panthéon*, at para. 12.)

[115] Accordingly, the purpose or effect of a party's discontinuance cannot be "to avoid a suit already brought against it" (*175809 Canada inc.*, at para. 6). In such circumstances, the court may take note of the discontinuance but should declare that it cannot cause the loss of rights claimed through a prior motion that is pending (see, e.g., *Taran Furs*, at paras. 30-32 and 59-60).

[116] It is in fact entirely coherent that a discontinuance cannot defeat an application filed prior to it, because in principle, renunciation does not have retroactive effects. It [TRANSLATION] "produces its effects from the moment it is made. In other words, the effects of renunciation are produced *ex nunc* and do not reach into the past" (Grammatikas, at p. 147).

### C. Article 108 C.C.P.: Removal of Exhibits and Its Limits

[117] The second paragraph of art. 108 *C.C.P.* provides that exhibits filed in the record must remain in the record until the end of the proceeding. They may be removed in two situations: (1) at the end of the proceeding, by the parties that filed them; and (2) with the consent of all the parties.

[118] In the present case, the parties and the courts below attached great importance to the nature of this rule. Upon reading the judgment under appeal, we note that two of the Court of Appeal judges concluded that art. 108 para. 2 *C.C.P.* sets out a rule of an administrative nature (para. 42, per Schragger J.A.; para. 54, per Marcotte J.A.). It is true that the wording of this paragraph and the parliamentary debates preceding its enactment confirm that its purpose is to reduce the costs of the justice system (National Assembly, “Adoption du principe — Projet de loi 24 — Loi modifiant le Code de procédure civile”, *Journal des débats*, vol. 33, No. 30, 3rd Sess., 34th Leg., June 1, 1994, at pp. 1573-79, Roger Lefebvre, Minister of Justice). We take note of the differing reading of art. 108 *C.C.P.* proposed by our colleague. However, for the purposes of this appeal, it is not necessary to decide this question. Even assuming that art. 108 para. 2 *C.C.P.* sets out a substantive rule, the parties cannot make use of this provision in a manner that adversely affects acquired rights given the circumstances of the discontinuance, which occurred after MediaQMI filed its application to unseal and to access the Superior Court’s record.

[119] It follows that, in the circumstances, the logic behind qualifying the principle that the parties control the course of the case also applies, by extension, to the

removal of exhibits under art. 108 para. 2 *C.C.P.* If the discontinuance of a proceeding cannot be relied on at the expense of third persons' existing legitimate interests or contrary to the rules of public order, including the openness of court proceedings, then parties cannot avail themselves of art. 108 para. 2 *C.C.P.* in order to remove exhibits from the record after an application has been made under art. 11 *C.C.P.* As art. 19 *C.C.P.* provides, the control that the parties have over the course of their case must be exercised in compliance with the principles of civil procedure.

[120] As the cases considered above show, parties may not infringe rules of public order like that of the openness of proceedings, even on consent (see, e.g., *Marcovitz*). They certainly do not “control the course of their case” to such an extent that they can circumvent a rule of public order, including through the actions they can take with respect to exhibits under art. 108 para. 2 *C.C.P.* The judicial process cannot condone a form of private justice in which parties decide between themselves how a court proceeding will be conducted without regard for the open court principle. In short, the parties cannot displace a rule of public order by mutual consent (see, e.g., *Berenbaum*, at para. 16, citing *Entreprises de béton Fern Leclerc Ltée v. Bourassa*, [1990] R.D.J. 558 (C.A.), at p. 561).

[121] The right to remove exhibits that are in a court record with the consent of all parties must also be interpreted in the same way as the unilateral right to discontinue an application: it cannot adversely affect the existing and legitimate interests of third persons. For example, the Superior Court recognized in a family law case that a

discontinuance by the plaintiff that adversely affected a child's rights could be set aside even though the defendant had consented to it (*Droit de la famille* — 092038, 2009 QCCS 3822, [2009] R.D.F. 646, at paras. 14-15 and 34). In other words, because it is not possible to renounce the rights of others, a discontinuance, whether unilateral or by mutual consent, cannot defeat a third person's rights.

[122] The reason why art. 108 para. 2 *C.C.P.* makes the right to remove exhibits in the court record subject to the consent of all the parties is that, in principle, the removal of exhibits affects only the parties, as it may deprive them of relevant exhibits in support of their arguments. Where only the parties have a legitimate interest in the exhibits, their decision to remove them by mutual consent does not prejudice anyone. In such a case, they have complete freedom to remove the exhibits from the record, including in order to protect the confidentiality of the documents involved (*Sirius*, at para. 4). The purpose of the consent requirement in this situation is to ensure that the removal of exhibits does not have prejudicial effects. In fact, as long as the unilateral removal of an exhibit is not prejudicial to the other parties, this breach of the obligation to obtain the consent of all the parties cannot be fatal (*Wetherall v. Macdonald* (1903), 9 R. de J. 381 (Sup. Ct.), at p. 383).

[123] The situation is entirely different where the removal of exhibits, even by mutual consent, infringes a rule of public order or adversely affects an existing and legitimate interest of a third person. If a party's discontinuance cannot unilaterally extinguish the right of others to advance their applications, it would be inconsistent if

parties could, even by mutual consent, “renounce for others and deprive them of a right or advantage they possess” (*Graham-Albulet*, at p. 324).

[124] Moreover, the Court of Appeal has recognized that the principle that procedural acts may not prejudice the rights of a party or a third person who has already brought an application also obtains where a pleading is withdrawn or amended under art. 206 *C.C.P.* (*9163-5771 Québec inc. v. Bonifier inc.*, 2017 QCCA 1316, at para. 43 (CanLII)). This principle running through the *Code of Civil Procedure* therefore clarifies the scope of the right to remove exhibits by mutual consent provided for in art. 108 para. 2 *C.C.P.*

[125] Applying the principle that the parties control the course of their case as if it were an end in itself would be contrary to Quebec jurisprudence and to the general scheme of the *Code of Civil Procedure*. It would also conflict with the well-established principle that the Code’s provisions must be interpreted in harmony with the *Quebec Charter* and the general principles of law (preliminary provision of the *C.C.P.*; *Lac d’Amiante*, at para. 40; *Globe and Mail*, at para. 45). To do so would be to disregard the principle that the parties’ control over the course of their case is subject to limits and that, in exercising it, parties must “comply with the principles, objectives and rules of procedure” (art. 19 para. 1 *C.C.P.*), including the rules of public order and the existing and legitimate interests of third persons.

#### IV. Application of the Law to the Facts

[126] It should be noted at the outset that MediaQMI's application was brought in a case in which a judge had issued an order limiting the principle of open court proceedings as soon as the legal action was filed. On the application of the respondent CIUSSS, a judge had rendered a discretionary *Norwich* order on an *ex parte* basis and had ordered the sealing of the judicial application and of the exhibits filed to support it. We are therefore not in a purely private sphere of the case; the justice system was engaged, and a judge was asked, on the application of the respondent CIUSSS, to shield the record from public view. The appellant's application under art. 11 *C.C.P.* to determine whether the exception to the principle of open proceedings had been adhered to should, from the start, be regarded as *prima facie* legitimate.

[127] It is clear that the position of the CIUSSS and Mr. Kamel is premised in part on the idea that the character of private dispute resolution processes must be respected and that, on the basis of the principle that the parties control the course of their case, they can therefore resolve their private dispute out of public view. They are not entirely wrong on this point. Because the parties control the course of their case, they can, in principle, agree to terminate their litigation through a negotiated discontinuance or otherwise and, in many cases, to remove their exhibits. But this freedom to withdraw from the court process once the dispute has arisen, as in this case, can produce effects only in relation to the principal litigation.

[128] Here, the court record was sealed from the outset, including the exhibits filed by the respondent CIUSSS in support of its application. From the moment the

appellant MediaQMI applied to unseal the record and access the exhibits, a new proceeding began. That second proceeding went beyond the strictly private interests of the parties to the principal litigation: it was of concern to the public and concerned the legitimacy of the judicial institution and the functioning of the justice system itself. The discontinuance filed following the application brought under art. 11 *C.C.P.* could not defeat that new proceeding, which was separate from the principal litigation and related to the proper functioning of the judicial institution, whose legitimacy depends on its openness and in part, as we know, on media scrutiny. Once the appellant applied to unseal the record and access the exhibits, these exhibits were subject to that new proceeding and, it must be concluded, the parties no longer had complete control over them.

[129] MediaQMI's application for access to exhibits was notably based on art. 11 *C.C.P.*, which gives it the right to "have access to court records". Although the application was called "Motion to unseal", its express purpose was to gain access to the exhibits. It is well established that the name of a juridical act is not what determines or defines its nature (*Ditomene v. Syndicat des enseignants du Cégep de l'Outaouais (SECO)*, 2012 QCCA 1296, at para. 43 (CanLII)). MediaQMI was seeking access to exhibits that were in fact in the court record at the time.

[130] With an application for access to exhibits before it, validly made under art. 11 *C.C.P.*, the court had to exercise the discretion conferred on it by art. 12 *C.C.P.* because of the respondents' opposition. MediaQMI was thus seeking to play its role as



a “surrogat[e] for the public” and to inform readers of what was taking place in the courts (*Edmonton Journal*, at pp. 1339-40 and 1360), a crucial role in a context where it was alleged that fraud had been committed within a public body responsible for ensuring the proper functioning of regional health institutions. The public has a legitimate interest in obtaining information about a court proceeding involving allegations of misappropriation of public funds by a manager working for that public body.

[131] Had the CIUSSS not filed a discontinuance, the Superior Court would have had to decide MediaQMI’s application and exercise its discretion by applying the analytical framework established in *Dagenais*, *Mentuck* and *Sierra Club*. The discontinuance could not be set up against MediaQMI to deprive it of its right to argue its motion and, if the court had granted that application, of its right to have access to the exhibits in the record. That right arose when its application was filed, which was several weeks before the CIUSSS’s discontinuance. MediaQMI was therefore “entitle[d] to the Court’s pronouncement on the legal issues thus raised that even [a] desistment cannot now remove” (*Byer v. Québec (Inspecteur général des institutions financières)*, [2000] R.L. 615 (Sup. Ct.), at p. 623; see also *Sobeys*, at para. 37).

[132] Accordingly, the court retained its jurisdiction under art. 11 *C.C.P.* to decide MediaQMI’s application. The appellant had “an acquired right to argue its demand, which the respondent could not prejudice through a discontinuance of its action” (*Classic Fabrics*, at para. 39). The principle that the parties control the course

of the case could not adversely affect MediaQMI's existing and legitimate interests in seeking the application of a rule of public order like the openness of proceedings.

[133] We also note that MediaQMI's motion was originally supposed to be argued on April 5, 2017, prior to the CIUSSS's discontinuance. The hearing was postponed at the request of the CIUSSS. If the hearing had been held on that date, MediaQMI's application for access to exhibits would have been subject to the discretion of the Superior Court, which would have had to apply the analytical framework developed in *Dagenais*, *Mentuck* and *Sierra Club*. It would be incongruous, to say the least, to conclude that the appellant could lose its right to argue its application solely because of the date on which the hearing of that application was scheduled. The analytical framework established in *Dagenais*, *Mentuck* and *Sierra Club* would clearly have been applicable if the hearing had been held prior to the discontinuance. This latter procedure could not adversely affect the right to have an application decided when that application had already been filed.

[134] It is useful to recall that *Norwich* orders can be made *in camera* and *ex parte* and may be the subject of a sealing order, as was the case here (see, e.g., *Fers et métaux américains, s.e.c. v. Picard*, 2013 QCCA 2255, at paras. 3 and 7 (CanLII); M. Piché-Messier and A. Bussières McNicoll, "Développements récents en matière de propriété intellectuelle dans le cadre des ordonnances de type *Anton Piller*, *Mareva* et *Norwich*", in *Service de la qualité de la profession du Barreau du Québec*, vol. 464, *Développements récents en droit de la propriété intellectuelle* (2019), 89, at pp. 127

and 129). If a discontinuance could defeat an application for access to a record, then *Norwich* orders could be obtained in a justice system that would, in many respects, be private. The principle of open proceedings could thus be circumvented, despite the exceptional and draconian nature of such orders.

[135] Contrary to the submission of the respondent CIUSSS, MediaQMI was therefore not required to bring an application to set aside the discontinuance in order to be heard. Although the discontinuance was valid and produced its effects in relation to the CIUSSS and Mr. Kamel, it could not extinguish the rights asserted by MediaQMI through an application filed earlier. In other words, the discontinuance quite simply could not be set up against MediaQMI. In any event, counsel for MediaQMI specifically objected to the removal of the exhibits at the hearing and stated that the discontinuance had no effect on its application for access to exhibits because its right to have its application decided had “crystallized”.

[136] The CIUSSS in fact concedes that the court still had jurisdiction to decide MediaQMI’s motion to unseal even though the proceeding had ended as a result of the discontinuance. It also acknowledges that a discontinuance has no impact on the right to argue a prior application. It follows that the CIUSSS has implicitly confirmed that the discontinuance could not adversely affect MediaQMI’s right to have the merits of its application — which is, among other things, an application for access to exhibits — decided, which the Superior Court judge failed to do. The Superior Court therefore

erred in law in concluding that the discontinuance could be set up against MediaQMI and in allowing the CIUSSS to remove the exhibits.

[137] The CIUSSS argues that the purpose of MediaQMI's motion was not to have access to the exhibits, but solely to have the court record unsealed, and that the Superior Court judge granted its motion. This argument is without merit: the purpose of a motion to unseal is to gain access to the content of the record as it stood at the time the motion was filed. In other words, MediaQMI was applying to unseal the Superior Court's record *in order* to have access to the exhibits that were in it at the time. In any event, the motion specifically stated that MediaQMI was seeking access to the exhibits, and counsel for the appellant reiterated that request at the hearing on April 25, 2017. The Superior Court did not deal with it.

[138] The respondents submit that the discontinuance could produce its effects against the appellant's application given that the appellant was not a party to the principal litigation. It is clear from art. 11 *C.C.P.* and the applicable jurisprudence that the appellant's status has no bearing on this appeal. A party that files a discontinuance renounces rights held by that party, as discontinuance is, as we have seen, a unilateral act. Given that it is not possible to renounce the rights of others, it would be inappropriate if the principle that the parties control the course of their case could adversely affect rights not held by the renouncing party simply because the rights in question are those of third persons rather than those of a party.

[139] Pratte J. explained in *Atkins* that “discontinuance may not be effected to the prejudice of third persons’ rights” (p. 66). This is all the more true given the issue of public order raised by the application in this case. It has consistently been held that this rule applies both to the parties’ rights and to the existing and legitimate rights of third persons (*Barzelex*, at para. 18; *Georgiadis*, at para. 9; *Banque Commerciale Italienne du Canada v. Magas Development Corp.*, [1992] R.D.I. 246 (Que. Sup. Ct.), at p. 248; *9163-5771 Québec inc.*, at para. 33; *Portnoff (Syndic de)*, [2000] R.J.Q. 1290 (Sup. Ct.); see also *Ferland and Emery*, at Nos. 1-1702 and 1-1703). If the media have an interest in applying for the revocation of a judgment that is contrary to the principle of open proceedings (*3834310 Canada Inc.*, at paras. 13, 18 and 33), then *a fortiori* they have an interest in obtaining a decision on an application for access to exhibits that was filed prior to a discontinuance, even if they are “third persons” in relation to the proceeding.

[140] Our conclusion that the Superior Court judge should have decided MediaQMI’s application is based on the fact that it came before him prior to the CIUSSS’s discontinuance. In contrast, the discontinuance would have produced its full effects against an application filed subsequently. If MediaQMI had filed its application after the CIUSSS’s discontinuance and had sought access to the exhibits when they were no longer in the record, its appeal would have failed on that basis unless it challenged the constitutionality of art. 108 *C.C.P.* Like our colleague, we therefore do not accept the appellant’s argument that the principle of open proceedings protects the

right to have applications for access to exhibits decided years after a proceeding has ended and the exhibits have been removed.

[141] In short, the CIUSSS and Mr. Kamel cannot, even by mutual consent, prevent MediaQMI from having its application for access to exhibits decided, circumvent the principle of open proceedings and extinguish a right not held by them. With respect for those who hold the contrary view, we believe that to conclude otherwise would allow parties to remove their exhibits, even in the course of a proceeding, despite the fact that a prior application has been made. This could undermine the fundamental principle of public access to court records affirmed by the legislature in art. 11 *C.C.P.* In the circumstances of this case, art. 108 *C.C.P.* cannot have this effect.

## V. Conclusion

[142] For the foregoing reasons, the appeal should be allowed with costs.

[143] However, we cannot grant the appellant's application for access to exhibits, because the respondents have not had an opportunity to present their arguments on this point. Moreover, the exhibits are not in the court record and it is thus impossible to apply the analytical framework developed in *Dagenais*, *Mentuck* and *Sierra Club* in the abstract. We agree with Marcotte J.A. that the case must be remanded to the Superior Court so that it can decide the application for access to the exhibits in accordance with the applicable law and make the orders it considers necessary, given that, in our

respectful view, the Superior Court judge erred in allowing the CIUSSS to remove the exhibits from the record.

## Appendix — Relevant Statutory Provisions

*Charter of human rights and freedoms, CQLR, c. C-12:*

**23.** Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.

The tribunal may decide to sit *in camera*, however, in the interests of morality or public order.

*Code of Civil Procedure, CQLR, c. C-25:*

**83.** Prior to the end of the proceedings, filed exhibits cannot be taken out of the record, except with the consent of the opposite party or the authorization of the clerk, and upon giving a receipt; the parties may, however, obtain copies from the clerk.

**331.9.** Once proceedings are terminated, the parties must retrieve the exhibits they have filed, failing which the exhibits are destroyed by the clerk one year after the date of the judgment or of the proceeding terminating the proceedings, unless the chief justice or chief judge decides otherwise.

Where a party, on whatever grounds, seeks a remedy against a judgment, the exhibits that have not been retrieved by the parties are destroyed by the clerk one year after the date of the final judgment or of the proceeding terminating the proceedings, unless the chief justice or chief judge decides otherwise.

The child support determination forms attached to the judgment under article 825.13 are excepted from the above rules.

*Code of Civil Procedure, CQLR, c. C-25.01:*



## PRELIMINARY PROVISION

This Code establishes the principles of civil justice and, together with the Civil Code and in harmony with the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs procedure applicable to private dispute prevention and resolution processes when not otherwise determined by the parties, procedure before the courts as well as procedure for the execution of judgments and for judicial sales.

This Code is designed to provide, in the public interest, means to prevent and resolve disputes and avoid litigation through appropriate, efficient and fair-minded processes that encourage the persons involved to play an active role. It is also designed to ensure the accessibility, quality and promptness of civil justice, the fair, simple, proportionate and economical application of procedural rules, the exercise of the parties' rights in a spirit of co-operation and balance, and respect for those involved in the administration of justice.

This Code must be interpreted and applied as a whole, in keeping with civil law tradition. The rules it sets out are to be interpreted in the light of the specific provisions it contains or of those of the law, and in the matters it deals with, the Code compensates for the silence of the other laws if the context so admits.

**11.** Civil justice administered by the courts is public. Anyone may attend court hearings wherever they are held, and have access to court records and entries in the registers of the courts.

An exception to this principle applies if the law provides for in camera proceedings or restricts access to the court records or to certain documents filed in a court record.

Exceptions to the principle of open proceedings set out in this chapter apply despite section 23 of the Charter of human rights and freedoms (chapter C-12).

**16.** In family matters or in matters regarding a change of designation of sex as it appears in a minor child's act of birth, access to the court records is restricted. In all other matters, especially those relating to personal integrity or capacity, access to documents pertaining to a person's health or psychosocial situation is restricted if they have been filed in a sealed envelope.

Access-restricted records or documents may only be consulted or copied by the parties, by their representatives, by lawyers and notaries, by persons

designated by law, and by any person, including journalists, who has been authorized by the court after proving a legitimate interest, subject to the access conditions and procedure determined by the court.

In adoption matters, access to the court records is restricted to the parties, their representatives and any person having proven a legitimate interest, and is subject to the authorization of the court and to the conditions and procedure it determines.

The Minister of Justice is considered, by virtue of office, to have a legitimate interest to access records or documents for research, reform or procedure evaluation purposes.

No person who has had access to a record in a family matter or in a matter regarding a change of designation of sex as it appears in a minor child's act of birth may disclose or circulate any information that would allow a party or a child whose interests are at stake in a proceeding to be identified, unless authorized by the court or by law or unless the disclosure or circulation of the information is necessary for the purpose of applying a law.

**19.** Subject to the duty of the courts to ensure proper case management and the orderly conduct of proceedings, the parties control the course of their case insofar as they comply with the principles, objectives and rules of procedure and the prescribed time limits.

They must be careful to confine the case to what is necessary to resolve the dispute, and must refrain from acting with the intent to cause prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith.

They may, at any stage of the proceeding, without necessarily stopping its progress, agree to settle their dispute through a private dispute prevention and resolution process or judicial conciliation; they may also otherwise terminate the proceeding at any time.

**20.** The parties are duty-bound to co-operate and, in particular, to keep one another informed at all times of the facts and particulars conducive to a fair debate and make sure that relevant evidence is preserved.

They must, among other things, at the time prescribed by this Code or determined in the case protocol, inform one another of the facts on which their contentions are based and of the evidence they intend to produce.

**108.** The parties and the lawyers, or in non-contentious proceedings, the notaries representing the parties, must see to it that exhibits and other documents that contain identifying particulars generally held to be confidential are filed in a form that protects the confidentiality of the information.

Any document or real evidence that is filed in the record as an exhibit must remain in the record until the end of the proceeding, unless all the parties consent to its being removed. Once the proceeding has ended, the parties must retrieve the exhibits they have filed; otherwise, the court clerk may destroy them one year after the date on which the judgment becomes final or the date of the pleading terminating the proceeding. In either case, the chief justice or chief judge, if of the opinion that the exhibits can still be useful, may stay their destruction.

However, in reviewable or reassessable matters and, in non-contentious cases, notices, certificates, minutes, inventories, medical and psychosocial evidence, affidavits, statements, declarations and documents made enforceable by a judgment, including any child support determination form attached to a judgment, cannot be removed from the record or destroyed.

**213.** Discontinuance by the plaintiff of the whole of a judicial application terminates the proceeding on the notification of a notice of discontinuance to the other parties and its filing with the court office. It restores matters to their former state, and is effective immediately if it takes place before the court and in the presence of the parties. The legal costs are borne by the plaintiff, subject to an agreement between the parties or a decision of the court.

*Appeal dismissed with costs, WAGNER C.J. and ROWE, MARTIN and KASIRER JJ. dissenting.*

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