

IN THE SUPREME COURT OF VICTORIA  
IN THE COURT OF APPEAL  
AT MELBOURNE

S APCI 2017 0082

BETWEEN:

AB	Applicant
and	
CD	First Respondent
and	
EF	Second Respondent
and	
VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION	Intervener

SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN  
RIGHTS COMMISSION (INTERVENING)

INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (the **Commission**) is a party in this proceeding as of right under s 40(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**).
2. The Commission's intervention is directed to the application of the Charter in the procedure being adopted by the Court in these proceedings, as well as responding to any Charter-related issues the Court may raise. The Commission does not seek to be heard on any issues unrelated to the Charter.

SUMMARY OF SUBMISSIONS

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3. The Court is obliged by operation of s 6(2)(b) of the Charter to ensure that the proceedings are conducted in a manner that protects the rights of the Named Individuals to a fair hearing under s 24(1), 25(2)(b) and 8(3) of the Charter. 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. This proceeding acutely raises the question of how the Court should balance competing rights protected by the Charter in deciding the procedures to adopt which will apply in the determination of the public interest immunity claim. In this proceeding, the Court should apply the test stated in s 7(2) of the Charter to determine whether the limitations on the fair hearing 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.

4. When carrying out the proportionality task, the absence of less restrictive means reasonably available to achieve the purpose of protecting EF and her children's security does not positively establish that the hearing of this proceeding in the absence of the Named Individuals is compatible with their right to a fair hearing. The Court's duty is no less than to ensure that this proceeding is conducted in a manner that protects the rights of Named Individuals to a fair hearing.
5. Arguably the Court has not yet determined if it is able to fairly determine the public interest immunity claim by providing a fair hearing to the Named Individuals in their absence. In these circumstances, this Court should make that determination.
6. The Commission does not seek to supplement these submissions with oral submissions, unless that would be of assistance to the Court.

## SECTION 6(2)(b) OF THE CHARTER

7. Section 6(2)(b) of the Charter 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".
8. It is settled that courts and tribunals have "functions" under s 24(1) and s 25,<sup>1</sup> as well as under s 8(3) of the Charter.<sup>2</sup> As a result, Courts and tribunals acting in a judicial capacity are obliged to apply and enforce those rights.<sup>3</sup>
9. By operation of 6(2)(b), the rights in ss 8(3), 24(1) and 25(2)(b) of the Charter apply to the Court in this proceeding. In determining whether and how these rights are in fact engaged, it is necessary to consider the scope of the rights. The proper approach to the construction of the Charter rights is well settled. They must be construed "in the broadest possible manner",<sup>4</sup> taking account of their beneficial purpose and "in a non-technical sense."<sup>5</sup>

## THE RIGHT TO A FAIR HEARING: s 24(1)

10. Section 24(1) of the Charter protects a person's right to a fair hearing. The Charter right to a fair hearing reflects the fundamental common law right.<sup>6</sup> The content of the right at

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<sup>1</sup> *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 (*Matsoukatidou*) [34] (Bell J); *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237 (Neave JA and Williams AJA), 247 [52], cited with approval in *Slaveski* [2012] VSCA 25; (2012) 34 VR 206, 221 [54] n 27 (Warren CJ, Nettle and Redlich JJA) and followed, with respect to s 24 of the Charter, in *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 at 81 [247] (Tate JA). The same view was taken in *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221 at 258 [164] - [166] (Bell J); *R v Williams* (2007) 16 VR 168 at [36]-[37], [54]-[55] (King J); *Kortel v Mirik* (2008) 28 VAR 405.

<sup>2</sup> *Matsoukatidou* at [40]. In *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 at 81 [247], Tate JA said it was arguably correct that s 8(3) of the Charter imposed "functions" on Courts and tribunals.

<sup>3</sup> *Matsoukatidou* [2017] VSC 61 at [29] - [32] (Bell J).

<sup>4</sup> *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) VR 415 at 434 [80] (Warren CJ).

<sup>5</sup> *DPP v Ali (No 2)* [2010] VSC 503 at [29] (Hargrave J).

<sup>6</sup> 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)

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.*”<sup>7</sup> The Charter right applies in both civil and criminal proceedings. In form, this proceeding (by which the Commission is referring to the proceedings below and this application for leave to appeal) is a civil proceeding to which the parties are AB, EF and CD. The primary judge correctly accepted that the right to a fair hearing was engaged in respect of the procedure adopted by the Court in this proceeding.<sup>8</sup>

11. 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 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 for 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*,<sup>9</sup> “[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.”<sup>10</sup> 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.
12. The criminal limb of s 24(1) is also applicable to this proceeding.<sup>11</sup> In substance, this proceeding is an aspect of the process commenced by the bringing of criminal charges against the Named Individuals. It has been commenced after the convictions and sentence of the Named Individuals because certain information has come to light that the primary Judge has found might provide substantial assistance to these persons in challenging their convictions. 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”.<sup>12</sup> This proceeding is properly regarded as an aspect of a potential process by the Named Individuals to seek leave to appeal and to appeal against their convictions. These proceedings are associated proceedings connected to the criminal proceedings that the Named Individuals were parties to. It is not of significance that the criminal charges against the Named Individuals have already been determined. Their right to a fair hearing remains relevant to these

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and 75 (Gaudron J). *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 at [203]. See also *Tomasevic v Travaglini* (2007) 17 VR 100 at [139]-[142].

<sup>7</sup> *Matsoukatidou* [2017] VSC 61 at [178] (Bell J).

<sup>8</sup> *AB & EF v CD* [2017] VSC 350R (“*PII Judgment*”), [80]-[81].

<sup>9</sup> [2011] VSC 313 at [32]; see also *Brazel v Westin* [2013] VSC 527 at [21] (Kaye J).

<sup>10</sup> *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.

<sup>11</sup> *Matsoukatidou* [2017] VSC 61 at [78]. His Honour held that the word of application (“[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.”

<sup>12</sup> Transcript, 22 November 2016, P-100.20-22.

proceedings. Applying a broad and non-technical approach, the right to a fair hearing in s 24(1) encompasses any appeal proceedings and associated processes.<sup>13</sup>

13. Plainly 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”. This minimum guarantee is an aspect of the common law requirement for a fair trial.

### PROCEDURAL EQUALITY: s 8(3)

14. 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. It is settled 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.<sup>14</sup> These obligations are additional to the right to a fair hearing, but what may be required to ensure a fair hearing 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).<sup>15</sup>
15. 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.

### The duty of disclosure

16. The right to a fair hearing is absolute in the sense that, as Bell J said in *Tomasevic v Travaglini*,<sup>16</sup> “[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.<sup>17</sup> The right of an accused person to fair disclosure is an aspect of this principle and “is an inseparable part of [the] right to a fair trial”<sup>18</sup> both at common law and under s 24(1) of the Charter. It is also an aspect of the right a person charged with a criminal offence to have “adequate ... facilities to prepare his or her defence” in s 25(2)(b).<sup>19</sup>
17. In *R v H*,<sup>20</sup> the House of Lords set out a helpful framework for how to deal with an application by the prosecution for limited disclosure or non-disclosure of material to the

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<sup>13</sup> *Matsoukatidou* [2017] VSC 61 at [73]-[99].

<sup>14</sup> *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].

<sup>15</sup> *Matsoukatidou* [2017] VSC 61 at [110].

<sup>16</sup> (2007) 17 VR 100.

<sup>17</sup> *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).

<sup>18</sup> *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.”

<sup>19</sup> 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).

<sup>20</sup> [2004] 2 AC 134 at 155-156 [36]-[37].

defence on public interest immunity grounds prior to, or during, a criminal trial compatibly with the right to a fair trial.<sup>21</sup> It is apparent from this framework that after considering the material in detail (question 1), assessing its relevance (question 2), identifying the relevant public interests (question 3) and addressing how the defendant's interests can be protected while protecting the public interest, by considering whether alternative procedures should be adopted by the Court, such as the appointment of a special advocate to represent the interest of the defence (question 4), the Court must assess *first*, whether the measures proposed represent the minimum derogation necessary to protect the public interest (question 5), and *secondly*, whether the effect of limited disclosure is to render the trial process "viewed as a whole" unfair to the defendant (question 6)? In respect of question 6, the House of Lords stated "[i]f 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 the disclosure."<sup>22</sup>

18. It is accepted that there may be rare, "highly exceptional" cases where disclosure of even the fact that an ex parte public interest immunity application has been made will injure the public interest.<sup>23</sup> The Commission however adopts the House of Lords observation in *R v H*:

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.<sup>24</sup>

19. In this proceeding, because the Named Individuals have not been notified of the proceeding, alternative procedures to protect their rights assume the greatest importance. As the European Court of Human Rights stated in *Rowe and Davis v United Kingdom*:<sup>25</sup>

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...

20. The Commission's submission is that the Court should be positively satisfied that the procedures adopted by the Court in the proceeding enable it to conduct a fair trial in the absence of notification to the Named Individuals.

## THE RIGHT TO LIFE: s 9

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<sup>21</sup> Ibid.

<sup>22</sup> *Ibid* at 155 [36].

<sup>23</sup> *R v H* [2004] 2 AC 134 at 156 [37]; *R v Davis* [1993] 1 WLR 613 at 616.

<sup>24</sup> *Ibid* at 156 [37].

<sup>25</sup> *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1 at [60].

21. Section 9 provides: “*Every person has the right to life and has the right not to be arbitrarily deprived of life*”. This right was modelled on article 6(1) of the International Covenant on Civil and Political Rights (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*”.<sup>26</sup> Under the Charter, all 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.
22. 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.<sup>27</sup> A positive obligation on a State to protect life, to take steps to do so, has also been recognised in the jurisprudence under the European Court of Human Rights.<sup>28</sup> 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 activity.<sup>29</sup>
23. The extent to which any positive obligation applies in Victoria is not settled. 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*”. Further, the footings of the positive obligation rest on the obligations imposed in those conventions on States to ensure the protection of individuals against violations of rights (ICCPR, article 2) and to secure the practical and effective protection of the rights and freedoms (ECHR article 1), respectively, contained in the instruments<sup>30</sup>, which have no counterpart in the Charter. It is unclear that any positive duty exists under the Charter independently of the obligation imposed on a public authority in s 38. In our submission, the primary judge correctly accepted that EF’s right to life was engaged in this proceeding. The engagement arose from the evidence of the extent to which CD’s proposed disclosure would endanger EF’s life.<sup>31</sup>

## **RIGHT TO LIBERTY AND SECURITY: s 21**

24. 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 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.

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<sup>26</sup> At paragraph 1.

<sup>27</sup> See *Peiris v Sri Lanka* (Communication No 1962/09).

<sup>28</sup> *Osman v United Kingdom* (1998) [2000] 29 EHRR 245 at [115]; *Re Officer L* [2007] 4 All ER 965, [19].

<sup>29</sup> See *Osman v United Kingdom* [2000] 29 EHRR 245 at [115]; see also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (Constitutional Court) at [46].

<sup>30</sup> See *Osman v United Kingdom* [2000] 29 EHRR 245 at [116]; *Peiris v Sri Lanka* (Communication No 1962/09) [7.2]; *Momcilovic v R* (2011) 245 CLR 1 at 37 [19] (French CJ); *Bare v IBAC* (2015) 48 VR 129 at 189, [186] (Warren CJ).

<sup>31</sup> PII Judgment, [209], [415].

## **FAMILY AND PROTECTION OF CHILDREN: ss 13 and 17**

25. Section 13(a) of the Charter protects a person's privacy, family, home or correspondence from being "unlawfully or arbitrarily interfered with". It has been said that the fundamental values which the right to privacy expresses are physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person.<sup>32</sup>
26. 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*".
27. 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.<sup>33</sup>
28. 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. The central element of this right is the best interests of the child.<sup>34</sup> The right includes protection of special measures that a child acquires under another law protecting children.<sup>35</sup>
29. 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. The primary judge found that the threats to EF may affect her children.<sup>36</sup> However, the risk may be justified in circumstances where EF and her children will not be separated as a result of the Court's 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.

## **PROPORTIONALITY OF THE LIMITATION ON THE RIGHT TO A FAIR HEARING**

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30. By reason of the Court's obligation imposed by s 6(2)(b) of the Charter, the Court is obliged 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. That requires, at the least, careful consideration by the Court of whether its actions in

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<sup>32</sup> *Kracke v Mental Health Review Board (General)* [2009] VCAT 646 [619]-[620] (Bell J).

<sup>33</sup> Charter of Human Rights Bench Book, Judicial College of Victoria, at [6.7.2], paragraph 10.

<sup>34</sup> *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796 at [145].

<sup>35</sup> For example, under the *Children, Youth and Families Act 2005* (Vic): see *Baker (a Pseudonym) v DPP* [2017] VSCA 58 at [99].

<sup>36</sup> PII Judgment, [210].

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.

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. Section 7(2) requires that the reasonableness of any limitation must be demonstrably justified, taking into account all relevant factors. Section 7(2) of the Charter embodies a proportionality test.<sup>37</sup>
32. 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”<sup>38</sup> of full disclosure may nevertheless be consistent with the right to a fair hearing.
33. The factors listed in s 7(2)(a)-(e) fall to be considered in the context of the proportionality test. They inform the application of the test. In the next paragraphs, the Commission examines the factors to assess the proportionality of the limitation on the Named Individual’s right to a fair hearing.
34. **Nature of the right: s 7(2)(a).** The right to a fair hearing is fundamental to our system of criminal justice,<sup>39</sup> to “respect for the dignity of the individual and the rule of law in democratic society”.<sup>40</sup> 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:<sup>41</sup>

“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.”

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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.

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<sup>37</sup> *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].

<sup>38</sup> *R v H* [2004] 2 AC 134 at 155- 156 [36].

<sup>39</sup> 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).

<sup>40</sup> See Bell J in *Matsoukatidou* at [75].

<sup>41</sup> [2013] VSCA 43 at [65]-[69].



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 only be justified by a conclusion that they have been adopted for the purpose of protecting countervailing considerations of equal or greater 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. In assessing the proportionality of the limitation on the rights of the Named Individuals in this proceeding, 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. Plainly, by reason of s 7(2) of the Charter applying to all Charter rights, each of these rights is also subject to the proportionality test.
38. **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 of the fact of the proceeding itself is in fact capable of achieving those purposes depends on the evidence of the extent to which the information the subject of the proposed disclosure is already in the public domain. The primary judge made findings on the extent of public knowledge that EF was a police informer,<sup>42</sup> but it is not apparent from his Honour's reasons whether the Court therefore considered that not notifying the Named Individuals of the fact of the proceeding (i.e. without any further disclosure) was rationally capable of achieving the protection of countervailing public interests and the rights of EF and her children.
39. **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.
40. The Commission accepted before the primary judge, and continues to accept, 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. This may be one of the rare "exceptional cases" spoken of in *R v H* where the question of disclosure must be determined in the absence of the accused and without notice to them. If these proceedings are an "exceptional case",

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<sup>42</sup> PII Judgment, [237]-[238].

the critical question is whether the procedures adopted in this proceeding are sufficient to counterbalance the limitation on the rights of the Named Individuals to a fair hearing.

41. Having regard to the very significant limitation on the Named Individuals' right to a fair hearing in the conduct of this proceeding, it was incumbent on the primary judge, and is incumbent on this Court, to give careful consideration to whether or not the procedures adopted, including the role of the Amici, enable the Court to fairly determine the significance of the potentially disclosable material to the putative appeals by the Named Individuals in their absence.
42. The learned primary Judge's finding that there were no less restrictive means reasonably available to achieve the purpose of protecting EF and her children's security<sup>43</sup> does not positively establish that the Court was satisfied that it could have a fair hearing in these proceedings in the absence of notice to the Named Individuals. In the Commission's submission, the Court was required by reason of the direct application of s 24(1), s 25(2)(b) and s 8(3) of the Charter to be satisfied that a fair hearing could take place. It was necessary for it to decide the question of whether it could have a fair hearing of the public interest immunity claim without notice of the proceedings to the Named Individuals.
43. Arguably, the Court has not yet answered this question. It has rather made a finding that there was no less restrictive means reasonably available to achieve the purpose of protecting EF's and her children's security. In these circumstances, this Court should answer the question. To proceed to determine the application for leave to appeal without answering it might otherwise have the result that the Court is exercising its functions contrary to the Charter.

24 August 2017

KYLIE M EVANS

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<sup>43</sup> PII Judgment, [80].