

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

S CI 2016 3143

BETWEEN:

AB (a pseudonym)

First Plaintiff

EF (a pseudonym)

Second Plaintiff

and

CD (a pseudonym)

Defendant

SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN
RIGHTS COMMISSION

INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (**the Commission**) intervenes in this proceeding under s 40(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**).¹ The Charter Notice served by AB on the Commission stated two questions relating to the application of the Charter:
 - 1.1. whether, and if so how, ss 9, 13, 21, 24, 25 and 38 of the Charter are relevant to the central issue in this proceeding: whether the public interest in protecting the identity of a police informer precludes disclosure by [CD] of information that might assist a convicted person to have a conviction quashed; and
 - 1.2. whether, and if so how, ss 9, 13, 21 and 24 of the Charter are relevant to the question of whether the Court can and should determine the issues raised by [AB] and grant the relief sought in the absence of any extant criminal proceedings and where the convicted persons directly affected by the issues have not been named as parties to the proceedings, are not represented in the proceedings, and have not been notified of the proceedings.
2. The Commission was provided with the Charter Notice on 18 November 2016 and received the Protected Information, as defined in the Revised Confidentiality Undertaking at Annexure A of the orders of Ginnane J dated 31 January 2017, on 15 February 2017. In the circumstances, the Commission has not taken an active part in the hearing of this proceeding and does not enter into the merits of the central issue raised by it, which is described in Question 1 as whether the public interest in protecting the identity of a police informer precludes disclosure by CD of information that might assist the Named Individuals to have their convictions quashed. The Commission's involvement is necessarily focused on Question 2 and the question of whether procedures adopted by the Court in determining the central issue are compatible with the rights of the Named

¹ The Commission does not intervene in *EF v CD* (proceeding no S CI 2016 04688).

Individuals to a fair hearing. The Commission considers that that question is a threshold question and may lead to the conclusion that the Court should refuse the relief sought because it cannot determine the central issue in a manner consistent with the Named Individuals' right to a fair hearing.

3. In summary, the Commission submits that:
 - 3.1. The Court is obliged by s 6(2)(b) of the Charter to ensure that this proceeding is conducted in a manner that ensures that the rights of the Named Individuals to a fair hearing under ss 24(1), 25(2) and to equality before the law under 8(3) of the Charter are protected. That is so whether this proceeding is characterised as an aspect of the determination of the criminal charges against the Named Individuals or as civil proceedings between the parties actually present.
 - 3.2. The relevant aspect of the right to a fair hearing is the right to fair disclosure. The Court should apply the test stated in s 7(2) of the Charter to determine whether the limitations on that right caused by the conduct of this proceeding in the absence of the Named Individuals and without notice to them are proportionate to the purposes sought to be achieved by those limitations, including the protection of informers and the Charter rights of EF and her children.
 - 3.3. That requires the Court to give careful consideration to whether, having regard to the evidence put before it and the involvement of the amici curiae, it is able to determine the central issue in this proceeding in a manner that ensures that the Named Individuals receive a fair hearing. If the Court is not satisfied that it can do so, it may have no alternative but to refuse the relief sought.
 - 3.4. If, however, the Court is satisfied that it can determine the central issue fairly to the Named Individuals in their absence, their rights to a fair hearing and to the equal protection of the law and the rights of EF and her children to life, physical security and the protection of their family under ss 9, 13, 17 and 21 of the Charter, should be taken into account as aspects of the countervailing public interests in the balancing exercise to be undertaken by the Court in the resolution of that central issue.
4. The Commission does not seek to supplement these submissions with oral submissions, but can do so if it would assist the Court.

QUESTION 2: APPLICATION OF THE CHARTER TO THE PROCEDURE ADOPTED IN THIS PROCEEDING

Application of certain Charter rights by operation of s 6(2)(b) of the Charter

5. The second question should be considered first because it raises the threshold issue of whether, in light of the manner in which these proceedings have been constituted and conducted, the Court can and should determine the central issue raised in this proceeding.
6. Charter rights may apply to a proceeding in a court or tribunal by means of:
 - 6.1. the construction of a statutory provision in accordance with s 32 of the Charter;

- 6.2. the consideration of whether a public authority has complied with its obligation to give proper consideration to, and act compatibly with, Charter rights under s 38 of the Charter; or
 - 6.3. the direct application of certain Charter rights to courts and tribunals by operation of s 6(2)(b) of the Charter.
7. In this proceeding, the parties have not raised any question of statutory construction to which s 32 might apply. There is no direct question of compliance by a public authority with its s 38 obligations: CD is undoubtedly a public authority,² but the Court is not engaged in the review of the decision taken by CD to disclose the information in question; and the Court is not a public authority because it is acting in a judicial capacity, not an administrative capacity.³
 8. Certain Charter rights are, nevertheless, directly applicable to the proceedings by operation of s 6(2)(b). Section 6(2)(b) provides that the “*Charter applies to ... (b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3*”. It is well accepted that courts and tribunals have “functions under Part 2” of the Charter to the extent that some of the rights in Part 2 relate to court and tribunal proceedings and that the effect of s 6(2)(b) is that courts and tribunals acting in a judicial capacity are obliged to apply and enforce those rights.⁴ It is also well established that those rights include the rights in ss 8(3), 24(1) and 25 of the Charter.⁵

Scope of ss 24(1) and 25(2)(b) – why they apply to this proceeding

9. Section 6(2)(b) is therefore the route by which the rights in ss 8(3), 24(1) and 25(2)(b) of the Charter may apply to this proceeding. In determining whether, and how, those rights are in fact engaged, it is necessary to begin with consideration of the scope of those rights, bearing in mind that the scope of the human rights in Pt 2 of the Charter must be construed “in the broadest possible manner”,⁶ taking account of their beneficial purposes and “in a non-technical sense”.⁷
10. Section 24(1) of the Charter covers both civil and criminal proceedings. In form, this proceeding is a civil proceeding to which the parties are AB, EF and CD. However, that is too narrow a conception of the nature of this proceeding for the purposes of s 24(1). In substance, this proceeding is an aspect of the process commenced by the bringing of criminal charges against the Named Individuals. Following the conviction and sentence of the Named Individuals, certain information has come to light and the jurisdiction of this Court has been invoked to determine whether that information ought now be disclosed to the Named Individuals. The Court will make that determination by the application of a test which requires an assessment of whether the information that may ultimately be disclosed may assist them in answering the case against them. In doing so, the Court is

² *Momcilovic v The Queen* (2011) 245 CLR 1 at 78-79 [128] (Gummow J).

³ Charter, s 4(1)(j).

⁴ *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 at [29]-[32] (Bell J) and the cases cited at [32] fn 12.

⁵ *Matsoukatidou* [2017] VSC 61 at [34] and the cases there cited.

⁶ *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) VR 415 at 434 [80] (Warren CJ).

⁷ *DPP v Ali (No 2)* [2010] VSC 503 at [29] (Hargrave J).

exercising its inherent jurisdiction to avoid or remedy the abuse or frustration of the curial processes engaged for the determination of the criminal charges against the Named Individuals and ensure a fair hearing.

11. Accordingly, the Commission submits that the criminal limb of s 24(1) is applicable to this proceeding. Although the criminal charges against the Named Individuals have already been determined, their right to a fair hearing remains relevant to these proceedings. It was recently held in *Matsoukatidou v Yarra Ranges Council* that, applying a broad and non-technical approach, the right to a fair hearing in s 24(1) encompasses any appeal proceedings and associated processes.⁸ In that case, Bell J said:

“The underlying purpose of the right in s 24(1) of the Charter is the fair determination of criminal charges by a competent, independent and impartial criminal process, which is fundamental to respect for the dignity of the individual and the rule of law in democratic society. That process encompasses an appeal proceeding and includes such associated processes as applications for bail⁹ and, in the present case, orders setting aside orders striking out an appeal. In respect of such proceedings and processes, appellants and applicants ... are to be regarded as persons charged with a criminal offence and therefore enjoy the fundamental protections of s 24(1) of the Charter.”

12. In particular, the Court held that the words of application in s 24(1) (“*a person charged with a criminal offence*”) “do not suggest that the right to a fair hearing by a competent, independent and impartial court was intended to be confined in criminal cases to the actual determination of the charge at first instance.”¹⁰
13. For the reasons given above, this proceeding is properly regarded an aspect of a potential process by the Named Individuals to seek leave to appeal and to appeal against their convictions or what Bell J in *Matsoukatidou* described as an “*associated process*”.¹¹ As senior counsel for AB put it in opening, this proceeding is “the first turn of the key in the lock of the door that secures the material”.¹²
14. The same conclusion must follow in relation to the minimum guarantees in criminal proceedings in s 25(2) of the Charter, and specifically s 25(2)(b), which provides that “*a person charged with a criminal offence is entitled without discrimination ... to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her*”. As will be explained below, this minimum guarantee is an aspect of the principle of “equality of arms” and embraces the prosecutor’s duty of disclosure.
15. Alternatively, if these proceedings are to be regarded solely as civil proceedings, s 24(1) still applies (although s 25(2)(b) would not). The words of application in s 24(1) so far as it applies to civil proceedings (“*a party to a civil proceeding*”) should not be construed as limiting the scope of the right to persons who have instituted or been joined to proceedings

⁸ *Matsoukatidou* [2017] VSC 61 at [73]-[99].

⁹ See the analogous cases decided under s 25(3) of the Charter of *HL* [2016] VSC 750 at [72] (Elliott J) and *SE* [2017] VSC 13 at [15] (Bell J).

¹⁰ *Matsoukatidou* [2017] VSC 61 at [78].

¹¹ *Matsoukatidou* [2017] VSC 61 at [75].

¹² Transcript, 22 November 2016, P-100.20-22.

in a court or tribunal. Rather, s 24(1) should be construed broadly, in a manner that gives effect to the underlying purpose of the right, so as ensure access to justice to persons who are not parties to a proceeding but whose rights and interests may be directly affected by it. This is an essential aspect of the right to a fair hearing. As Hollingworth J said in *Knight v Wise*,¹³ “[t]here is a well-established common law right to unimpeded access to the courts, as part of a fundamental right to a fair trial” which may be breached “by action or inaction that would, in effect, prevent a person from accessing the courts.”¹⁴ Whenever a court or tribunal hears a proceeding in the absence of a person whose interests are directly affected by the proceeding, that person’s right to a fair hearing under s 24(1) of the Charter is engaged.

16. Section 24(1) would therefore apply, for example, to “associated processes” such as an application by a person to be joined as a party to a proceeding. There is also a clear analogy between such processes and pre-charge and pre-trial processes in the criminal sphere, to which the right to a fair hearing in both the ICCPR and the ECHR has been applied.¹⁵
17. In the circumstances, the Court is therefore obliged by s 6(2)(b) of the Charter to ensure that the procedures adopted in this proceeding are consistent with the rights of the Named Individuals to a fair hearing under s 24(1) and, in the Commission’s submission, s 25(2)(b) of the Charter, even though they are not formally parties to it. As will be explained below, that requires, at the least, careful consideration by the Court of whether its actions in proceeding in the absence of the Named Individuals and without notice to them, or its inaction in not giving give them notice of the proceeding, can be consistent with their right to a fair hearing.

Scope of s 8(3) – procedural equality

18. Further, the right to equality before the law in s 8(3) is relevant to courts and tribunals in so far as it has procedural implications that impact on the way people are treated before courts and tribunals. Accordingly, it has been held that s 6(2)(b) renders the procedural aspects of s 8(3) directly applicable to courts and tribunals when acting in a judicial capacity.¹⁶ These obligations are additional to the right to a fair trial, but what may be required to ensure a fair trial under s 24(1) (or at common law) might equally be sufficient to ensure equality before the law for the purposes of s 8(3).¹⁷

¹³ [2011] VSC 313 at [32]; see also *Brazel v Westin* [2013] VSC 527 at [21] (Kaye J).

¹⁴ *Knight v Wise* [2011] VSC 313 at [33], citing *Raymond v Honey* [1983] 1 AC 1; *Rich v Groningen* (1997) A Crim R 272, 287-288; *R v Secretary of State for the Home Department; ex parte Leech (No 2)* [1994] QB 198 at 216.

¹⁵ See the cases discussed in *Matsoukatidou* [2017] VSC 61 at [86]-[88] and [92]-[95].

¹⁶ *Re Lifestyle Communities Ltd (No 3)* (2009) 31 VAR 286; [2009] VCAT 1869 at [142] (Bell J); *Matsoukatidou* [2017] VSC 61 at [36]-[46] and [102]-[116].

¹⁷ *Matsoukatidou* [2017] VSC 61 at [110].

The right to a fair hearing at common law

19. The right to a fair hearing is also, of course, a fundamental common law right.¹⁸ As Tate JA said in *Victoria Police Toll Enforcement v Taha*:¹⁹

“The right to a fair hearing under s 24(1) of the Charter reflects a fundamental principle of the common law.”²⁰ As Isaacs J said in *R v McFarlane; ex parte O’Flanagan*:²¹

[That] the elementary right of every accused person to a fair and impartial trial ... exists as a personal right seems to me so deeply rooted in our system of law and so elementary as to need no authority to support it. It is a right which inheres in every system of law that makes any pretension to civilisation. It is only a variant of the maxim that every man is entitled to his personal liberty except so far as that is abridged by a due administration of the law. Every conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle.

20. Further, what is required to ensure a fair hearing at common law will in almost all cases be the same as that required under the Charter. The two sources “*are mutually reinforcing and the obligations arising under each are almost always co-extensive.*”²² Accordingly, even if, contrary to the Commission’s submissions, this Court were to conclude that it is not bound by ss 24(1), 25(2)(b) and 8(3) of the Charter in this proceeding, the following submissions as to the requirements of the right to a fair hearing in this proceeding apply equally at both common law and under the Charter.

Sections 24(1), 25(2)(b) and 8(3) – disclosure as an aspect of the right to a fair hearing

21. Once it is accepted that the rights of the Named Individuals to a fair hearing and to equality before the law are engaged in this proceeding, the next question is what is required in order to ensure that the Court acts in accordance with those rights.
22. The right to a fair hearing is absolute in the sense that, as Bell J said in *Tomasevic v Travaglini*,²³ “[a] fair trial is the only trial a judge can judicially conduct.” However, what is required to ensure a fair hearing may vary from case to case.²⁴ In this proceeding, the relevant aspect of the right is the principle of “equality of arms”, which requires that “*each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent.*”²⁵ The right of an accused

¹⁸ See, eg, *Dietrich v The Queen* (1992) 177 CLR 292 at 299-300 (Mason CJ and McHugh J), 325-6, 353, 361 and 362; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29 (Mason CJ), 56 (Deane J), 72 (Toohey J) and 75 (Gaudron J).

¹⁹ [2013] VSCA 37 at [203]. See also *Tomasevic v Travaglini* (2007) 17 VR 100 at [139]-[142].

²⁰ *Dietrich v The Queen* (1992) 177 CLR 292 at 299; *Jago v District Court (NSW)* (1989) 168 CLR 23.

²¹ (1923) 32 CLR 518 at 541-542.

²² *Matsoukatidou* [2017] VSC 61 at [178] (Bell J).

²³ (2007) 17 VR 100.

²⁴ *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 at [205] (Tate JA); *Tomasevic v Travaglini* (2007) 17 VR 100 at 118 [88] (Bell J); *Knight v Wise* [2014] VSC 76 at [36] (T Forrest J); *R v A (No 2)* [2002] 1 AC 45 at [38] (Lord Steyn).

²⁵ *Foucher v France* (1998) 25 EHRR 234 at 247 [34], cited in *Ragg v Magistrates’ Court of Victoria* (2008) 18 VR 300 at 310 [46].

person to fair disclosure is an aspect of this principle and “is an inseparable part of [the] right to a fair trial”²⁶ both at common law and under s 24(1) of the Charter. It is also an aspect of right a person charged with a criminal offence to have “adequate ... facilities to prepare his or her defence” in s 25(2)(b).²⁷

23. As the House of Lords said in *R v H*:²⁸

“Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.”

24. However, as the word “ordinarily” implies, the rule is not absolute and something less than full disclosure may be consistent with the right to a fair hearing in some circumstances. In a number of cases, the European Court of Human Rights has considered the compatibility of non-disclosure of evidence in criminal proceedings with Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR), the equivalent to Article 24(1) of the Charter. The principles developed by the Court were summarised in *Rowe and Davis v United Kingdom*²⁹ as follows:

“It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party... In addition Article 6 § 1 requires, as indeed does English law..., that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused ...

However, ... the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused... In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1... Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities...”

²⁶ *R v Brown* [1995] 1 Cr App 191 at 198 (Steyn LJ), cited in *Ragg* (2008) 18 VR 300 at 319 [77]. See also *R v Brown* [1998] AC 367 at 374 (Lord Hope): “The rules of disclosure which have been developed at common law owe their origin to the elementary right of every defendant to a fair trial.”

²⁷ See *Ragg* (2008) 18 VR 300, in which, although the case did not arise under the Charter, Bell J discussed the ICCPR and ECHR equivalents of ss 24(1) and 25(2)(b).

²⁸ [2004] 2 AC 134 at 147 [14].

²⁹ (2000) 30 EHRR 1; [2000] ECHR 91 at [60] (citations omitted). See also *McKeown v United Kingdom* (2012) 54 EHRR 7; [2011] ECHR 22 at [43], where these principles were restated.

25. In addition, in considering whether the procedures adopted provided a sufficient counterbalance, the European Court of Human Rights has examined both the trial and appeal stages of the proceedings “to ascertain whether the proceedings in their entirety were fair.”³⁰
26. In *R v H*, the House of Lords set out framework for how to deal with an application by the prosecution for limited disclosure or non-disclosure of material to the defence on public interest immunity grounds prior to or in the course of a criminal trial. It is worth setting this out in full:³¹

“When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:

- (1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.
- (2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below) be ordered.
- (3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.
- (4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected... In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).

- (5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.
- (6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.
- (7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

It is important that the answer to (6) should not be treated as a final, once-and-for-all,

³⁰ *McKeown v United Kingdom* (2012) 54 EHRR 7; [2011] ECHR 22 at [44].

³¹ [2004] 2 AC 134 at 155-156 [36]-[37].

answer but as a provisional answer which the court must keep under review.

Throughout his or her consideration of any disclosure issue the trial judge must bear constantly in mind the overriding principles referred to in this opinion. In applying them, the judge should involve the defence to the maximum extent possible without disclosing that which the general interest requires to be protected but taking full account of the specific defence which is relied on. There will be very few cases indeed in which some measure of disclosure to the defence will not be possible, even if this is confined to the fact that an ex parte application is to be made. If even that information is withheld and if the material to be withheld is of significant help to the defendant, there must be a very serious question whether the prosecution should proceed, since special counsel, even if appointed, cannot then receive any instructions from the defence at all."

27. Several important points emerge from these decisions relevant to the consideration of whether limitations on the golden rule of full disclosure can be consistent with the right to a fair hearing:
 - 27.1. First, consideration of the issue of disclosure should ordinarily take place while the criminal charges against the accused are pending.
 - 27.2. Secondly, in order to determine whether disclosure should be made, the court must consider the material that is sought to be withheld in detail.
 - 27.3. Thirdly, any restrictions on the involvement of the defence should be the minimum necessary to protect the rights of others or the countervailing public interests.
 - 27.4. Fourthly, any restrictions on the involvement of the defence should be sufficiently counterbalanced by alternative procedures adopted by the court such as, where necessary, the appointment of a special advocate to represent the interests of the defence.
 - 27.5. Fifthly, there may be cases where some measure of disclosure to the defence will not be possible, but they will be exceptional.
 - 27.6. Sixthly, there may also be cases where, despite the alternative procedures put in place, non-disclosure would render the trial unfair. Such cases may also be exceptional, but where they occur, the court must order disclosure, even if this will be likely to lead to the prosecution being withdrawn to avoid disclosure.

Section 7(2) – proportionality of the limitation on the right to a fair a hearing

28. The criminal charges against the Named Individuals were determined without any consideration of whether they should be given notice of the existence of underlying material or whether that material should be disclosed. That in itself is sufficient to suggest that, to that point, the Named Individuals did not receive a fair hearing. However, as noted above, it is possible that procedures adopted on appeal may be sufficient to remedy any unfairness at trial. This proceeding is not an appeal from the Named Individuals' convictions, but it is a process associated with a potential appeal. The Court must be satisfied that the procedures adopted to determine whether the disclosure should be made are sufficient to render the proceedings in their entirety fair.

29. The resolution of that question is undoubtedly difficult. In part, that is because what is in issue in this proceeding is not whether the underlying material should be disclosed but whether notice should be given to the Named Individuals that such material exists. If they are given notice, the Named Individuals may bring a separate application for disclosure of the underlying material and the giving of the notice will likely be a matter of substantial weight in the determination of that application. The difficulty also arises because, on the other hand, as AB and EF contend, the giving of notice will likely result in some prejudice to the countervailing public interests that the immunity is intended to protect, including the risks to EF.
30. However, it should not be assumed, as the submissions for AB seem to assume,³² that because any form of notice to the Named Individuals may “let the cat out of the bag”, the Court has no alternative but to proceed to determine the substantive issue in dispute in the absence of the Named Individuals. The Court must first consider whether the procedures adopted are sufficient to enable it to determine the substantive issue in a manner that is consistent with its obligation under the Charter and at common law to ensure that the Named Individuals receive a fair hearing.
31. Whether the limitations that have been placed on the Named Individuals in this proceeding (that is, the absence of any notice to them) are compatible with the right to a fair hearing should be determined by application of the test in s 7(2) of the Charter. For the reasons discussed above, application of s 7(2) to the right to a fair hearing does not mean that the Charter permits the Court to conduct something less than a fair hearing; it means, in this context, that some limitation on the “golden rule” of full disclosure may nevertheless be consistent with the right to a fair hearing.
32. Section 7(2) requires that the reasonableness of any limitation must be demonstrably justified, taking into account all relevant factors. It has been held that it establishes a test of proportionality.³³ In *McCloy v New South Wales*,³⁴ French CJ, Kiefel, Bell and Keane JJ described the test of proportionality applicable to the determination of whether or not a limitation on the constitutional freedom of political communication is valid in terms which, the Commission submits, can be equally applied to be applied to s 7(2) of the Charter. Their Honours said:

“The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

suitable — as having a rational connection to the purpose of the provision;³⁵

necessary — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

adequate in its balance — a criterion requiring a value judgment, consistently with the

³² AB’s Confidential Closing Submissions dated 14 March 2017, at para 25.

³³ *Momcilovic v The Queen* (2011) 245 CLR 1 at [22] (French CJ), [541] (Crennan and Kiefel JJ); *Re An Application Under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 at [148]; and *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 at [99], [107] – [112].

³⁴ [2015] HCA 34 at [2(3)].

³⁵ *Unions NSW v New South Wales* (2013) 252 CLR 530 at 558-559 [55]-[56].

limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.”

33. The factors listed in s 7(2)(a)-(e) fall to be considered in the context of that test. They inform the application of the proportionality. Consideration of the proportionality of the limitation on the rights of the Named Individuals to a fair hearing should therefore begin by considering the nature of the right being limited (s 7(2)(a)) and the nature and extent of the limitation upon it (s 7(2)(c)) and then consider whether, having regard to its purpose (s 7(2)(b)) and the relationship between the purpose and the limitation (s 7(2)(d) and (e)), the limitation is suitable and necessary and strikes an adequate balance overall.
34. **Nature of the right: s 7(2)(a).** The right to a fair hearing is fundamental to our system of criminal justice,³⁶ to “respect for the dignity of the individual and the rule of law in democratic society”.³⁷ In *Pham v Drakopoulos*, Vickery AJA (with whom Whelan JA agreed) said, referring to both the right to a fair trial and the right to equality before the law:³⁸

“The right to equality before the courts ... and the right to a fair trial ... do not focus on single issues, but rather consist of a complex set of rules and practices.

The importance of these rights in the protection of human rights generally is underscored by the fact that the effective observance of all human rights ultimately depends upon the proper administration of justice.”
35. **Nature and extent of the limitation: s 7(2)(c).** The limitation on the right of the Named Individuals to a fair hearing is undoubtedly very significant. The question of whether the proposed disclosure should be made was not raised at all prior to their conviction and sentence and is now to be determined in separate proceedings, in their absence and without any notice to them. In these circumstances, there must be a real question as to whether the procedures adopted in this proceeding are sufficient to ensure that the determination of whether the proposed disclosures should be made can be done in a manner that is consistent with the rights of the Named Individuals to a fair hearing.
36. Having regard to the fundamental importance of the fair hearing rights to the administration of justice and the rule of law and the significance of the limitations imposed upon those rights by the procedures adopted in this proceeding, those limitations could be only be justified by a conclusion that they have been adopted for the purpose of protecting countervailing considerations of equal importance and that they are the minimum limitations reasonably necessary to achieve that purpose. That requires consideration of s 7(2)(b), (d) and (e).
37. **Importance of the purpose of the limitation: s 7(2)(b).** As the passage quoted above from *Rowe and Davis v United Kingdom* makes clear, rights may be limited not only for the protection of countervailing public interests but also for the protection of the rights of others, including their human rights under the Charter. Accordingly, in assessing the proportionality of the limitation on the rights of the Named Individuals in this proceeding,

³⁶ See, eg, *Dietrich v The Queen* (1992) 177 CLR 292 at 299-300 (Mason CJ and McHugh J); *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29 (Mason CJ), 56 (Deane J), 72 (Toohey J) and 75 (Gaudron J).

³⁷ See Bell J in *Matsoukaidou* at [75].

³⁸ [2013] VSCA 43 at [65]-[69].

the rights of EF and, where relevant, her children, to life (s 9), freedom from arbitrary interference with their family (s 13), the protection of families (s 17(1)) and the right of children to such protection as is in their best interests (s 17(2)), and the right to liberty and security (s 21) must be taken into account to the extent that they arise upon the evidence.

Right to life (s 9)

38. Section 9 provides: “Every person has the right to life and has the right not to be arbitrarily deprived of life”. This right is modelled on art 6(1) of the ICCPR. At international law, it is an absolute right. The UN Human Rights Committee has described it in General Comment 6 as “the supreme right”.³⁹ Under the Charter, rights may be limited in accordance with section 7(2), but the fundamental nature of this right must be considered in determining whether any limitation is justified.
39. At international law, States parties have a positive obligation to ensure the protection of individuals against violations of ICCPR rights, which may be committed not only by its agents, but also by private persons or entities.⁴⁰ Further, the European Court of Human Rights has found that, in certain circumstances, the right to life imposes a positive obligation on a State to protect life, or take steps to do so.⁴¹ This protective obligation extends to requiring authorities to put in place measures that would protect an individual whose life is being put at risk by another’s criminal activity⁴².
40. The extent to which the positive obligation applies in Victoria is an open question. Unlike s 9 of the Charter, both ICCPR art 6(1) and ECHR art 2(1) contain a formal statement that the right to life shall be protected by law. If the positive obligation does exist under the Charter, then it is likely based on the requirement in s 38 that public authorities must give proper consideration to a Charter right when making a decision. This may require public authorities, such as AB and CD, to relevantly have regard to the right to life in their actions and decision-making.
41. Accordingly, the Commission submits that EF’s right to life is engaged. However, the extent of the risk to EF’s life that would result from disclosure is a matter of evidence. Although the Commission makes no submissions on the evidence, it notes that in order to assess the risk that would be created by the proposed disclosure, the Court should take into account evidence as to the extent to which the information that is the subject of the proposed disclosure (that is, relating to EF’s status as a human source and her relationships with some of the Named Individuals) is already in the public domain and by the feasibility or otherwise of EF entering into witness protection.

Right to liberty and security (s 21)

42. The right to liberty and security in s 21 of the Charter is related to the right to life in so far as the concept of ‘security’ refers to a person’s physical security and mental health. The scope of a public authority’s obligation to refrain from any interference with a person’s

³⁹ At para 1.

⁴⁰ See *Peiris v Sri Lanka* (Communication No 1962/09).

⁴¹ *Osman v United Kingdom* (1998) VIII Eur Court HR 3124 [115].

⁴² See *Osman v United Kingdom* (1998) VIII Eur Court HR 3124 [115]; see also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (Constitutional Court) [46].

security (unless in accordance with section 7(2)), is analogous with a State's obligations at international law to take protective measures to safeguard the right to life. In this proceeding, the right to security is engaged in circumstances where AB and EF claim that the proposed disclosure of the material by CD would threaten EF's life. As is the case in relation to s 9, the extent of the risk to EF's security is a matter of evidence.

Right to be free from arbitrary interference with one's family (s 13) and the protection of families and children (s 17)

43. Section 13(a) of the Charter protects a person's privacy, family, home or correspondence from being "unlawfully or arbitrarily interfered with". The scope of the right to privacy in s 13(a) has been summarised as follows⁴³:

"The purpose of the right to privacy is to protect people from unjustified interference with their personal and social individuality and identity. It protects the individual's interest in the freedom of their personal and social sphere in the broad sense. This encompasses their right to individual identity (including sexual identity) and personal development, to establish and develop meaningful social relations and to physical and psychological integrity, including personal security and mental stability.

The fundamental values which the right to privacy expresses are the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person."

44. This aspect of s 13(a) is related to s 17(1) of the Charter, which states that families are entitled to protection by society and the State. Section 17(1) imposes a positive obligation on the State to "protect" families, recognising that they are the "*fundamental group unit of society*".
45. While s 13(a) and s 17(1) overlap and will often arise together on the facts of a particular case, the rights themselves are not co-extensive. Section 13(a) is a negative obligation that prohibits unlawful or arbitrary interferences with family, whereas s 17(1) imposes a positive obligation on society and the State.⁴⁴
46. Section 17(2) grants children the right to such protection as is in their best interests and needed by them by reason of being a child. It requires that courts give paramount consideration to the best interests of any children who will be affected by the subject of the proceedings before it. This reflects the relative importance of s 17(2) as a right that protects the most vulnerable members of society. There are a number of examples in Victorian law that give primacy to the best interests of the child over other competing interests and rights.⁴⁵
47. The rights of EF and EF's children in ss 13(a) and 17 of the Charter are undoubtedly engaged and will be limited, in the sense of being put at risk, in the event that the Court does not grant the relief sought by AB and EF. However, the risk may be justified in circumstances where EF and her children will not be separated as a result of the Court's

⁴³ *Kracke v Mental Health Review Board (General)* [2009] VCAT 646 [619]-[620] (Bell J).

⁴⁴ Charter of Human Rights Bench Book, Judicial College of Victoria, at [6.7.2].

⁴⁵ See for example section 10 of the *Children Youth and Families Act* 2005 and section 80 of the *Family Violence Prevention Act* 2008.

decision and where the purpose of the limitation is of such fundamental importance as upholding the rule of law and preventing a miscarriage of justice.

48. **Relationship between the limitation and its purpose: s 7(2)(d).** The s 7(2)(d) factor requires that any limitation on a Charter right must be rationally capable of achieving its intended purpose. The fact that the Named Individuals have not been given notice of this proceeding would seem at first blush to be rationally capable of achieving the purposes discussed above. However, whether non-disclosure is in fact capable of achieving those purposes must be affected by evidence of the extent to which the information the subject of the proposed disclosure is already in the public domain. If the Court were to conclude that non-disclosure is, in the circumstances, of little or no benefit, the necessary rational connection between the limitation and its purpose may be absent.
49. **Any less restrictive means: s 7(2)(e).** Section 7(2)(e) requires the Court to consider whether there are any less restrictive means available of achieving the purpose of the limitation. This is, very often, the nub of the proportionality test. As the High Court has observed in the context of restrictions on the constitutional freedom of political communication, the proposed alternative means must be obvious and compelling and must be equally as effective as the means actually chosen.⁴⁶ However, as Gageler J said in *Tajjour v New South Wales*,⁴⁷ “*their presence or absence will not necessarily be decisive. The weight they will be accorded will vary with the nature and intensity of the burden to be justified.*”
50. The Commission accepts that there does not appear to be any means of giving some form of notice of this proceeding to the Named Individuals that would be equally effective to protect the countervailing public interests and the rights of EF and her children while the Court is engaged in the determination of the substantive issue. As noted above, the framework established by the House of Lords in *R v H* contemplates that there may be exceptional cases where the question of disclosure must be determined in the absence of the accused and without notice to them. However, that directs attention to the question of whether the procedures adopted in this proceeding are sufficient to counterbalance the difficulties caused to the Named Individuals.
51. The following aspects of the procedures adopted in this proceeding must be taken into account:
 - 51.1. First, as noted above, the potential disclosure relates to the contents of the letters proposed to be sent by CD, not the underlying evidentiary material. The Court has recognised that the resolution of the substantive issue must turn on its consideration of so much of the underlying evidentiary material as has been admitted in this proceeding, but it must be borne in mind in determining the significance of the material to the Named Individuals’ defences that that may not be the whole of the potentially relevant material. That elevates the importance here of the first step in the *R v H* framework, the need for detailed consideration of the potentially disclosable material. In addition, the Court may conclude that, in order to fairly

⁴⁶ See, eg, *McCloy* [2015] HCA 34 at [61]-[62]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 550 [36] (French CJ), 571 [113]-[114] (Crennan, Kiefel and Bell JJ); *Monis v The Queen* (2013) 249 CLR 92 at 214 [347] (Crennan, Kiefel and Bell JJ); *Momcilovic* (2011) 245 CLR 1 at 214 [556] (Crennan and Kiefel JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 134 [438] (Kiefel J).

⁴⁷ (2014) 254 CLR 508 at 581 [152]; but cf 571-572 [113]-[116] (Crennan, Kiefel and Bell JJ).

determine the substantive issue, it must be provided with a larger sample of the potentially disclosable evidentiary material or even the whole of it.

- 51.2. Secondly, the substantive issue is here entrusted to a judge who was not the trial judge and who is not therefore familiar with the evidence against the Named Individuals in relation to the charges brought against them. The importance of the involvement of the trial judge in the determination of the question of disclosure has been acknowledged in the European cases. However, it has also been recognised that the involvement of trial judge in this process may in some cases be unfairly prejudicial to the defendant and instead a “disclosure judge” is used.⁴⁸ Accordingly, in the Commission’s submission, the fact that the question of disclosure has come before this Court is not necessarily inconsistent with the right of the Named Individuals to a fair hearing, provided the Court is satisfied that it has a sufficient appreciation of the potential significance of the potentially disclosable material to the putative appeals by the Named Individuals that is able to make a fair assessment of the substantive issue.
- 51.3. Thirdly, no special advocate has been appointed to represent the interests of the Named Individuals. On the other hand, the Court has appointed amici curiae to assist it, including by identifying arguments to oppose the relief sought,⁴⁹ but without the ability to take instructions from the Named Individuals. And although CD cannot in any sense be said to represent the interests of the Named Individuals, it is relevant that CD opposes the relief sought and contends for disclosure. The Court can assess the extent to which the role played by CD and the amici counterbalances the absence of the Named Individuals.
52. Having regard to the limited role the Commission has had in this proceeding, it does not submit that these considerations necessarily lead to a conclusion that the procedures adopted in this proceeding are or are not sufficient to ensure a fair hearing. The Commission’s submission is that the Court must give careful consideration to whether or not the procedures adopted, including the evidence put before it and the role of the amici, enable it to fairly determine the significance of the potentially disclosable material to the putative appeals by the Named Individuals in their absence.
53. The Court may ultimately conclude that there is no means of achieving the purpose of protecting the countervailing public interests and the rights of EF and her children that is less restrictive of the fair hearing rights of the Named Individuals than complete non-disclosure. However, it does not necessarily follow that the hearing of this proceeding in the absence of the Named Individuals is therefore compatible with their rights to a fair hearing. As noted above, *R v H* contemplates that there may be cases where non-disclosure will mean that no fair trial can be had.
54. However, *R v H* also contemplated that, in such a case, the court must order disclosure. The ultimate safeguard is that either the prosecution will withdraw the charges or the court will stay the trial. *R v H* was concerned with the situation where the hearing of a criminal charge is pending or on foot. That highlights the basic difference from the question confronting this Court. Here, the Named Individuals have already been convicted and sentenced. Those safeguards are not available to this Court. In the unusual circumstances

⁴⁸ *McKeown v United Kingdom* (2012) 54 EHRR 7; [2011] ECHR 22.

⁴⁹ Orders made by Ginnane J dated 2 November 2016.

of this case, if the Court were to come to the conclusion that it is unable to fairly determine the substantive issue in the absence of the Named Individuals, it should not go on to determine the substantive issue. To do otherwise would involve the Court in conducting a hearing that was unfair. In that circumstance, the Court would have no alternative but to refuse the declaratory relief sought by AB and EF.

QUESTION 1: APPLICATION OF THE CHARTER TO THE SUBSTANTIVE ISSUE

55. If the Court comes to the conclusion that it can determine the substantive issue in a manner that is procedurally fair to the Named Individuals, the role of the Charter in the determine of that issue is limited. The test to be applied to determine the substantive issue is a common law test. The Commission does not submit that the Charter should influence the formulation or the development of that test. The common law does not develop in response to legislative change in one or two jurisdictions within the Australian federation,⁵⁰ such as the Charter and the *Human Rights Act 2004* (ACT).
56. However, in so far as the substantive test calls for a balancing of the countervailing public interest in the administration of justice and the protection of informers (both EF and informers generally), the Commission submits that the relevant Charter rights may and should be taken into account as elements of those public interests. The Charter constitutes legislative recognition of the fact that all persons within Victoria have the rights set out in Part 2 of the Charter.⁵¹ The public interest in the administration of justice must therefore now include the extent to which non-disclosure may impact upon the statutory right to a fair hearing. Similarly, the public interest in the protection of informers should take into account the extent to which disclosure may impact the statutory right to life and the other relevant rights discussed above. The Commission does not contend that this means that the balancing exercise should be resolved one way or the other in this proceeding. Rather, it submits only that these rights should be explicitly recognised as relevant to the balancing exercise.

Dated: 15 March 2017

A. D. Pound

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Victorian Equal Opportunity and Human Rights Commission

⁵⁰ *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 83.

⁵¹ Charter, s 6(1).