SCC File No.: 40371

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

BETWEEN

SOCIÉTÉ RADIO-CANADA / CANADIAN BROADCASTING CORPORATION, LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉPENDANTE (CN21), CANADIAN PRESS ENTERPRISES INC., MEDIAQMI INC., and GROUPE TVA INC.

APPELLANTS

and

HIS MAJESTY THE KING and NAMED PERSON

RESPONDENTS

(continued)

FACTUM OF THE INTERVENER,
CENTRE FOR FREE EXPRESSION
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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AND BETWEEN

ATTORNEY GENERAL OF QUÉBEC

APPELLANT

and

HIS MAJESTY THE KING and NAMED PERSON

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SOCIÉTÉ RADIO-CANADA / CANADIAN BROADCASTING CORPORATION, LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉPENDANTE (CN21), CANADIAN PRESS ENTERPRISES INC., LUCIE RONDEAU, IN HER CAPACITY AS CHIEF JUSTICE OF THE COURT OF QUÉBEC, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, CANADIAN MUSLIM LAWYERS ASSOCIATION, ADVOCATES' SOCIETY, BARREAU DU QUÉBEC, ASSOCIATION QUÉBÉCOISE DES AVOCATES ET AVOCATES DE LA DÉFENSE AND ASSOCIATION DES AVOCATS DE LA DÉFENSE DE MONTRÉAL-LAVAL-LONGUEUIL, CENTRE FOR FREE EXPRESSION, CANADIAN CIVIL LIBERTIES ASSOCIATION, AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, POSTMEDIA NETWORK INC., GLOBAL NEWS, A DIVISION OF CORUS TELEVISION LIMITED PARTNERSHIP, TORSTAR CORPORATION, GLACIER MEDIA INC., and CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

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PART I - CONCISE OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. The spectre of the secret trial – where a person is accused, investigated, convicted, and punished behind closed doors – is closely associated with authoritarian and abusive state regimes. Closed courts can be a critical tool for powerful actors who aim to wield state power in service of private and political interests. As this Court has noted, quoting the words of Jeremy Bentham, "in the darkness of secrecy, sinister interest and evil in every shape have full swing … where there is no publicity there is no justice".[1]

2. Police informer privilege, as currently formulated in Canada, holds unparalleled potential to stifle the open court principle and the public's constitutional right to information. It is a uniquely strong doctrine, both within Canada and internationally. In the CFE's view this country's approach to police informer privilege requires greater procedural protections to ensure that the application of this privilege is appropriately reconciled with the open courts principle. At a minimum, courts should be required to take the procedural steps necessary to ensure that meaningful adversarial debate – a cornerstone of our judicial system – can occur before the privilege is fully applied.

PART II - QUESTIONS IN ISSUE

3. CFE takes no position on the facts or the outcome of this appeal.

PART III - STATEMENT OF ARGUMENT

A. Protecting the Open Court Principle and the Public's Right to Receive Information through Adversarial Debate

4. The open court principle entrenches the general rule that "the public can attend hearings and consult court files and the press – the eyes and ears of the public – is left free to inquiry and comment on the workings of all the courts".[2] It receives constitutional protection through the *Charter*'s guarantee of freedom of expression, which encompasses the right to receive information about the courts and in particular protects the public's ability to access court information.[3]

5. The presumption of an open court is inextricably tied to the administration of justice and democracy. It supports the public's understanding of and confidence in the justice system.[4] It "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law" and

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[1] *AG (Nova Scotia) v MacIntyre*, [1982] 1 SCR 175 at pp 184.
[2] *Sherman Estate v Donovan*, 2021 SCC 25 at para 1.
[3] *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para 23.
[4] *AG (Nova Scotia) v MacIntyre*, *supra* note 1 at page 185.

"permits the public to discuss and put forward opinions and criticisms of court practices and proceedings."[5]

6. Of course, robust protection of the open court principle does not require that all court proceedings and documents be open to public scrutiny. The determination of exactly what information should be removed from public view is a nuanced and contextual analysis. Frequently, adversarial debate will be an essential precursor to a meaningful examination of all the issues.

7. Adversarial debate is a foundational pillar of the Canadian justice system, and essential to the full protection of constitutional rights. It ensures, to the greatest extent possible, that all relevant facts and legal arguments are placed before the court, thereby allowing the judge to make the most informed decision possible.[6] Traditionally, the parties are charged with revealing the truth. Although a judge may intervene in the adversarial exchange, typically they may not redefine the factual or legal debate nor examine arguments that have not already been raised.[7] Any court procedure that hinders effective adversarial debate necessarily impairs one fundamental element intended to enable a thorough and fair judgment.

8. The precise nature of the steps necessary to ensure meaningful debate will vary depending on the context, but they may include notice to impacted parties and disclosure of relevant material. The level of procedural protections should be responsive to the impact that a particular step - like a publication ban for example - would have on the open court, s. 2(b) rights and the administration of justice. The greater the risk to constitutional rights and the administration of justice, the greater the need for robust procedural protections prior to a judicial ruling.

9. Applying this approach to the case at bar requires an examination of the nature, scope, and likely impact of a claim for police informer privilege.

B. Canada's Absolute Approach to Police Informer Privilege

10. Police informer privilege is a uniquely strong privilege within the Canadian legal system:

- The privilege is "a legal rule of public order by which the judge is bound"; if no party to the case invokes the privilege, a judge is still required to impose it of his or her own motion.[8]

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[5] *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, *supra* note 3 at paras 22-23.
[6] *R v Kahsai*, 2023 SCC 20 at para 52.
[7] *Ibid* at para 51.
[8] *Bisaillon v Keable*, [1983] 2 SCR 60 at page 93.

- The privilege is shared between the accused and the Crown: neither may waive it without the other's consent.[9]
- The privilege is not lost by inadvertent disclosure.[10]
- The threshold for triggering the privilege is low – all that is necessary is that a peace officer, in the course of investigation, either implicitly or explicitly "guarantees protection and confidentiality to a protective informer in exchange for useful information".[11]
- Police informer privilege will apply to any information that may reveal the informer's identity; even in situations where it cannot be determined with confidence whether the information is likely to identify the informer, the information is protected from disclosure.[12]
- Once police informer privilege is found to apply "no case-by-case weighing of the justification for the privilege is permitted."[13]
- It takes precedence over typical constitutionally-protected disclosure obligations and is subject only to one narrow exception: innocence at stake.[14]

Although it has been consistently labelled a "class privilege" in Canadian jurisprudence, in light of its rationale and application, some have classified it as an "immunity" rather than a privilege.[15]

11. In fact, Canada's police informer doctrine takes some of the strongest elements of both class privileges and public interest immunities to create a level of protection that, in many ways, goes beyond that of either doctrine. Many of the critical limits of public interest immunities do not apply. This includes the requirement to judicially weigh competing public interests, the supremacy of criminal law disclosure requirements, and the general approach that a public interest immunity "should not be invoked unless clearly warranted by the circumstances."[16] The result is a doctrine that has a uniquely expansive ability to cloak court proceedings and information from public view.

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[9] *R v Basi*, 2009 SCC 52, [2009] 3 SCR 389 at para 40.
[10] Sidney Lederman, Michelle Fuerst, & Hamish Stewart, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada*, 6th ed (Montreal: LexisNexis, 2022) at ¶15.100 [Book of Authorities of CFE, Tab 1, pp 5].
[11] *R v Basi*, *supra* note 9 at para 36; *R v Barros*, 2011 SCC 51, [2011] 3 SCR 368 at para 31.
[12] *Re Personne désignée c R*, 2022 QCCA 984 at para 62.
[13] *Named Person v Vancouver Sun*, 2007 SCC 43, [2007] 3 SCR 252 at para 30.
[14] *R v Leipert*, [1997] 1 SCR 281.
[15] *Law of Evidence*, *supra* note 10 at ¶15.2 and ¶15.96 to ¶15.103. [Book of Authorities of CFE, Tab 1, pp 1].
[16] *Ibid* at ¶15.4; see generally ¶15.1 to ¶15.4 and ¶15.51 to ¶15.55. [Book of Authorities of CFE, Tab 1, pp 1-5].

12. Canada's approach to the protection of confidential informants is also more stringent than numerous other common law jurisdictions.[17] In Australia, for example, informer privilege is subject to judicial balancing of public interests;[18] in England judges balance various conflicting public interests in determining whether privileged information should be disclosed;[19] and in the United States the courts are tasked with balancing the public interest, and the privilege specifically gives way where disclosure of an informer's identity is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause."[20]

C. The Current Process for Considering Police Informer Privilege Claims is Insufficient

13. Police informer privilege poses a real risk to the open courts principle. As currently structured, the procedure for determining the application of police-informer privilege is insufficient to meaningfully protect constitutional rights and the administration of justice. Enhanced procedural safeguards must be implemented to ensure meaningful adversarial debate can occur.

14. This Court, in *Vancouver Sun*, set out a two-step process to determine the application of police informer privilege.[21] The first step examines whether there is sufficient evidence to support the assertion that a person is a confidential informer. The proceedings are *in camera* and only the person seeking protection and the Attorney General are present. This Court recognized that "the non-adversarial nature of the proceedings at this stage may cause concern" and place the judge in a "difficult position".[22] Although the Court left discretion with the trial judge to appoint an *amicus*, the Court's language on this point was decidedly unenthusiastic: appointing an *amicus* "may be permissible in some cases,"[23] but should only be necessary in "unusual situations."[24]

15. Once it is determined that the individual is a confidential informer, the second step of the

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[17] See generally Matthew Taylor (Justice Canada), *The Law of Informer Privilege: Final Report of the Working Group* (Fredericton, NB: Uniform Law Conference of Canada–Crim. Sec., 2016), online: www.ulcc-chlc.ca/ULCC/media/Criminal-Section/The-Law-of-Informer-Privilege.pdf.
[18] See, for ex., *AB (a pseudonym) v CD (a pseudonym),* [2018] HCA 58 (AustLII) (HC Austl).
[19] See, for example, *Chief Constable of the Greater Manchester Police v McNally*, [2002] EWCA Civ 14 (BAILII) (CA UK).
[20] *Roviaro v. United States*, [1957] 353 US 53 at p 353 (SC US).
[21] *Named Person v Vancouver Sun*, *supra* note 13 at paras 45-51.
[22] *Ibid* at para 48.
[23] *Ibid*.
[24] *Ibid* at para 49.

inquiry requires the judge to determine "the proper way of protecting informer privilege and realizing the open court principle," including concerning "himself or herself with minimal intrusion."[25] The "guiding rule" at the second stage is that "the judge must accommodate the open court principle to as great an extent possible without risking a breach of the informer privilege."[26] The Court's description makes it clear that the analysis at this stage is more complex and nuanced than at the first step. The crucial importance of adversarial debate at this stage was also recognized, with the Court again noting that "the Attorney General and the confidential informer will argue strenuously in favour of restricting any and all disclosure of information related to the proceeding, eliminating the efficiencies of the adversarial process."[27]

16. It is at this point that, in the CFE's view, the process outlined in *Vancouver Sun* becomes inadequate. The Court relied on the involvement of additional interested parties to provide the necessary adversarial debate at the second step of the process, but declined to place any firm obligation on the court to notify the public that a proceeding involving informer privilege is occurring.[28] The burden therefore falls on the public, and in particular the media, to monitor whether *in camera* proceedings of significant public import are taking place. The first step of the *Vancouver Sun* test takes place behind closed doors with parties that will often all be in favour of less, not more, publicity. It is unclear – absent notice – how this monitoring can be accomplished.

17. Even when additional parties do get involved at the second step their access to information that is "necessary" to make "meaningful submissions" is circumscribed by the privilege being claimed.[29] Given the task at hand – determining the scope of the privileged information and how this protection can best be reconciled with the open court principle – it is likely that in many cases parties that are outside the traditional circle of privilege will not have enough information to provide meaningful submissions. The Court did not suggest an *amicus* should be used at this stage.

18. The risks posed by the current process are highlighted by the case under appeal. The trial judge determined that no notice needed to be sent to the media in advance because the informer's claim of privilege was "évidente".[30] Both the parties at first instance agreed to proceed in "huis

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[25] *Ibid* at para 51.
[26] *Ibid* at para 55.
[27] *Ibid* at para 51.
[28] *Ibid* at para 53.
[29] *Ibid* at para 51.
[30] *Personne désignée c R*, 2022 QCCA 406 at para 12.

clos complet et total", a position that was endorsed by the trial judge.[31] The Court of Appeal found that no record of the trial exists except in the memories of the individuals involved.[32] The public only became aware of the existence of the proceeding because the confidential informer decided to appeal the trial judge's decision not to enter a stay of proceedings. The Court of Appeal decided, after reviewing the record, that the manner of proceeding was exaggerated and contrary to the fundamental principles governing our legal system.[33] A record at the court office was opened, subject to a sealing order, and the Court of Appeal released redacted public reasons.[34] And finally, although interested parties were able to request that the Court of Appeal to review its own sealing order and then appeal that decision to this Court, the only way they could challenge the original trial level decisions was by direct appeal to the Supreme Court of Canada.

19. The CFE agrees with the Courts of Appeal for Quebec and British Columbia that proceedings should never be 'off-the-docket',[35] and that while information may be sealed or certain proceedings be held *in camera*, the fact that there is a trial itself must be public.[36] Even if these extremes are avoided, however, a significant risk remains that significant portions of a trial will be shielded from public view. There may be cases where such secrecy is justified. The courts, and the justice system more broadly, should not confer such a broad power on itself without stringent procedural steps and accountability measures. In this context it should be mandatory for courts to take the necessary procedural steps to ensure a robust, adversarial process occurs.

D. CFE's Proposed Procedural Changes to Protect Adversarial Debate

20. The CFE submits that the following procedural steps should be incorporated into the second step of the *Vancouver Sun* test for determining the information to be sealed pursuant to claim of police informant privilege. First, notice should be given to interested parties that a sealing order is being sought. Second, these interested parties should be given standing and, to the greatest extent possible, be provided with the information they require to make relevant submissions. And third, in circumstances where the constitutional issues will not be fully argued by the parties, an appointed advocate should be selected by the court to make submissions pertaining to the public's

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[31] *Ibid* at para 11.
[32] *Ibid*.
[33] *Ibid* at para 14.
[34] *Ibid* at paras 14, 16.
[35] *Ibid* at paras 7-8; *R v Bacon*, 2020 BCCA 140 at paras 68-70.
[36] *Personne désignée c R*, *supra* note 30 at para 16.

s. 2(b) rights and how the court may remain as open as possible while honouring the informer privilege. Each of these steps is explored in further detail below.

Step 1: Notice Should Be Given to Media and Other Interested Parties

21. Though the determination of whether to impose the police informer privilege is not a discretionary one, the second stage of the *Vancouver Sun* inquiry will require a full exploration of the scope of information to be sealed, and how best to maintain an open court system while still respecting a valid claim for privilege. At this point the judge is properly concerned with minimal impairment and a range of possible solutions may be proposed.

22. Prior to this portion of the hearing it should be mandatory for courts to provide notice to interested parties. CFE respectfully submits that, as set out above and contrary to this Court's holding in *Vancouver Sun*,[37] there is a clear difference between the impact of a claim for police informer privilege and other *in camera* proceedings. It is also a feasible procedural requirement, in line with the way that many jurisdictions proceed with discretionary publication ban requests.[38]

Step 2: Interested Parties Should Be Granted Standing

23. Following notice, interested parties should be granted standing to make relevant submissions. These may include addressing the importance of the open court principle, the appropriate scope of the police informer privilege, and proposals regarding how to most effectively reconcile informant protection with open courts.

24. To permit interested parties' meaningful participation they must, to the greatest extent possible, have access to the relevant documents and information before the court. A variety of measures can be employed to allow for meaningful adversarial debate while addressing concerns

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[37] *Named Person v Vancouver Sun*, *supra* note 13 at para 53.

[38] Ontario, Superior Court of Justice, *Consolidated Provincial Practice Direction*, part VI, s. F (1 July 2014, as amended) at paras 109-115, online: www.ontariocourts.ca/scj/practice/practice-directions/provincial/; Alberta, Provincial Court, *Notice to the Profession: Publication Bans (#2)* (12 January 2005, as amended) at paras 6-11, online: www.albertacourts.ca/docs/default-source/pc/practice-note-governing-notice-of-application-for-publication-ban.pdf; Nova Scotia, Provincial Court, *Practice Direction — Applications for Discretionary Publication Bans (PC Rule 2)* at p. 2, online: www.courts.ns.ca/sites/default/files/editor-uploads/NSPC_Practice_Direction_Publication_Bans.pdf; British Columbia, Supreme Court, *Practice Direction — Notification of Publication Ban Applications (PD-56)* (28 October 2019, as amended) at para 4, online: www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions/civil/PD-56_Notification_of_Publication_Ban_Applications.pdf.

regarding the security, confidentiality, and sensitivity of the information.[39]

Step 3: An Appointed Advocate May Be Necessary to Ensure Adversarial Debate

25. Although adversarial debate should typically be ensured through the arguments presented by interested parties, this may not always be possible. There may be cases where significant constitutional rights are at issue, but no interested parties step forward to argue contrasting constitutional positions. In such circumstances, trusted and vetted special counsel or partisan *amicus* who can be given full access to the privileged material, should be appointed.

26. There may also be cases where interested parties are granted standing, but the information that is provided to the parties that remain outside of the circle of privilege is still too limited to allow for fully informed and effective adversarial debate. Where interested parties are granted standing, the judge should canvass the parties for their perspectives about their ability to fully argue the case on the basis of the information that is available.[40] Again, if meaningful adversarial debate cannot take place, courts should be required to appoint an advocate with access to the privileged information. Judges should be presented with a variety of viewpoints as to how they can give effect to the difficult, contextual task of protecting informer identity while also promoting open courts.[41]

27. Appointed advocates are used sparingly in Canadian law. In *R v. Kahsai*, 2023 SCC 20, for example, this Court held that an *amicus* must be used "sparingly and with caution" and may only be appointed in specific and exceptional circumstances where its assistance is essential to the judge in discharging their judicial functions.[42] Similarly, to date "special counsel" and "special advocates" have been reserved for a relatively narrow category of cases. [43]

28. In the CFE's submissions, the invocation of police informer privilege as per the *Vancouver Sun* process is, in and of itself, an exceptional circumstance. We know of no other recognized judicial mechanisms whereby Canadian courts have approved 'off the docket' criminal proceedings or 'secret trials'. A secrecy that is this expansive and absolute warrants an exceptional

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[39] See Mémoire de L'Appelant at paras 85-98. See also *R v Garofoli*, [1990] 2 SCR 1421.
[40] This aligns with the process set out in *R v Kahsai*, *supra* note 6 at para 65.
[41] *Named Person v Vancouver Sun*, *supra* note 13 at para 57.
[42] *R v Kahsai*, *supra* note 6 at para 36; see also *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 SCR 3 at para 47.
[43] See generally *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350.

procedure: the mandatory appointment of partisan counsel where meaningful adversarial debate would not otherwise occur.

29. The appointed advocate's role would be to advocate for the public's constitutional rights and open court principle. The appointed advocate would be able to apply the legal test to the specific facts of the case, with full knowledge of the file, and may for example argue for a different or more nuanced manner to both preserve the open court principle and ensure privileged information is not disclosed. The appointed advocate may also present arguments to the court regarding the sufficiency of any judicial summaries or the necessities of particular redactions.

30. The scope of the appointed advocate's role in any particular case should be determined based on the circumstances of the trial as a whole.[44] The more information that is concealed from interested parties, the broader the appointed advocate's role should become.

31. What the CFE proposes is not beyond the bounds of *amicus* and special counsel appointments within Canadian jurisprudence. The Ontario Court of Appeal has ruled that an *amicus* or partisan advocate should not be regularly appointed when an accused seeks to challenge a search warrant that is based at least in part on information from a confidential informant.[45] In coming to this conclusion, however, the Court relied on various safeguards built into the *Garofoli* process, all of which are geared towards ensuring defence counsel can meaningfully debate the requested redactions and the ultimate validity of the search warrant.[46] Moreover, in the *Garofoli* context the accused will always have notice that police informant privilege has been raised. There is also little risk that the parties will be aligned, thereby prejudicing adversarial debate.

32. Giving an appointed advocate access to privileged information is not an impermissible disclosure of privileged information. In *Vancouver Sun* this Court sanctioned giving an *amicus* access to sufficient information – including certain information subject to police informer privilege – to enable meaningful debate.[47] Although courts have expressed concerns about sharing this information with *amicus* previously,[48] the concerns about inadvertent disclosure of the confidential informant's identity are significantly mitigated in this context as there would be no constitutional imperative for the appointed advocate to communicate with defence counsel.

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[44] *R v Kahsai*, *supra* note 6 at para 61.
[45] *R v Gero*, 2021 ONCA 50 at paras 63-65; *R v Shivrattan*, 2017 ONCA 23 at paras 63-70.
[46] *R v Gero*, *supra* note 45 at paras 63, 65.
[47] *Named Person v Vancouver Sun*, *supra* note 13 at paras 48, 63.
[48] *R v Gero*, *supra* note 45 at paras 63-65; *R v Shivrattan*, *supra* note 45 at paras 63-70.

33. Appointed counsel form a part of the criminal law regime, immigration and national security cases, and family law.[49] Though different in their weight and scope, all of these appointments provide examples of courts turning to partisan advocates to protect the interests – and, in some cases, the constitutional rights and freedoms – of a class of people who cannot be effectively represented through the traditional adversarial systems. The case at bar demonstrates that, in cases such as this, the media and the public may require a similar form of aid.

E. Conclusion

34. Implementing a more robust adversarial process would encourage greater public faith in the justice system. As stated by the British Columbia Court of Appeal, though the result "may still be a complete sealing of the file and an entirely in camera proceeding", the public "will at least know that the matter has been fully argued and considered."[50]

35. The CFE's proposed modifications to the structure of the *Vancouver Sun* inquiry maintains a strong regard for preserving the police informer privilege while affording greater procedural protections to ensure that all issues and interests are fully canvassed before a decision is rendered. Although this would require revisiting some of the holdings in *Vancouver Sun*, the CFE submits that this adjustment will not create significant additional risks for confidential informants, and is clearly necessary in light of the constitutional rights at stake.

PART IV - SUBMISSIONS CONCERNING COSTS

36. The CFE seeks so costs and asks that no costs be awarded against it.

PART V - ORDER SOUGHT

37. The CFE takes no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 12TH DAY OF SEPTEMBER, 2023

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[49] *Charkaoui v Canada (Citizenship and Immigration)*, *supra* note 43; see generally Macy Mirsane,"The Roles of Amicus Curiae (Friend of the Court) in Judicial Systems with Emphasis on Canada and Alberta", 2022 59-3 Alberta Law Review 669, 2022 CanLIIDocs 1110.

[50] *Postmedia Network Inc v Named Persons*, 2022 BCCA 431 at para 84.

PART VI - TABLE OF AUTHORITIES

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