

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)**

B E T W E E N:

**CANADIAN BROADCASTING CORPORATION  
LA PRESSE INC., COOPERATIVE NATIONALE DE L'INFORMATION  
INDEPENDANTE (CN21), CANADIAN PRESS ENTERPRISES INC.  
MEDIAQMI INC., and GROUPE TVA INC.**

Appellants

- and -

**HIS MAJESTY THE KING and NAMED PERSON**

Respondents

*\*Style of cause continued on p. ii*

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**FACTUM OF THE INTERVENER  
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)**

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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*\*style of cause continued (SCC File No.: 40371)*

AND BETWEEN:

**ATTORNEY GENERAL OF QUEBEC**

Appellant

- and -

**HIS MAJESTY THE KING and NAMED PERSON**

Respondents

- and -

**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  
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## PART I - OVERVIEW AND STATEMENT OF FACTS

1. At the heart of this appeal lies the constitutionally protected participatory rights of litigants.
2. The Criminal Lawyers' Association (Ontario) (“CLA”) respectfully submits that where a litigant and their counsel are lawfully excluded from a proceeding, special counsel should be appointed to advance their interests in that proceeding. Taking this step protects the excluded litigant’s constitutionally protected participatory rights.
3. In every proceeding, participatory rights are afforded to litigants and interested parties. Some participatory rights are constitutionally protected. For example, an accused’s right to participate in all aspects of their criminal trial,<sup>1</sup> a complainant’s right to protect their privacy interests,<sup>2</sup> the right to be heard in the official language of one’s choice,<sup>3</sup> and the media’s right to make submissions regarding publication bans.<sup>4</sup>
4. These participatory rights are not absolute. For example, an accused’s s. 7 right to disclosure *can* be limited by national security confidentiality or informer privilege. That said, in cases where it is impossible to meet the requirement of fundamental justice in the usual way due

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<sup>1</sup> The accused’s right to participate is recognised in ss 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* (having statutory expression in s 650 of the *Criminal Code*, [RSC 1985, c C-46](#)), which includes the right to know the case to meet (which is intertwined with the right to disclosure), to be able to meet the case, to make submissions, to call evidence, and to testify in their own defence); see also *R v Hertrich* (1982), [67 CCC \(2d\) 510 \(ONCA\)](#), at paras 81-82, leave to appeal dismissed [1982] SCCA No 124; *R v Laws* (1998), [41 OR \(3d\) 499 \(ONCA\)](#), at paras 79-83.

<sup>2</sup> *R v JJ*, [2022 SCC 58](#), at para 45; *R v Mills*, [\[1999\] 3 SCR 668](#); see also the variety of statutory expressions of a complainant’s right to privacy in ss 278.1 to 278.94 of the *Criminal Code*.

<sup>3</sup> See s 16 of the *Charter*, s 15(1) of the *Official Languages Act*, [RSC 1985, c 31 \(4<sup>th</sup> Supp\)](#), s 530 of the *Criminal Code*.

<sup>4</sup> Section 2(b) of the *Charter*; *Dagenais v Canadian Broadcasting Corp*, [\[1994\] 3 SCR 835](#).

to competing confidentiality or privilege concerns, adequate substitutes for the abridged s.7 protections must be found.<sup>5</sup>

5. This principle an adequate substitute for participation transcends cases that deal with limitations on s. 7 rights. It is a fundamental tenet of our constitutional law that both common law and statutory limitations on constitutional rights must impair these rights as little as reasonably possible.<sup>6</sup>

6. It is in this context that the CLA submits that in all cases where a litigant has a constitutionally protected right to participate in a hearing, but is excluded from that hearing due to privilege concerns, an adequate substitute for participation is required for the exclusion of the litigant to be constitutional.<sup>7</sup> In cases where the litigant is fully excluded from the hearing and is therefore unable to protect and advance their interests, the appointment of special counsel will be the appropriate substitute.

7. The CLA takes no position on the facts of this case, or the outcome of this appeal.

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<sup>5</sup> *Canada (Attorney General) v Khawaja*, [2007 FCA 388](#), at [para 75](#), citing *Charkaoui v Canada (Citizenship and Immigration)*, [2007 SCC 9](#), at [paras 57-59](#) [*Charkaoui*].

<sup>6</sup> *R v Oakes*, [\[1986\] SCR 1 103](#), at [139](#) [*Oakes*]; *R v Swain*, [\[1991\] SCR 1 933](#) [*Swain*]; *RJR-MacDonald Inc v Canada (AG)*, [\[1995\] 3 SCR 199](#), at [para 160](#) [*RJR-McDonald*].

<sup>7</sup> *Canadian (Citizenship and Immigration) v Harkat*, [2014 SCC 33](#), at [paras 40-50, 53-55, 63-65](#) [*Harkat*]. Where the criminally accused is excluded from pre-trial evidentiary proceedings of any consequence or complexity, the substantial substitute for their participation will be appointed counsel. To be clear, an accused person cannot be excluded from their trial (i.e. where the merits are determined; guilt or innocence) absent extremely disruptive conduct and the like.

## PART II - QUESTIONS IN ISSUE

8. The CLA agrees with the Appellants'<sup>8</sup> framing of the questions in issue in this appeal. Its submissions are relevant to the following questions raised:

(a) Can a trial proceed outside the justice system, *in camera*, without creating a file or revealing the very existence of proceedings taking place before the courts, contrary to the open court principle of protected by s. 2(b) of the *Charter*?

(b) Although the police informer privilege is absolute, can its unfettered interpretation set aside the constitutionally protected open court principle, as proposed by the Court of Appeal?

(c) In determining which facts can nonetheless be published while protecting the identity of the police informer, should the judge hearing the application order that interested third parties be notified and given the opportunity to be heard on these matters?

9. Though these issues seek to reconcile two principles that stand in opposition in this specific appeal (the open court principle and the rule of confidentiality made necessary by informer privilege), they have implications for cases where constitutionally protected participatory rights conflict with the need to protect claims of privilege.

## PART III - STATEMENT OF ARGUMENT

10. It is uncontroversial that in cases where privilege is invoked in a manner that places limits on constitutional rights, the privilege invoked must be interpreted and protected in a way that

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<sup>8</sup> The Appellants, Canadian Broadcasting Corporation, La Presse Inc., Cooperative Nationale de l'information independante (CN21), Canadian Press Enterprises Inc., MediaQMI Inc., Groupe TVA Inc.

*minimally impairs or limits* the rights at issue. How the principle of minimal impairment is applied will depend on both the type of privilege and the constitutional right implicated.

11. When a party with a constitutionally protected right to participate cannot do so because of a conflicting interest, such as informant privilege, minimal impairment can only be achieved by a *substantial participatory substitution* for the excluded litigant. The appropriate substantial substitution in such cases is the appointment of counsel.

#### **A. Different Forms of Appointed Counsel**

12. There are three roles that appointed counsel may fulfill in cases where there are closed proceedings: the role of *amicus curiae*, the role of “Special Advocate”, and the role of special counsel.

13. The primary attribute of an *amicus* is their commitment to serving the court. They do not function as legal counsel for the absent litigant in closed proceedings. That is not to say that they cannot oppose a position taken by the Crown.<sup>9</sup> As this Honourable Court recently recognized in *Kahsai*, “there is a wide range of adversarial functions that *amicus* can execute” without engaging the dangers that arise from blending the roles of defence counsel and *amicus*.<sup>10</sup> And in some cases, “trial fairness may be best served by appointing *amicus* to oppose the position of the Crown where the accused is unrepresented.”<sup>11</sup> However, the overriding duty of *amicus* is to assist the Court. This Court has previously found that *amicus* can be appointed in cases where informer privilege is raised.<sup>12</sup>

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<sup>9</sup> *Ontario v Criminal Lawyers’ Association of Ontario*, [2013 SCC 43](#), at [paras 44-56](#).

<sup>10</sup> *R v Kahsai*, [2023 SCC 20](#), at [paras 38-39](#) [*Kahsai*].

<sup>11</sup> *Kahsai*, at [para 39](#).

<sup>12</sup> *R v Brassington*, [2018 SCC 37](#), at [paras 36-38](#), citing *R v Brown*, [2002 SCC 32](#); *Named Person v Vancouver Sun*, [2007 SCC 43](#), at [paras 45-49](#); *R v Basi*, [2009 SCC 52](#), at [para 57](#).

14. The role of “Special Advocates” was created by amendments to the *Immigration Refugee and Protection Act* (“*IRPA*”), which were made in response to this Court’s decision in *Charkaoui* (discussed further below).<sup>13</sup> The role of “Special Advocates” is “to protect the interests of the named person and ‘to make up so far as possible for the [named person’s] own exclusion from the evidentiary process’.”<sup>14</sup> Division 9 of *IRPA* regulates the appointment of “Special Advocates”.

15. The role of special counsel is a common law appointment that is like the role of “Special Advocates”. Special counsel protects and advances the interests of the excluded party. Unlike *amicus*, the hallmark of special counsel is to aid excluded litigants on whose behalf they are appointed, rather than to act as a friend of the court. Indeed, special counsel is a partisan actor providing adversarial balance that is meant to fulfill a function that defence counsel would fulfill were they not excluded. The British Columbia Court of Appeal described the difference between the role of *amicus* and special counsel in the following manner:

[62] It is important to note that the role played by the *Amici* in this case was different than the role described by Justice Karakatsanis in *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 [*Criminal Lawyers’ Association*]. The *Amici*’s initial appointment was to assist with the resolution of the privilege claims of E3 and E5, which necessarily had to proceed without the accused or their defence counsel. Once those claims were upheld, *Amici*’s role shifted to providing an adversarial context to the *ex parte* portions of this proceeding, and thus took on a role similar to that of defence counsel. At the hearing of these appeals, *Amici* helpfully suggested that their role was more akin to that of “special counsel”, and that they would not use the term *Amici* if the appointment were made today.

[63] We agree with *Amici*’s submission that their role is more accurately described as that of special counsel. *Amici* were not truly appointed to be friends of the court, but rather to provide an adversarial context in the absence of defence counsel. They fulfilled that role ably on appeal. Nevertheless, because the appointment of *Amici* predates the decision in

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<sup>13</sup> *Charkaoui*.

<sup>14</sup> *Harkat*, [at para 35](#).

*Criminal Lawyers' Association*, and the term *Amici* has been used throughout this litigation, we will continue to use the term *Amici*.<sup>15</sup>

16. Courts have the inherent jurisdiction to appoint special counsel to ensure that an excluded party's participatory rights are protected.

**B. The Framework that Applies to Determine When Counsel Should be Appointed**

17. The CLA proposes the following three-step framework for courts to consider when determining whether counsel should be appointed in cases where a litigant is excluded from a proceeding:

(a) First, courts should identify if the litigant has a constitutional right to participate in the proceedings from which they are excluded (the "**Closed Proceeding**").

(b) Second, courts should determine whether the litigant's exclusion is legally justified. For example, exclusion can be legally justified when the litigant or their counsel, by participating in the Closed Proceeding, will learn privileged information or private information to which they are not entitled.

(c) Third, if a litigant with a constitutional right to participate is lawfully excluded, the court should fashion a process that ensures efficacious participation by the excluded litigant without compromising the security, privilege, or privacy of the information that will be revealed in the Closed Proceeding. Put another way, a substantial participatory substitute is required for the exclusion to be constitutional. Where a litigant is being excluded from a hearing of any complexity where they have constitutionally protected participatory rights, the appointment of special counsel should be recognized as the appropriate substitution.

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<sup>15</sup> *R v Johnston*, [2021 BCCA 34](#), at [paras 62-63](#) (upheld in *R v Haevischer*, [2023 SCC 11](#) [*Haevischer*]).

18. Special counsel are better placed than *amicus* to carry out the role of protecting and advancing the interests of the excluded party. The role of special counsel is more flexible than the role of *amicus* as they do not owe duties to the court beyond the ethical duties that all counsel owe in the normal course. Special counsel, unlike *amicus*, will have as their primary duty the protection of the excluded litigant. Special counsel will be empowered to vigorously protect the interests of the excluded litigant and take on the functions of that litigant's counsel in closed proceedings—a role that is necessary where the matters under consideration are material to the litigation.

19. Once the Court determines that the appointment of counsel is necessary under the three-step framework and that appointed counsel should act as special counsel rather than *amicus*, it should move on to order specific terms of appointment that will maintain the integrity of the Closed Proceeding. In addition to any other bespoke terms, the following terms of appointment are routinely ordered and should be mandatory (in no particular order):

(a) Special counsel is to assist the court by representing the interests of the excluded litigant in the Closed Proceeding. To fulfill this mandate, counsel should be permitted to read, hear, challenge, and respond to the evidence and representations made on behalf of any party in the Closed Proceeding, call witnesses, and/or make submissions to the Court on factual and legal, where appropriate;

(b) Special counsel shall have access to all information and documents in the Closed Proceeding, including all confidential materials as relied upon in Closed Proceeding and may apply for and obtain further disclosure as determined by the court;



(c) Any communication between the excluded litigant and their counsel is protected by solicitor/client or litigation privilege, and will not lose that privilege if shared with special counsel; and

(d) Special counsel will keep confidential from the excluded litigant and their counsel, and any other person not participating in the Closed Proceeding, all confidential information and documents to which special counsel has had access.

**C. Counsel Must be Appointed to Uphold the Constitutionality of the Exclusion of a Litigant**

20. It is well recognized that both common law and statutory limitations on constitutional rights must be as minimally intrusive as reasonably possible.<sup>16</sup> In cases where a litigant with constitutionally recognized participatory rights is excluded from proceedings such that they cannot protect or advance their interests, the constitutionality of their exclusion is engaged.

21. This Court has previously recognized that the appointment of counsel can save an otherwise unconstitutional exclusion.

22. In *Charkaoui*, this Court found that the previous versions of the provisions in *IRPA* setting out the process for confirming the reasonableness of security certificates violated s. 7 of the *Charter*.<sup>17</sup> It found that because of the consequences to the named person's liberty, a "substantial substitute" was *required* for the full disclosure to, and full participation of, the named person.<sup>18</sup> This Court explained that appointing counsel to represent an excluded litigant's interests was a substantial substitute that could strike the right balance between protecting sensitive information

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<sup>16</sup> *Oakes*, [at 139](#); *Swain*; *RJR-MacDonald*, [at para 160](#).

<sup>17</sup> *Charkaoui*, [at paras 79-86](#).

<sup>18</sup> *Charkaoui*, [at para 63](#); see also *Harkat*, [at paras 43-47](#).

and the participatory rights of the named person.<sup>19</sup> In response, Parliament amended the security certificate procedures in *IRPA* to mandate the participation of “Special Advocates”. The use of “Special Advocates” in security certificate proceedings to protect the constitutional interests of those who have been excluded from proceedings was upheld in *Harkat*.<sup>20</sup>

23. The security certificate regime is one example where appointed counsel has been used to achieve substantial compliance with constitutional rights. In criminal proceedings where the Crown seeks to rely upon a privilege to exempt information from their *Stinchcombe* obligations, counsel have been appointed to “level the playing field” where the accused’s exclusion threatens trial fairness.<sup>21</sup>

24. This appeal offers the Court the opportunity to clarify that appointing special counsel to advocate for an excluded litigant’s interests safeguards sensitive information while protecting the participatory rights of the excluded litigant where the issues canvassed are significant to the case. Appointing special counsel maintains the constitutionality of the party’s exclusion from a proceeding and should be the default.

#### **PART IV - SUBMISSIONS REGARDING COSTS**

25. The CLA seeks no costs and asks that no costs be ordered against it.

#### **PART V - ORDER SOUGHT**

26. The CLA takes no position on the outcome of this appeal.

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<sup>19</sup> *Charkaoui*, [at para 61](#).

<sup>20</sup> *Harkat*.

<sup>21</sup> *Haevischer; R v Johnston*, [2021 BCCA 34](#), [at paras 62-63](#); *R v Bacon*, [2020 BCCA 140](#); *R c Mirarchi*, [2016 QCCA 81](#); *R v Huang*, [2018 ONSC 831](#); *Canada (Attorney General) v Huang*, [2018 FCA 109](#).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of September, 2023.



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**PART VI: AUTHORITIES**

<b>CASE</b>	<b>Paragraph(s)</b>
<i>Canada (Attorney General) v Huang</i> , <a href="#">2018 FCA 109</a>	23
<i>Canada (Attorney General) v Khawaja</i> , <a href="#">2007 FCA 388</a>	4
<i>Canadian (Citizenship and Immigration) v Harkat</i> , <a href="#">2014 SCC 33</a>	6, 14, 22
<i>Charkaoui v Canada (Citizenship and Immigration)</i> , <a href="#">2007 SCC 9</a>	4, 14, 22,
<i>Dagenais v Canadian Broadcasting Corp.</i> , <a href="#">[1994] SCR 3 835</a>	3
<i>Named Person v Vancouver Sun</i> , <a href="#">2007 SCC 253</a>	13
<i>Ontario v Criminal Lawyers' Association of Ontario</i> , <a href="#">2013 SCC 43</a>	13
<i>RJR-MacDonald Inc v Canada (AG)</i> , <a href="#">[1995] SCR 3 199</a>	5, 20
<i>R v Bacon</i> , <a href="#">2020 BCCA 140</a>	23
<i>R v Basi</i> , <a href="#">2009 SCC 52</a>	13
<i>R v Brassington</i> , <a href="#">2018 SCC 37</a>	13
<i>R v Brown</i> , <a href="#">2002 SCC 32</a>	13
<i>R v Haevischer</i> , <a href="#">2023 SCC 11</a>	15, 23
<i>R v Hertrich</i> (1982), <a href="#">67 CCC (2d) 510 (ONCA)</a>	3

<i>R v Huang</i> , <a href="#">2018 ONSC 831</a>	23
<i>R v JJ</i> , <a href="#">2022 SCC 58</a>	3
<i>R v Johnston</i> , <a href="#">2021 BCCA 34</a>	15, 23
<i>R v Kahsai</i> , <a href="#">2023 SCC 20</a>	13
<i>R v Laws</i> (1998), 41 OR (3d) 499 (ONCA)	3
<i>R v Mills</i> , [1999] SCR 3 668	3
<i>R c Mirarchi</i> , <a href="#">2016 QCCA 81</a>	23
<i>R v Oakes</i> , [1986] SCR 1 103	5, 20
<i>R v Swain</i> , [1991] SCR 1 933	5, 20

<b>LEGISLATION</b>	<b>Paragraph(s)</b>
<p><i>Canadian Charter of Rights and Freedom</i>, <a href="#">the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11</a>, ss 2(b), 7, 11(d), 16</p> <p><i>Charte canadienne des droits et libertés</i>, <a href="#">Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11</a>, arts 2(b), 7, 11(d), 16</p>	3
<p><i>Criminal Code</i>, <a href="#">RSC 1985, c C-46</a>, ss 278.1 to 278.94, 530, 650</p> <p><i>Code criminel</i> <a href="#">LRC (1985), ch C-46</a>, arts 278.1 à 278.94, 530, 650</p>	3

<p><i>Official Languages Act</i>, <a href="#">RSC 1985, c 31 (4<sup>th</sup> Supp)</a>, s 15(1)</p> <p><i>Loi sur les langues officielles</i>, <a href="#">LRC (1985), ch 31 (4e suppl)</a>, art 15(1)</p>	3
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