

**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., GROUPE TVA INC.**

Appellants

- and -

**HIS MAJESTY THE KING
NAMED PERSON**

Respondents

- and -

**LUCIE RONDEAU, IN HER CAPACITY AS CHIEF JUSTICE OF THE COURT OF
QUEBEC**

Intervener

**Style of cause continued on p. ii*

**MOTION FOR LEAVE TO INTERVENE AND EXTENSION OF TIME OF
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)**
(RULES 47 AND 55-57 OF THE *RULES OF THE SUPREME COURT OF CANADA*)

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Lawyers' Association (Ontario)**

**style of cause continued from p. i*

AND BETWEEN:

ATTORNEY GENERAL OF QUEBEC

Appellant

- and -

**HIS MAJESTY THE KING
NAMED PERSON**

Respondents

- and -

**CANADIAN BROADCASTING CORPORATION
LA PRESSE INC., COOPERATIVE NATIONALE DE L'INFORMATION
INDEPENDANTE (CN21), CANADIAN PRESS ENTERPRISES INC.
LUCIE RONDEAU, IN HER CAPACITY AS CHIEF JUSTICE OF THE COURT
OF QUEBEC**

Interveners

ORIGINAL: Registrar
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inc., Coopérative nationale de l'informa-
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Press Enterprises inc., Media QMI Inc.,
Groupe TVA Inc.**

Respondent, His Majesty the King

Respondent, Named Person

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**LUCIE RONDEAU, IN HER CAPACITY AS CHIEF JUSTICE OF THE COURT OF
QUEBEC**

Intervener

A N D B E T W E E N:

ATTORNEY GENERAL OF QUEBEC

Appellant

- and -

**HIS MAJESTY THE KING
NAMED PERSON**

Respondents

- and -

**CANADIAN BROADCASTING CORPORATION
LA PRESSE INC., COOPERATIVE NATIONALE DE L'INFORMATION
INDEPENDANTE (CN21), CANADIAN PRESS ENTERPRISES INC.
LUCIE RONDEAU, IN HER CAPACITY AS CHIEF JUSTICE OF THE COURT OF
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Interveners

NOTICE OF MOTION FOR EXTENSION OF TIME AND FOR LEAVE TO INTERVENE

(Rules 47 and 55-57 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that the Moving Party, the Criminal Lawyers' Association (Ontario) (the "CLA"), hereby applies to a Judge of this Court or the Registrar, pursuant to Rules 47 and 55-57 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, for an order granting the CLA:

- a. An extension of time to serve and file its motion for leave to intervene;
- b. Leave to intervene in this appeal;
- c. Leave to file a factum not exceeding ten (10) pages in length;
- d. Leave to make oral argument at the hearing of the appeal in accordance with this Honourable Court's direction; and
- e. Any further or other order that the Judge or Registrar may deem appropriate.

THE GROUNDS FOR THE JOINT MOTION ARE:

The Motion for an Extension of Time for Service and Filing

1. On April 26, 2023, this Court ordered, amongst other things: (1) that the appellants' respective factums, records, and books of authorities, had to be served on or before June 12, 2023; and (2) thus, that in accordance with Rule 56 of the *Rules of the Supreme Court*, any motion for leave to intervene had to be served and filed on or before July 10, 2023.
2. The CLA did not serve and file its motion for leave to intervene on or before July 10, 2023. This delay was the result of a clerical mistake that the co-chair of the CLA's litigation committee (the "**co-chair**") made in recording the timelines for this appeal. The co-chair mistakenly recorded, and thus believed, that the CLA had until August 10, 2023, to serve and file its motion for leave to intervene.
3. The co-chair discovered her mistake on July 26, 2023, as she was in the process of retaining counsel for the CLA to prepare the motion materials for leave to intervene in the appeal.

4. The co-chair immediately retained counsel for the CLA and instructed them to complete and serve this joint motion, to advise counsel for the appellants and respondents of the error, and to request their position to the late serving and filing of the CLA's motion materials for leave to intervene.
5. On July 29, 2023, counsel for the CLA wrote to counsel for the appellants and respondents, advising them of the mistake and requesting their position on the motion to extend time for the delivery of the motion materials.
6. On July 31, 2023, counsel for the Appellants, the Attorney General of Quebec and CBC et. al., responded that they are not taking a position on our motion. Because the names of the counsel for the Respondents His Majesty the King and Named Persons are redacted, the CLA was unable to correspond with counsel to seek their position.
7. The CLA had a settled and *bona fide* intention to seek leave to intervene in this appeal to this Court prior to the expiry of the time to seek leave to intervene.
8. The delay in serving and filing the motion for leave to intervene was due to the inadvertence of the co-chair. The delay was not inordinate, and it does not prejudice the parties.
9. The CLA's motion seeking leave to intervene in this appeal has merit.

The Motion for Leave to Intervene

10. The CLA is an organization of over 1,900 criminal defence lawyers with a long history of intervening in judicial proceedings. It has been consistently granted leave to participate in appeals impacting the participatory rights of an accused and other parties in the criminal justice system, which flow primarily from the right to a fair trial, the right to make full answer and defence, privacy rights, and the right to freedom of expression.
11. The CLA and its members have a direct interest in this appeal. This appeal raises questions about the participatory rights of litigants in the context of criminal proceedings, where such litigants are excluded. The resolution of these questions will impact how cases involving the exclusion of an accused person or another party in criminal proceedings, due to competing interests (such as informer privilege), proceed moving forward. As an

organization representing the criminal defence bar in Ontario, the CLA's members and the clients that they represent will be directly affected by this Court's decision.

12. If granted intervener status, the CLA will offer a unique perspective. The CLA's submissions will reflect the practical experience of its membership and local jurisprudence in helping this Court understand the importance of the issues in this case.
13. The CLA has relevant submissions that will be useful to this Honourable Court and different from those of the other parties. Unlike the other parties, the CLA's proposed position is that where a litigant has a constitutionally protected right to participate in a hearing, but is excluded from that hearing due to privilege or other concerns, a substantial substitute for participation is required for the exclusion of the litigant to be constitutional. In such cases, the appointment of special counsel will be the appropriate substitute to protect and advance the interests of the excluded party.
14. The CLA's proposed submissions are set out in further detail in the CLA's Memorandum of Argument.
15. The CLA's proposed intervention will address issues within the scope of the appeal and will not cause delay or prejudice to the parties.
16. The CLA will not take a position on the outcome of the appeal, or file any additional evidence or extraneous material, beyond a factum.
17. Such further and other grounds as counsel may advise and this Court may permit.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of the motion:

18. The affidavit of Megan Savard, Co-Chair of the CLA's Litigation Committee, sworn on August 1, 2023;
19. The Memorandum of Argument on the motion for leave to intervene; and

20. Such further and other material as counsel may advise and this Honourable Court may permit.

Dated at Toronto, Ontario, this 1st day of August, 2023.



Anil Kapoor / Alexandra Heine

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ORIGINAL: Registrar
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Respondent, His Majesty the King

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**Counsel for Lucie Rondeau, in her capacity as
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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be. If the motion is served and filed with the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave to appeal.

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Intervener

- and -

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Moving Party (Proposed Intervener)

A N D B E T W E E N:

ATTORNEY GENERAL OF QUEBEC

Appellant

- and -

**HIS MAJESTY THE KING
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QUEBEC**

Interveners

- and -

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Moving Party (Proposed Intervener)

**AFFIDAVIT OF MEGAN SAVARD
IN SUPPORT OF JOINT MOTION FOR EXTENSION OF TIME AND LEAVE TO
INTERVENE**

(Rules 47 and 55-57 of the *Rules of the Supreme Court of Canada*)

I, **MEGAN SAVARD**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am a barrister and solicitor and a member in good standing of the Law Society of Ontario. I am a member of the Criminal Lawyers' Association (Ontario) ("CLA"), and the co-chair of the CLA's Litigation Committee. My practice is devoted to criminal law. On this basis, I have knowledge of the matters contained in this affidavit. Where I do not have direct knowledge of the facts, I have stated the source of my information and I believe such facts to be true.

I. OVERVIEW

2. I swear this affidavit in support of the CLA's joint motion for an extension of time to serve and file its motion seeking leave to intervene in the matter of *Canadian Broadcasting Corporation et al v His Majesty the King et al*, SCC File No. 40371, and for leave to intervene.

3. With respect to the first motion, the CLA formed a settled and *bona fide* intention to seek leave to intervene in this appeal. It did not file its materials in time due to an error that I made in

diarizing the timeline for this appeal. This inadvertence does not prejudice the parties and the delay in filing is not inordinate. Further, the counsel that the CLA retained to bring this joint motion (Anil Kapoor of Kapoor Barristers and Alexandra Heine of Stockwoods LLP), have sought and obtained the positions of counsel for the appellants and respondents in this matter, which are appended to this affidavit as exhibits (see below). Counsel have confirmed that they are not taking a position on the CLA's motion to extend time.

4. To avoid a two-step process, the CLA has prepared and filed in this record its second motion for leave to intervene for this Honourable Court's determination, if the motion to extend time for serving and filing is granted.

5. The CLA's position on the leave to intervene motion is that it will make a useful and distinct contribution to this Honourable Court's deliberations on the important legal issue this appeal raises, which are of substantial importance to the CLA and the criminal defence bar at large. Specifically, this appeal raises the issue of how our law should protect the interests of those who are entitled to participate in litigation but are nevertheless excluded because of competing interests (in this case, informer privilege).

6. If leave to intervene is granted, the CLA will argue that where a litigant has a constitutionally protected right to participate in a hearing but is excluded from that hearing due to privilege or other concerns, a substantial substitute for participation is required for the exclusion of the litigant to be constitutional. In such cases, the appointment of counsel will be the appropriate substitute to protect and advance the interests of the excluded party.

7. The CLA will take no position on the outcome of the appeal.

II. THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

A. History and purpose

8. The CLA is a non-profit organization founded on November 1, 1971. Its objects are to educate, promote and represent its membership on issues relating to criminal and constitutional law. The CLA has over 1,900 members in Ontario and associate members across Canada and in the United States. The CLA serves as the voice of criminal defence lawyers in Ontario.

9. The CLA is routinely consulted by both Houses of Parliament and their Committees to offer submissions on proposed legislation pertaining to issues in criminal and constitutional law. Similarly, the CLA is often consulted by the Government of Ontario, and in particular the Attorney General of Ontario, on matters concerning provincial legislation, court management, Legal Aid and various other concerns that involve the administration of criminal justice in the Province of Ontario.

10. The CLA presents educational workshops and seminars throughout the year, culminating in its annual Fall Convention and Education Program, which often includes guest speakers or participants from the United States, and, on occasion, the United Kingdom. The Association also produces a Newsletter which is published five times per year and circulated across Canada. It includes editorials, the President's report, feature articles, regular columns, book reviews, and case commentaries, all of which are directed to highlighting current developments in criminal and constitutional law.

B. Experience as an intervener

11. The CLA has been granted leave to intervene by this Court in numerous criminal and constitutional cases. These include, in the last five years alone:

R. v. Tayo Tompouba, SCC File No. 40332

R. v. Kahsai, 2023 SCC 20

R. v. Hills, 2023 SCC 2

R. v. S.S., 2023 SCC 1

R. v. Dare, 2022 SCC 47

R. v. Jaffer, 2022 SCC 45

R. v. Ramelson, 2022 SCC 44

R. v. Sharma, 2022 SCC 39

R. v. Ndhlovu, 2022 SCC 38

R. v. Nahanee, 2022 SCC 37

R. v. Kirkpatrick, 2022 SCC 33

R. v. Lafrance, 2022 SCC 32

R. v. J.J., 2022 SCC 28

R. v. Haniffa, 2022 SCC 26
R. v. Sullivan, 2022 SCC 19
R. v. Brown, 2022 SCC 18
R. v. J.F., 2022 SCC 17
R. v. Dussault, 2022 SCC 16
R. v. Ste-Marie, 2022 SCC 3
R. v. Khill, 2021 SCC 37
R. v. Chouhan, 2021 SCC 26
R. v. Ghotra, 2021 SCC 21
R. v. C.P., 2021 SCC 19
R. v. R.V., 2021 SCC 10
R. v. Esseghaier, 2021 SCC 9
R. v. Waterman, 2021 SCC 5
R. v. Langan, 2020 SCC 33
Ontario (Attorney General) v. G, 2020 SCC 38
R. v. Zora, 2020 SCC 14
R. v. Ahmad, 2020 SCC 11
R. v. K.G.K., 2020 SCC 7
R. v. Javanmardi, 2019 SCC 54
R. v. K.J.M., 2019 SCC 55.
R. v. R.V., 2019 SCC 41
Fleming v. Ontario, 2019 SCC 45
R. v. Poulin, 2019 SCC 47
R. v. Rafilovich, 2019 SCC 51
R. v. Goldfinch, 2019 SCC 38
R. v. Le, 2019 SCC 34
R. v. Barton, 2019 SCC 33
R. v. Omar, 2019 SCC 32
R. v. J.M., 2019 SCC 24
R. v. Mills, 2019 SCC 22
R. v. Kelsie, 2019 SCC 17

R. v. Morrison, 2019 SCC 15
R. v. George-Nurse, 2019 SCC 12
R. v. Jarvis, 2019 SCC 10
R. v. R.A. (SCC File No. 37757 (motion to quash))
R. v. Boudreault, 2018 SCC 58
R. v. Culotta, 2018 SCC 57
R. v. Reeves, 2018 SCC 56
R. v. Cyr-Langlois, 2018 SCC 54
R. v. Brassington, 2018 SCC 37
Trinity Western University v. Law Society of Upper Canada, 2018 SCC 33
Ewert v. Canada, 2018 SCC 30
Groia v. Law Society of Upper Canada, 2018 SCC 27
R. v. Wong, 2018 SCC 25
R. v. Boutilier, 2017 SCC 64
R. v. Jones, 2017 SCC 60
R. v. Marakah, 2017 SCC 59
R. v. Alex, 2017 SCC 37
R. v. Bradshaw, 2017 SCC 35
R. v. Cody, 2017 SCC 31
R. v. Antic, 2017 SCC 27
Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin, 2017 SCC 26
R. v. Oland, 2017 SCC 17
R. v. Bingley, 2017 SCC 12
R. v. Clifford, 2017 SCC 9
R. v. Clark, 2017 SCC 3

III. THE MOTION FOR AN EXTENSION OF TIME

12. On April 26, 2023, this Court ordered, *inter alia*: (1) that the appellants' respective factums, records, and books of authorities, had to be served on or before June 12, 2023; and (2) thus, that in accordance with Rule 56 of the *Rules of the Supreme Court*, any motion for leave to intervene had to be served and filed on or before July 10, 2023.

13. When diarizing the key dates and timelines for this appeal, I mistakenly recorded the deadline for intervener motions as August 10, 2023. I realized that I had committed this error on July 26, 2023, when I was preparing to retain counsel for the CLA to seek leave to intervene.

14. I immediately retained counsel and instructed them to advise counsel for the appellants and respondents of my error, to request their position to the late serving and filing of the CLA's motion materials for leave to intervene, and to complete and serve this motion as soon as possible.

15. Counsel for the CLA, Alexandra Heine, sent an email to counsel for the appellants and respondents on July 29, 2023, requesting their position on the CLA's motion to extend time to serve and file its motion seeking leave to intervene in this appeal. A copy of this email is attached as **Exhibit "A"**.

16. By emails dated July 31, 2023, counsel for the parties each responded that they would take no position on our motion. A copy of the email from counsel for the Appellant, the Attorney General of Quebec, is attached as **Exhibit "B"**. A copy of the email from counsel for Canadian Broadcasting Corporation, La Presse Inc., Cooperative Nationale de L'information Independante (CN2i), Canadian Press Enterprises Inc., MediaQMI Inc., and Groupe TVA Inc. is attached as **Exhibit "C"**.

17. I am informed by Ms. Heine that she was unable to obtain the position of two of the Respondents, His Majesty the King and Named Person, because the names and contact information of their counsel are redacted in the public file.

18. The delay in serving and filing the motion materials is my error. The CLA always intended to seek leave to intervene in this motion, and formed this settled and *bona fide* intention prior to the expiry of the time for seeking leave to intervene.

19. Further, the delay is not excessive. The CLA is 23 days late serving and filing its motion materials for leave to intervene. This short delay does not prejudice the parties.

20. Finally, for the reasons set out below, the CLA's motion seeking leave to intervene in this appeal has merit.

IV. THE MOTION FOR LEAVE TO INTERVENE

A. Leave Should be Granted

21. The CLA has been consistently granted leave to participate in appeals impacting the participatory rights of an accused and other parties in the criminal justice system, which flow primarily from the right to a fair trial, the right to make full answer and defence, privacy rights, and the right to freedom of expression. More specifically, the CLA has routinely been involved in cases before this Court that considered the role and fairness of *amicus* or special counsel, including but not limited to *R. v. Kahsai*, 2023 SCC 20, *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, and *R. v. Brassington*, 2018 SCC 37.

22. The CLA and its members have a direct interest in this appeal. The CLA's mandate is to represent the interests of the criminal defence bar and the clients that they serve. This appeal raises questions about the participatory rights of litigants in the context of criminal proceedings, where such litigants are excluded. The resolution of these questions will impact how cases involving the exclusion of an accused person or another party in criminal proceedings, due to competing interests (such as informer privilege), proceed moving forward. As an organization representing the criminal defence bar in Ontario, the CLA's members and the clients that they represent will be directly affected by this Court's decision.

23. The CLA also has a unique perspective on the underlying legal issues that flows from its role as the voice of the criminal defence bar in Ontario. If granted intervener status, the CLA will attempt in its submissions to reflect the practical experience of its membership in helping the Court understand the import of this issue. The CLA's submissions will be different from those of the

other parties. The CLA's proposed submissions are set out in detail in the CLA's Memorandum of Argument.

24. The CLA's proposed intervention will address issues within the scope of the appeal and will not cause delay or prejudice to the parties.

25. The CLA will not take a position on the outcome of the appeal, or file any additional evidence or extraneous material, beyond a factum.

B. The CLA's Proposed Submissions

26. I have read the Memorandum of Argument in support of this motion and can confirm that it is an accurate reflection of the proposed submissions that the CLA intends to make, should this Court grant the CLA leave to intervene in this appeal.

V. CONCLUSION

27. If the CLA's joint motion for an extension of time to serve and file its motion materials and for leave to intervene is granted, the CLA seeks permission to file a factum of ten (10) pages and to make oral submissions in accordance with this Honourable Court's direction. The CLA will make submissions to assist this Court in resolving the legal issues raised in the case, will not seek to expand the record, and will take no position on the facts or the application of the law to the facts, except to the extent reference to the facts is necessary to contextualize the legal issues advanced.

SWORN by Megan Savard of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on August 1, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits
(or as may be)

MEGAN SAVARD

This is **Exhibit "A"** to the Affidavit of Megan Savard
Sworn Before Me in the City of Toronto, Province of Ontario
this 1st day of August, 2023, in accordance with O. Reg. 431/20, Administering Oath
or Declaration Remotely.



A Commissioner for oaths, etc.

From: [Alexandra Heine](mailto:Alexandra.Heine@stockwoods.com)
To: ikalar@fasken.com; cleblanc@fasken.com; phenault@fasken.com; pierre-luc.beauchesne@justice.gouv.qc.ca; simon-pierre.lavoie@justice.gouv.qc.ca; mroy@rcavocats.ca; agagnonrocque@rcavocats.ca
Cc: akk@kapoorbarristers.com
Subject: Consent on Motion to Extend Time: SCC File No. 40371, CBC et al v His Majesty the King et al
Date: Saturday, July 29, 2023 2:18:36 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image164628.png](#)
[image198152.png](#)
[image097971.png](#)
Importance: High

Chère avocate, cher avocat,

Me Anil Kapoor et moi-même avons très récemment été engagés par la Criminal Lawyers' Association (« **CLA** ») pour présenter une requête en prolongation de délai pour déposer la requête de la CLA demandant l'autorisation d'intervenir dans l'affaire *Société Radio-Canada, et al. c Sa Majesté le Roi, et al.* (n° 40371).

Le retard de la CLA à demander l'autorisation d'intervenir est le résultat d'une erreur d'écriture, commise par le « Litigation Committee » de la CLA lors de l'enregistrement des dates pour cet appel. Le « Litigation Committee » a enregistré par erreur, et donc cru, que la CLA avait jusqu'au 10 août 2023, pour déposer sa demande.

Au nom de la CLA, nous allons demander une prolongation, et nous vous demandons, par l'entremise de ce courriel, votre position sur cette requête.

Nous prévoyons déposer notre requête le 2 août 2023. Et donc, nous vous serions reconnaissants de bien vouloir nous indiquer dès que possible si vous consentez à cette demande que nous estimons raisonnable.

Nous attendons votre réponse.

Merci,

Alexandra Heine

(She/Her)

Associate

STOCKWOODS
barristers

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Toronto, Ontario, Canada M5K 1H1

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www.stockwoods.ca AlexandraH@stockwoods.ca

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Dear counsel,

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The CLA's delay in seeking leave to intervene was the result of a clerical error that the CLA's Litigation Committee made in recording the timelines for this appeal. The Litigation Committee mistakenly recorded, and thus believed, that the CLA had until August 10, 2023, to serve and file its motion for leave to intervene.

On behalf of the CLA, we will be moving to extend the time to serve and file the CLA's materials, and we wanted to seek your position on such a request.

We are planning on filing our materials on August 2, 2023. As such, we would appreciate hearing from you as soon as possible as to whether you consent to this reasonable request.

We look forward to hearing from you.

Thanks,

Alexandra Heine

(She/Her)

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This is **Exhibit "B"** to the Affidavit of Megan Savard
Sworn Before Me in the City of Toronto, Province of Ontario
this 1st day of August, 2023, in accordance with O. Reg. 431/20, Administering Oath
or Declaration Remotely.



A Commissioner for oaths, etc.

From: [Simon-Pierre Lavoie](#)
To: [Alexandra Heine](#)
Cc: akk@kapoorbarristers.com; [Pierre-Luc Beauchesne](#)
Subject: RE: [EXTERNE] Consent on Motion to Extend Time: SCC File No. 40371, CBC et al v His Majesty the King et al
Date: Monday, July 31, 2023 8:46:22 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)

Chère consœur,

L'appelant Procureur général du Québec ne s'opposera pas à votre requête, mais s'en remettra à la discrétion de la Cour.

Veuillez agréer, chère consœur, l'expression de nos salutations distinguées.

Simon-Pierre Lavoie

M^e Simon-Pierre Lavoie

Conseiller juridique

Bureau des affaires criminelles et pénales

Direction générale du Contentieux du Procureur général du Québec

Sous-ministériat des affaires juridiques

Ministère de la Justice

1200, route de l'Église, 4e étage

Québec (QC) G1V 4X1

De : Alexandra Heine <AlexandraH@stockwoods.ca>

Envoyé : 29 juillet 2023 14:19

À : ikalar@fasken.com; cleblanc@fasken.com; phenault@fasken.com; Pierre-Luc Beauchesne <pierre-luc.beauchesne@justice.gouv.qc.ca>; Simon-Pierre Lavoie <simon-pierre.lavoie@justice.gouv.qc.ca>; mroy@rcavocats.ca; agagnonrocque@rcavocats.ca

Cc : akk@kapoorbarristers.com

Objet : [EXTERNE] Consent on Motion to Extend Time: SCC File No. 40371, CBC et al v His Majesty the King et al

Importance : Haute

***ATTENTION : Ce courriel provient de l'extérieur de votre organisation.**

Évitez de cliquer sur un hyperlien, d'ouvrir une pièce jointe ou de transmettre des informations personnelles si vous ne connaissez pas l'expéditeur du courriel. En cas de doute, communiquez verbalement avec lui.

Chère avocate, cher avocat,

Me Anil Kapoor et moi-même avons très récemment été engagés par la Criminal Lawyers' Association (« **CLA** ») pour présenter une requête en prolongation de délai pour déposer la requête de la CLA demandant l'autorisation d'intervenir dans l'affaire *Société Radio-Canada, et al. c Sa Majesté le Roi, et al.* (n° 40371).

Le retard de la CLA à demander l'autorisation d'intervenir est le résultat d'une erreur d'écriture, commise par le « Litigation Committee » de la CLA lors de l'enregistrement des dates pour cet appel. Le « Litigation Committee » a enregistré par erreur, et donc cru, que la CLA avait jusqu'au 10 août 2023, pour déposer sa demande.

Au nom de la CLA, nous allons demander une prolongation, et nous vous demandons, par l'entremise de ce courriel, votre position sur cette requête.

Nous prévoyons déposer notre requête le 2 août 2023. Et donc, nous vous serions reconnaissants de bien vouloir nous indiquer dès que possible si vous consentez à cette demande que nous estimons raisonnable.

Nous attendons votre réponse.

Merci,

Alexandra Heine

(She/Her)

Associate

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We look forward to hearing from you.

Thanks,

Alexandra Heine

(She/Her)

Associate



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This is **Exhibit "C"** to the Affidavit of Megan Savard
Sworn Before Me in the City of Toronto, Province of Ontario
this 1st day of August, 2023, in accordance with O. Reg. 431/20, Administering Oath
or Declaration Remotely.

A handwritten signature in black ink, appearing to be 'AA e.', positioned above a horizontal line.

A Commissioner for oaths, etc.

From: [Patricia Hénault](#)
To: [Alexandra Heine](#)
Cc: [akk@kapoorbarristers.com](#); [Isabelle Kalar](#); [Christian Leblanc](#); [mroy@rcavocats.ca](#); [agagnonrocque@rcavocats.ca](#)
Subject: RE: [EXT] RE: Consent on Motion to Extend Time: SCC File No. 40371, CBC et al v His Majesty the King et al
Date: Monday, July 31, 2023 3:41:04 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)

Chère Me Heine,

Pour leur part, nos clientes ne s'objecteront pas à votre demande de prolongation du délai.

Bonne fin de journée,

Patricia Hénault, BCL, LLB
Avocate / Lawyer

T +1 514 397 7488 | phenault@fasken.com

Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.

From: Patricia Hénault <phenault@fasken.com>
Sent: July-31-23 12:11 PM
To: Alexandra Heine <AlexandraH@stockwoods.ca>
Cc: [akk@kapoorbarristers.com](#); [Isabelle Kalar](#) <ikalar@fasken.com>; [Christian Leblanc](#) <cleblanc@fasken.com>; [mroy@rcavocats.ca](#); [agagnonrocque@rcavocats.ca](#)
Subject: RE: [EXT] RE: Consent on Motion to Extend Time: SCC File No. 40371, CBC et al v His Majesty the King et al

Dear Me Heine,

We are awaiting our clients' instructions. We will get back to you as soon as possible.

Have a good afternoon,
Patricia

Patricia Hénault, BCL, LLB
Avocate / Lawyer

T +1 514 397 7488 | phenault@fasken.com

Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.

From: Alexandra Heine <AlexandraH@stockwoods.ca>
Sent: July-31-23 12:09 PM

To: Isabelle Kalar <ikalar@fasken.com>; Christian Leblanc <cleblanc@fasken.com>; Patricia Hénault <phenault@fasken.com>; mroy@rcavocats.ca; agagnonrocque@rcavocats.ca

Cc: akk@kapoorbarristers.com

Subject: [EXT] RE: Consent on Motion to Extend Time: SCC File No. 40371, CBC et al v His Majesty the King et al

Good afternoon counsel,

Just following up on the below. We look forward to hearing from you.

Best,

Alex

Alexandra Heine

(She/Her)

Associate



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Toronto, Ontario, Canada M5K 1H1

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From: Alexandra Heine <AlexandraH@stockwoods.ca>

Sent: Saturday, July 29, 2023 2:19 PM

To: ikalar@fasken.com; cleblanc@fasken.com; phenault@fasken.com; pierre-luc.beauchesne@justice.gouv.qc.ca; simon-pierre.lavoie@justice.gouv.qc.ca; mroy@rcavocats.ca; agagnonrocque@rcavocats.ca

Cc: akk@kapoorbarristers.com

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Importance: High

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PART I – OVERVIEW AND BACKGROUND FACTS

A. Overview

1. In every proceeding, there are rights of audience that afford participatory rights to the litigants and interested parties. Some participatory rights¹ are constitutionally protected. For example, an accused's right to participate in all aspects of their criminal trial,² a complainant's right to protect their privacy interests in criminal proceedings,³ and the media's right to participate in publication ban proceedings.⁴

2. One issue this appeal raises is how our law should protect the interests of those who are entitled to participate in litigation but are nevertheless excluded because of competing interests (in this case, informer privilege). If leave to intervene is granted, the Criminal Lawyers' Association (Ontario) ("CLA") will argue that where a litigant has a constitutionally protected right to participate in a hearing but is excluded from that hearing due to privilege or other concerns, a substantial substitute for participation is required for the exclusion of the litigant to be constitutional.⁵ In such cases, the appointment of special counsel will be the appropriate substitute to protect and advance the interests of the excluded party.

¹ This phrase is used to describe the constellation of interests and actions that a criminal accused has pursuant to ss. 7 and 11(d) of the *Charter of Rights and Freedoms*, including the right to know the case to meet, to be able to meet the case, to make submissions, and to call evidence (including the accused testifying in their own defence).

² The accused's right to participate is recognised in ss. 7 and 11(d) of the *Charter* having statutory expression in s. 650 of the *Criminal Code*, RSC, 1985, c C-46. 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.

³ *R v Mills*, [1999] 3 SCR 668, 139 CCC (3d) 321, as well as a variety of statutory expressions of a complainant's right to privacy ss 278.1 to 278.91 of the *Criminal Code*, RSC, 1985, c C-46.

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

⁵ *Canadian (Citizenship and Immigration) v Harkat*, 2014 SCC 33, at paras 40-50, 53-55, 63-65.

(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 disruptive conduct and the like).

3. Though this appeal is about the exclusion of the media in the context of criminal proceedings, the underlying questions and interests raised are similar to the ones raised in cases where the excluded party is the accused. Indeed, the resolution of this appeal will undoubtedly be relied upon by trial judges who embark on a process in which the accused is excluded. That is why the CLA has an interest in this appeal and is well placed to make unique submissions.

B. Description and Expertise of the Proposed Intervener

4. The history of the CLA is set out in the affidavit of Megan Savard at paragraphs 8 to 11.

PART II – QUESTION IN ISSUE

5. The sole question is whether the CLA should be granted leave to intervene in this appeal.

PART III – ARGUMENT

6. The test for seeking leave to intervene before this Court is two-fold: applicants must show that they have a real and substantial interest in the subject of the appeal, and that they can provide submissions that are useful and different from those of the other parties.⁶

7. Public interest organizations such as the CLA will regularly meet this test. As Cory J. noted in *Canadian Council of Churches*, “Public interest organizations are, as they should be, frequently granted intervener status. The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts.”⁷

8. Here, the CLA satisfies the test for leave to intervene.

A. The CLA has a Real Interest in the Subject of this Appeal

9. The CLA has both a real interest and significant expertise in the issues engaged in this appeal. The protection of individual freedoms and constitutional rights, including the participatory rights of accused persons excluded from their criminal proceedings, is central to the CLA’s

⁶ *Rules of the Supreme Court of Canada*, SOR/2002-156, Rule 57(2)(b); *Reference re Workers’ Compensation Act, 1983 (Nfld) (Application to intervene)*, [1989] 2 SCR 335, at 339.

⁷ *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236, at 256.

mandate. The CLA’s expertise as an intervener in cases involving the protection of an accused’s constitutional rights, puts it in a strong position to assist the Court in this appeal.

B. The Proposed Submissions of the CLA are Useful and Different

10. The second criterion is “easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter.”⁸

11. One of the issues raised by this appeal is how our law should protect the interests of those who are entitled to participate in litigation but are nevertheless excluded because of competing interests. The CLA has a history of involvement in cases that engage this issue, most often where the excluded party is an accused person. Indeed, the CLA has been consistently granted leave to participate in appeals impacting the participatory rights of an accused and other parties in the criminal justice system, which flow primarily from the right to a fair trial, the right to make full answer and defence, privacy rights, and the right to freedom of expression. More specifically, the CLA has routinely been involved in cases before this Court that considered the role and fairness of *amicus* or special counsel, including but not limited to *R. v. Kahsai*, 2023 SCC 20, *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, and *R. v. Brassington*, 2018 SCC 37.

12. The CLA has an acute interest in protecting participatory rights of accused persons who are increasingly prevented from fully participating in criminal proceedings, for example where there are *ex parte* proceedings to protect case-by-case or class privileges made over information that would otherwise be disclosed pursuant to *Stinchcombe*,⁹ or in step six proceedings pursuant to *Garofoli*.¹⁰

⁸ Reference re *Workers’ Compensation Act, 1983 (Nfld) (Application to intervene)*, [1989] 2 SCR 335, at 340.

⁹ *R v Basi*, 2009 SCC 52, at para 53; *Named Person v Vancouver Sun*, 2007 SCC 43, at para 41.

¹⁰ *R v Garofoli*, [1990] 2 SCR 1421.

13. The CLA is uniquely placed to make submissions on exclusion from the perspective of the rights of accused persons and of the counsel who represent them, and on the manner in which exclusion can be ameliorated by providing alternate avenues for effective participation.

14. If the CLA is granted leave to intervene, it will work with counsel for the other proposed interveners to ensure that submissions are not duplicated.

C. The CLA's Proposed Arguments

15. Should leave be granted, the CLA will argue that where a party has a constitutional right to participate in a proceeding and is prohibited from doing so, the court should appoint counsel to protect and advance the interests of the excluded party where the matter is of consequence. The CLA will propose the following three-step framework for courts to consider when determining whether an appointment should be made.

16. First, courts should identify if the litigant has a constitutional right to participate in the proceedings from which it is proposed that they be excluded (the “**Closed Proceeding**”).

17. Second, courts should determine whether the litigant's exclusion is justified. For example, exclusion can be justified when the litigant, by participating in the Closed Proceeding, will learn privileged information or private information to which the litigant is not entitled.

18. Third, if a litigant with a constitutional right to participate is properly or 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 substitute to a litigant's right to full disclosure and to full participation is required. The modality of efficacious participation may differ depending on which rights are engaged. But where a litigant is being excluded from a hearing of any complexity where they have constitutionally protected participatory rights, the appointment of counsel for the excluded person in the Closed Proceeding should be recognized as the appropriate substitution.

19. The CLA proposes that in the limited circumstances described above, the role of the appointed counsel would be informed by the role of *amicus* recently discussed in *Khasai*.¹¹ Drawing on this Honourable Court’s recognition that *amicus could* discharge other adversarial functions depending upon the context, the CLA will argue that where a person with participatory rights is excluded, the role of appointed counsel could extend beyond the traditional role of a “friend of the court” and empower them to vigorously protect the interests of the excluded litigant and take on the functions of that litigant’s counsel, especially where the matters under consideration are of significance to the litigation. For example, to fulfill their mandate, appointed counsel should, where appropriate, 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 issues.

20. Specific terms of appointment that maintain the integrity of the Closed Proceeding should be ordered. For example, the following terms of appointment should be considered (in no particular order):

- a) Appointed counsel is to assist the court by representing the interests of the excluded litigant in the Closed Proceeding;
- b) Appointed 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 appointed counsel; and
- d) Appointed counsel will keep confidential from the excluded litigant and his counsel, and any other person not participating in the Closed Proceeding, all confidential information and documents to which appointed counsel has had access.

21. In other contexts, this Court has recognized that the appointment of special counsel can save an other unconstitutional exclusion. More specifically, the use and role of appointed counsel as a means of ensuring a constitutionally sound level of participation was considered by this

¹¹ *R v Khasai*, [2023 SCC 20](#), at para 39.

Honourable Court in *Charkaoui*.¹² There, this Court found that previous versions of the provisions in the *Immigration Refugee Protection Act* setting out the process for confirming the reasonableness of security certificates violated s. 7 of the *Charter*. It recognized that, due to the severe consequences to the named person on a security certificate, procedural fairness *required* a “substantial substitute” for the full disclosure to, and full participation of, the named person.¹³ This Court explained that appointing special counsel to represent an excluded litigant’s interests was one such substantial substitute that could strike the right balance between protecting sensitive information and the participatory rights of the named person.¹⁴ In response, Parliament amended the security certificate procedure in *IRPA* to mandate the participation of Special Advocates. The use of Special Advocates in security certificate proceedings was upheld in *Harkat*.¹⁵ Their role 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’.”¹⁶

22. The security certificate regime is but one example where appointed counsel has been used to achieve substantial compliance with s. 7 participatory 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 is excluded.¹⁷ However, this remains a matter of discretion to ensure a fair trial.

23. If leave is granted, the CLA will argue that where the excluded litigant has a constitutional right to participate in a proceeding of significance to the litigant’s interests and is excluded due to competing interests or for other lawful reasons, trial fairness is threatened and a substantial substitute for the full participation of a litigant in a hearing is therefore required. In most cases, that substitute will be appointed counsel whose mandate will be to advance the interests of the excluded party.

¹² *Charkaoui v Canada (Citizenship and Immigration)*, [2007 SCC 9](#), at paras 79-86.

¹³ *Charkaoui v Canada (Citizenship and Immigration)*, [2007 SCC 9](#), at para 63; see also *Canada (Citizenship and Immigration) v Harkat*, [2014 SCC 37](#), at paras 43-47.

¹⁴ *Charkaoui v Canada (Citizenship and Immigration)*, [2007 SCC 9](#), at para 61.

¹⁵ *Canada (Citizenship and Immigration) v Harkat*, [2014 SCC 37](#).

¹⁶ *Canada (Citizenship and Immigration) v Harkat*, [2014 SCC 37](#), at para 35.

¹⁷ *R v Haevischer*, [2023 SCC 11](#); *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](#).

24. All in all, the CLA's approach recognizes that the right to participate is a constitutional imperative.

PART IV: SUBMISSIONS ON COSTS

25. The CLA does not seek costs and asks that no costs be awarded against it.

PART V: ORDER SOUGHT

26. The CLA respectfully requests that the motion be granted and an order be made allowing the CLA leave to intervene and file a factum and make oral submissions in accordance with this Honourable Court's direction.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 1st DAY OF AUGUST, 2023.



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PART VI: AUTHORITIES

CASE	PARAGRAPH(S)
<i>Canada (Attorney General) v Huang</i> , 2018 FCA 109 .	21
<i>Canadian (Citizenship and Immigration) v Harkat</i> , 2014 SCC 33	2, 20
<i>Canadian Council of Churches v Canada (Minister of Employment and Immigration)</i> , [1992] 1 SCR 236	7
<i>Charkaoui v Canada (Citizenship and Immigration)</i> , 2007 SCC 9	20
<i>Dagenais v Canadian Broadcasting Corp</i> , [1994] 3 SCR 835	1
<i>Named Person v Vancouver Sun</i> , 2007 SCC 43	11
<i>Reference re Workers' Compensation Act, 1983 (Nfld)</i> , [1989] 2 SCR 335	6, 10
<i>R v Bacon</i> , 2020 BCCA 140	21
<i>R v Basi</i> , 2009 SCC 52	11
<i>R v Garofoli</i> , [1990] 2 SCR 1421	11
<i>R v Haevischer</i> , 2023 SCC 11	21
<i>R v Hertrich</i> (1982), 67 CCC (2d) 510 (ONCA)	1
<i>R v Huang</i> , 2018 ONSC 831	21
<i>R v Johnston</i> , 2021 BCCA 34	21
<i>R v Khasai</i> , 2023 SCC 20	18
<i>R v Laws</i> (1998), 41 OR (3d) 499 (ONCA)	1
<i>R v Mills</i> , [1999] 3 SCR 668 , 139 CCC (3d) 321	1
<i>R c Mirarchi</i> , 2016 QCCA 81	21