SCC File No. 40044

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

BETWEEN:

EMANUEL KAHSAI

Appellant

- and –

HIS MAJESTY THE KING

Respondent

– and –

DIRECTOR OF PUBLIC PROSECUTIONS, ATTORNEY GENERAL OF ONTARIO, EMPOWERMENT COUNCIL, INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY, CRIMINAL TRIAL LAWYERS' ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION

Interveners

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rules 42 of the *Rules of the Supreme Court of Canada*)

MCKAY FERG LLP
1705, 639 5TH Ave SW
Calgary, AB T2P 0M9

Sarah Rankin
Tel: 403-984-1919
Fax: 844-895-3926
Email: Sarah@mckayferg.com

Heather Ferg
Tel: 403-984-1919
Fax: 844-895-3926
Email: Heather@mckayferg.com

Counsel for the Intervener, Canadian Civil Liberties Association

POWER LAW
50 O'Connor Street,
Suite1313
Ottawa, ON K1P 6L2

Jonathan Laxer
Tel: 613-907-5652
Fax: 613-907-5652
Email: jlaxer@powerlaw.ca

Ottawa Agent for the Intervener, Canadian Civil Liberties Association

ORIGINAL TO: **SUPREME COURT OF CANADA**
The Registrar
301Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

PRINGLE CHIVERS SPARKS TESKEY
355 Burrard Street, Suite 1720
Vancouver, BC V6C2G8

Daniel J. Song, K.C.
Tel: (604) 669-7447
Fax: (604) 259-6171
Email: djsong@pringlelaw.ca

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext. 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

LEGAL AID ALBERTA
300 Revillon Building
10320 102 Avenue
Edmonton, AB T5J 4A1

Katherine E. Clackson
Tel: (780) 415-8800
Fax: (780) 427-1536
Email: kclackson@legalaid.ab.ca

Counsel for the Appellant,
Emanuel Kahsai

Agent for Counsel for the Appellant,
Emanuel Kahsai

ALBERTA JUSTICE & SOLICITOR GENERAL
300 Centrium Place
332 - 6 Avenue SW
Calgary, AB T2P 0B2

Julie Morgan
Elisa Frank
Tel: (403) 297-0006
Fax: (403) 297-3453
Email: julie.morgan@gov.ab.ca

Counsel for the Respondent,
His Majesty the King

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Respondent,
His Majesty the King

PUBLIC PROSECUTION SERVICE OF CANADA
Greenstone Building
5101 50th Avenue, 4th floor
Yellowknife, NWT X1A 2N8

Blair MacPherson
Judy Kliewer
Tel: (867) 669-6939
Email: blair.macpherson@ppsc-sppc.gc.ca

Counsel for the Intervener, Director of Public Prosecutions

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA
160 Elgin Street, 12th Floor
Ottawa, ON K1A 0H8

François Lacasse
Tel: (613) 957-4770
Fax: (613) 941-7865
Email: francois.lacasse@ppsc-sppc.gc.ca

Agent for Counsel for the Intervener, Director of Public Prosecutions

MN LAW
355 Burrard Street, Suite 1000
Vancouver, BC V6C 2G8

Matthew A. Nathanson
Rachel M. Wood
Tel: (604) 608-6185
Fax: (604) 677-5560
Email: matthew@mnlaw.ca

Counsel for the Intervener, Independent Criminal Defence Advocacy Society

MICHAEL J. SOBKIN
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Agent for Counsel for the Intervener, Independent Criminal Defence Advocacy Society

CROWN LAW OFFICE - CRIMINAL
720 Bay Street, 10th Floor
Toronto, ON M7A 2S9

Jeffrey Wyngaarden
Avene Derwa
Tel: (416) 326-4600
Fax: (416) 326-4656
Email: jeffrey.wyngaarden@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

RUTTAN BATES
600, 630 - 6th Avenue SW
Calgary, AB T2P 0S8

Jennifer Ruttan
Tel: (403) 237-0025
Fax: (403) 237-0566
Email: jr@ruttanbates.com

LIBERTY LAW
300 MacLean Block
10110-107 Street
Edmonton, AB T5J 1J4

Zachary Al-Khatib
Tel: (780) 784-7500
Fax: (780) 421-4872
Email: alkhatib@libertylaw.ca

Counsel for the Intervener,
Criminal Trial Lawyers' Association

KAPOOR BARRISTERS
161 Bay Street, Suite 2900
Toronto, ON M5J 2S1

Anil K. Kapoor
Tel: (416) 363-2700
Fax: (416) 363-2787
Email: akk@kapoorbarristers.com

Counsel for the Intervener,
Criminal Lawyers' Association

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Intevener,
Criminal Lawyers' Association

ANITA SZIGETI ADVOCATES
400 University Avenue, Suite 2001
Toronto, ON M5G 1S5

Anita Szigeti
Tel: (416) 504-6544
Fax: (416) 204-9562
Email: anita@asabarristers.com

MARTELL DEFENCE
116 Simcoe Street, Suite 100
Toronto, ON M5H 4E2

Carter Martell
Tel: (647) 748-7487
Fax: (416) 596-2597
Email: martell@martelldefence.com

DEMELO HEATHCOTE
239 Colborne Street
London, ON N6B 2S4

Cassandra DeMelo
Tel: (519) 204-7966
Fax: (519) 204-8871
Email: cassandra@demelolaw.com

SHUKAIRY LAW
116 Lisgar Street, Suite 401
Ottawa, ON K2P 0C2

Maya Shukairy
Tel: (613) 421-1589
Email: mshukairy@shukairylaw.ca

Counsel for the Intervener,
Empowerment Council

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Intervener,
Empowerment Council

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PART I - OVERVIEW

[1] The complex considerations around *amicus* appointments in criminal trials touch the heart of our system's commitments to an individual's autonomy and dignity. The issue almost invariably arises in some of the most difficult trials our system faces. The Canadian Civil Liberties Association ("**CCLA**") supports a flexible approach to quasi-defence *amicus* appointments. The guidance provided in *Criminal Lawyers' Association v Ontario* ("***CLA***") must be augmented and clarified.[1]

[2] Trial judge's would be aided in balancing the interests at stake by guidance to clearly and explicitly identify those interests, evaluate the extent to which the case engages them, and prioritize them with reference to their underlying purposes. This would also serve to manage and minimize the likelihood that the risks to *amicus* appointments, identified in *CLA*, will materialize in a trial.

[3] The CCLA encourages this Court to provide guidance on defining the right to self-representation in a manner that doesn't subsume the entire analysis, and so that its content can inform a trial judge's decision about whether *amicus* would interfere with the right. Recognition that a defendant's autonomy interests in a criminal trial go beyond self-representation would also ensure a trial judge considers all relevant aspects. Finally, the nature of risks to trial fairness and miscarriages of justice in these cases should be explicitly identified.

PART II - ARGUMENT

A. Other Interests At Stake For The Criminal Defendant

[4] When the full scope of criminalized conduct, investigative techniques, trial processes and punishment are considered, it is clear the criminal law may touch nearly all aspects of human life, dignity, and autonomy. Our sexual behaviour, emotional and romantic lives, cultural identities/practices, and more may become matters of public inquiry as criminalized conduct.[2] Our bodily integrity, intimate communications, freedom of thought and expression, homes and other private realms may become subjects of evidence and argument, as *Charter* or other evidentiary issues are canvassed at trial.[3] Past trauma, substance use issues, psychiatric histories and other

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[1] *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 [***CLA***].
[2] See e.g. *R v Zora*, 2020 SCC 14; *R v Marshall; R v Bernard*, 2005 SCC 43; *R v Morgentaler*, [1988] 1 SCR 30; *R v Latimer*, 2001 SCC 1; *Carter v Canada (Attorney General)*, 2015 SCC 5; *Canada (Attorney General) v Bedford*, 2013 SCC 72.
[3] See e.g. *R v Golden*, 2001 SCC 83; *R v Marakah*, 2017 SCC 59; *R v Saeed*, 2016 SCC 24.

personal and formative information – about a defendant, and potentially others in their family or social circles - may become public as part of the plea bargain or sentencing process, as might scrutiny from professionals generating reports. The status of being someone facing charges and facing a trial generates significant stress and fear, and may impose a substantial financial burden.[4] A criminal conviction marks an individual with societal stigma in a specific and heavy way.[5] All of this to say nothing of the most obvious interst at stake for the criminal defendant –the possibility of losing their liberty. The interests engaged by self-representation are merely one manifestation of how autonomy is at stake in a criminal proceeding. It may not even be the primary or most significant aspect.

[5] Situations engaging the right to self-representation will fall along a spectrum. In some cases, a defendant is actively and deliberately advancing their defence. A defendant may have made a decision about the conduct of their defence going to our most deeply held societal values, and their conscience and moral perspective. Interference or curtailment of the defendant's approach in such circumstances will mean a significant and profound disservice to their interests.

[6] There will also be cases, however, where self-representation is the result primarily of a defendant's circumstances, rather than the expression of a deliberate perspective or choice. This might include the presence of mental health issues not rising to the level of unfitness, or emotional dysregulation which interferes with their ability to maintain a relationship with defence counsel.

[7] For a self-represented defendant, the ability to shape and advance the defence as they choose may be one of many ways that their autonomy, dignity and self-determination is at stake in the criminal trial. Self-representation itself reflects a variety of interests – self-determination, dignity, freedom of expression and thought, liberty and more. It cannot be ignored that many "of the people involved in our criminal justice system are poor, live with addiction or other mental health issues, and are otherwise disadvantaged or marginalized."[6] The relationship between trauma and abuse, and psychological and emotional dysregulation is one which reveals itself in the sentencing decisions from courts across the country, and the findings of the Truth and

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[4] *R v Godin*, 2009 SCC 26; *R v Kreklewich*, 2016 SKQB 223.
[5] *R v Sault Ste Marie*, [1978] 2 SCR 1299.
[6] *R v Boudreault*, 2018 SCC 58 at para 3.

Reconciliation Commission.[7] The self-represented defendant who cannot maintain a relationship with counsel may come before the Court with particular vulnerabilities making an unfair trial or miscarriage of justice more likely.[8]

[8] The approach to determining whether an *amicus* appointment is appropriate should reflect the fact that the line from self-representation to autonomy is neither clear nor direct. Our law recognizes that the means necessary to promote and protect rights may vary depending on context, and that the impact of state conduct on a right may vary in degree.[9] The framework for trial judges assessing whether to appoint *amicus* in a trial with a self-represented defendant must be alive to the existence of the full spectrum of rights and interests at stake. That framework should not take a defendant's self-representation to be the sole, or even primary way that the defendant's autonomy is protected when assessing how an *amicus* appointment could impact the defendant's interests. Self-representation lies alongside multiple other rights and interests for defendants, including liberty, the presumption of innocence, and equality.

B. The Contours of The Right to Self-Represent

[9] Respect for the right to self-representation plays a significant role in the limits on *amicus* appointments in criminal trials. Trial judges require guidance on how to assess the way the right is implicated in a given case. It should not be presumed that the right to self-representation is at stake to the same degree in all situations where a defendant has proceeded to trial without defence counsel. Where a defendant is absent from their trial – literally or functionally – trial judges should be instructed to inquire whether it remains engaged at all.

[10] The most straightforward component of the right of self-representation is a corollary of the right to discharge counsel. The defendant has an absolute right to discharge counsel, and the state may not force a defendant to keep an unwanted lawyer.[10] A defendant also has a right against the state making decisions that control the conduct of the defence. This is most clearly demonstrated in the holding that the state may not unilaterally raise a defence of not criminally responsible by

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[7] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Legacy The Final Report of the Truth and Reconciliation Commission of Canada Volume 5,* (Winnipeg: McGill-Queen's University Press, 2015) at 159-61, 170-77.
[8] *R v Jaser,* 2014 ONSC 2277 at paras 12-14 [***Jaser***].
[9] See e.g. the second branch of the test under s 24(2) from *R v Grant,* 2009 SCC 32.
[10] *R v Cunningham,* 2010 SCC 10 at para 9; *Rex v Vescio* (1948), 91 CCC 123 at para 11; *Jaser* at paras 28-29.

reason of mental disorder. The decision about advancing a particular challenge to a charge is the defendant's, particularly where that challenge has direct implications on the defendant's liberty.[11] The defendant's autonomy means they must be allowed to make, "fundamental decisions and assume the risks involved" in advancing a defence.[12]

[11] The defendant is entitled to advance their own defence, even where he may "act to his own detriment in doing so."[13] The wide berth around a defendant's decisions should be contextualized by the fact that the law does not require that a defendant who proceeds to trial unrepresented has the capacity to act in his own best interest, including where he has discharged counsel.[14] The challenge for a trial judge will be whether and how to assess if what they see before them reflects a choice and assumed risk, or something less deliberate and more circumstantial on the part of a self-represented defendant.[15] The analysis of Justice McDonald at the Court of Appeal, in particular, reflects a distinction between a non-participating defendant and one who engages in some way.[16] There is, however, no overarching analytical framework for assessing the specific role it plays, particularly when it is in tension with the right to a fair trial or against a miscarriage of justice.[17] Making implicit considerations and assumptions explicit can assist trial judges in evaluating the case before them, and clarifying whether a defendant can be seen to have truly made an "unwise choice" and must "live with the consequences," or if the situation is less clear.[18]

C. The American Approach To The Right To Self-Representation

[12] A clear approach to outlining the details of the right to self-representation is found in the American case law, which also considers the use of *amicus*. Considering when the right is invoked, how, what limits it permits and how to evaluate this helps to provide significant clarity to trial judges who are wrestling with respect for a defendant's autonomy in tension with trial fairness considerations. While there are differences in the underlying doctrines and values between the American and Canadian approaches, the cases nevertheless provide some information on what

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[11] *R v Swain*, [1991] 1 SCR 933 at para 33 [***Swain***].
[12] *R v Taylor* (1992), 77 CCC (3d) 551 at para 51 [***Taylor***].
[13] *Taylor* at para 51.
[14] *R v Steele*, [1991] AQ No 240 at para 92; *R v Whittle*, [1994] 2 SCR 914 at para 52; *Taylor* at para 53.
[15] See for example: *R v Walker*, 2019 ONCA 765 at paras 33-35 [***Walker***].
[16] *R v Kahsai*, 2022 ABCA 12 at para 5; See also *R v Ryan*, 2012 NLCA 9 at para 190 [***Ryan***].
[17] See e.g. *Jaser* at paras 35-37; *Ryan* at paras 100-01.
[18] *Ryan* at para 190.

might be considered in a more explicit approach to these issues.

[13] A District of Columbia appeals Court considered the existence of, and limits on, the right to self-representation in *US v Dougherty.*[19] The defendants were denied permission to self-represent and were convicted at trial. The charges arose from vandalism at the height of the backlash to the Vietnam war, and the defendants' politics went to the heart of their planned defence. While the constitutional status of the right was unsettled, it was entrenched in statute. The Court found three things necessary for the right to be invoked:

a. A timely assertion of the right (prior to the beginning of trial);
b. Accompanied by a valid waiver of the right to counsel; and
c. No waiver of the right, either explicitly or constructively through the defendant's trial behaviour.

[14] The decision identifies a profound basis for the right. A defendant has, "a fundamental right to confront his accusers and his 'country,' to present himself and his position to the jury not merely as a witness or through a 'mouthpiece'" but directly.[20] He is not, "obliged to seek what counsel would record as a victory but what he sees as tantamount to condemnation or doubt rather than vindication."[21] Ultimately a convicted defendant suffering the consequences has the right, "to the knowledge that it was the claim he put forward that was considered and rejected" and that "in our free society, devoted to the ideal of individual worth, he was not deprived of his own free will to make his own choice, in his own trial, to handle his own case."

[15] The Court also outlines limits on the right - it is not a right to behave in a way which subverts "the core concept of a trial."[22] A defendant should be warned that behaviour amounting to obstructing the trial may function as a constructive waiver of the right to self-represent. The Court also addressed the utility of *amicus* in self-represented trials. A "measure of unorthodoxy, confusion and delay is likely; perhaps inevitable, in *pro se* cases", and appointing *amicus* in a limited role can relieve some of these challenges.[23] An aspect of exercising the right to be self-represented may include clearly *appearing* self-represented, particulary before a jury. If a defendant is willing, however, an *amicus* can advise on procedure and strategy. The Court states that a defendant should be aware of the potential that *amicus* may be given conduct of the defence,

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[19] *United States v Dougherty,* 473 F (2d) 1113 (DC Cir 1972) [***Dougherty***].
[20] *Dougherty* at 8.
[21] *Dougherty.*
[22] *Dougherty* at 6.
[23] *Dougherty.*

if their behaviour reaches the threshold of a constructive waiver of the right to self-represent.

[16] In *Edwards v Indiana* the US Spreme Court considered whether a state could impose counsel on a fit defendant, if the defendant was found incompetent to conduct his own defence.[24] The Court found it could. The approach in *Edwards* is stark, inconsistent with the absolute right of a defendant to discharge counsel in Canada, and the clear rule that the threshold for fitness should not be raised or varied for different decisions a defendant might make. However, the case's approach to the particulars of the self-representation, and identifying the multi-faceted nature of the right and a defendant's interests at trial is nevertheless useful.

[17] The Court's decision started from principles already entrenched in American law – that, "a knowing and intelligent waiver of counsel 'must be honoured'", but that "the right to self-representation is not absolute," and that "appointment of standby counsel over self-represented defendant's objection is permissible." Further, the right to self-representation is not a right to "abuse the dignity of the courtroom" or "engage in serious and obstructionist misconduct."[25]

[18] The Court also observed that mental "illness is not a unitary concept," but something which "varies in degree," may "vary over time" and "interferes with an individual's functioning at different times in different ways."[26] This meant a Court could consider the particular tasks self-representation would call for, and the defendant's ability to manage them – the bundle of responsibilities of a represented defendant differs from those of a self-represented defendant. Whether the defendant required assistance with these tasks, and the overall dignity of the defendant and the trial process, meant trial judges would be best positioned to evaluate the circumstances and determine whether the defendant was competent to defend himself. The Court notably cited research on trial fairness as part of the justification for affirming this power for trial judges, observing that there was evidence that the majority of self-represented people had success at trial,

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[24] *Edwards v Indiana*, 128 US 2379 (2009) [***Edwards***]. The defendant's fitness had fluctuated before a first trial could ultimately begin. After a request for an adjournment to prepare for a self-represented defence was denied, he proceeded to trial with counsel. At a second trial on two charges the first jury could not reach a verdict for, he again asked to be self represented. He was denied on the basis the trial judge concluded he was not competent to do so, despite being fit.

[25] *Edwards.*
[26] *Edwards.*

but that trial fairness concerns arose in the subset of defendants where their competency was also at issue.[27]

[19] In *Hanan*, the issue was the scope of the federal government's *amicus* appointment in ongoing litigation enforcing minimum constitutional standards in the operation of the Alabama state mental health system.[28] Their entitlement to join as *amicus* was not contentious. The underlying litigation was civil, but the District Court's approach is nevertheless useful. The Court stressed that the overarching concern is ensuring that the focus of the litigation remains under the control of the parties. *Amicus* may – indeed "must" – be adversarial to advance its point, but crosses the line if they have an interest in the litigation, rather than responding to the issues raised by the parties themselves. Some of the factors the Court identified as considerations in appointing *amicus* are worth highlighting. These factors include:

a. The nature of the case, including whether the issues are narrow factual ones or broader ones with public implications, and the complexity of the case and procedures;
b. The views of the parties, and of the Court, on the participation of *amicus;*
c. Any prior participation of *amicus* in the process and the utility of that participation; and
d. Any potential prejudice to the parties from the involvement of *amicus.*

[20] Of these, perhaps two are most important: (1) the distinction between whether the party has an interest in the proceedings and whether a party is adversarial; and (2) the specific inquiry into prejudice from *amicus* involvement. The inquiry into prejudice is one way of evaluating inconsistency or incompatibility with a party's rights or interests – which is addressed in the next section of this factum. The distinction between an adversarial *amicus* and a partial one is also relevant to the Canadian context, and is discussed in part E of this factum, where the functions of *amicus* are addressed.

D. <u>The Canadian Approach Suggested By *Swain*</u>

[21] The American case law treats the right to self-representation like other rights implicated in the criminal justice system. It seeks to clearly identify when and how the right is asserted, when and how it may be waived, and what purposes it serves. This approach can greatly assist in evaluating whether quasi-defence *amicus* would unjustifiably infringe the right to self-

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[27] *Edwards.*
[28] *Wyatt By and Through Rawlins v Hanan*, 868 F Supp 1356 at 1358.

representation, while balancing the other rights at play. This Court's decision in *Swain* offers some tools for trial judges who are considering whether the right to self-representaton is infringed.[29]

[22] *Swain* held that allowing the state to unilaterally raise NCRMD at trial unjustifiably infringed a defendant's right to advance their own defence. In the process, the Court considered an analysis of whether permitting this was irreconcilable with a defendant's approach. The state could not be permitted to raise NCRMD because it might actively interfere or be incompatible with a defendant's theory of his defence, and carried serious consequences to his liberty interest. It is not for the state to weigh the pros and cons of involuntary psychiatric confinement against the likelihood of outright acquittal. A state theory that a defendant committed the offence because of a mental disorder could not be reconciled with a defendant's account that he was never there. A defendant's credibility and clarity of approach could be fundamentally impaired by the role stigma and discrimination would play in decision-making, if the state introduced evidence of mental disorder.[30] A defendant could not avoid dealing with an inconsistent theory from the Crown.

[23] Where a trial judge has actively considered whether a defendant is asserting the right to self-represent, and the the trial judge still has concerns about trial fairness and the dignity of both the process and the defendant, *Swain* provides a way to consider if *amicus* would infringe the right in an unjustifiable way.[31] The decisions in the ABCA consider whether a defence theory was positively advanced, but without the analytical structure that would allow for an assessment of whether or how *amicus* would impair, conflict or run neutrally parallel to a defendant's approach.

[24] There is undoubtedly much that a trial judge will not – and should not – know about a defendant's plans for a trial. Where profound concerns for fairness prompt considering a quasi-defence *amicus,* however, the trial judge has observed something about a defendant's apparent capacity or execution.[32] In these circumstances trial judges should at minimum be instructed to assess whether appointing *amicus* would do violence to the defendant's self-determination, rather than assuming that it would. It may be clear, on reflection, that *amicus* can engage in an extensive set of trial activities without contradicting or undermining what is known about the defendant's position. It should also be recalled that it is possible to have *amicus* prepared to perform functions

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[29] *Swain*.
[30] *Swain* at para 39.
[31] See also *Walker* at para 69.
[32] *Jaser* at para 35; *Walker* at para 63.

but adjust the functions they are called on to perform as the trial unfolds – permitting the trial judge to tailor the response to the fairness concerns which actually arise.

E. Specificity About The Risks To Trial Fairness

[25] In the same vein, trial judges should be encouraged to identify risks to the trial process as specifically as possible. Many of the concerns about overbroad *amicus* appointments can be alleviated by clearer identification of what may be missing from a trial – allowing the appointment of *amicus*, and the roles assigned, to be approached in a tailored, incremental and responsive way.

[26] The functional or literal absence of a defendant is key among the concerns in cases where these kinds of appointments arise.[33] Reflecting on the particular risks this poses is helpful in a realistic appraisal of which duties *amicus* should or should not be given.

[27] The common law tradition is organized around a "requirement of an adversarial context" because this "helps guarantee that issues are well and fully argued by parties who have a stake in the outcome." [34] The "principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of human beings."[35] Embedded in this is the focus of the system on the individual litigant. While society as a whole, and other stakeholders in a particular case, have an interest in the functioning of the justice system, the common law tradition resists instrumental treatment of an individual to satisfy a broader desire for perceived fairness or truth.

[28] The defendant in a criminal trial is in a unique position in an adversarial system. Involuntarily entered into the proceeding which may lead to the seizure of his body, he bears no onus to give information or participate. Where the defendant is silent or absent from the courtroom, parts of the adversarial system which perhaps best protect autonomy and dignity –an accusatorial process, and a reliance on the parties to adduce the record and arguments that best address the issue between them and further the search for truth and a just result– may be missing entirely.[36]

[29] *CLA* cautions that "*amicus* can no longer properly be called a 'friend of the Court'" once "cloaked with all the duties and responsibiliites of defence counsel."[37] If that is so, the distinction

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[33] *Walker* at paras 91-108; *R v LePage* (2006), 214 CCC (3d) 105.
[34] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at para 31.
[35] *Swain* at para 35.
[36] *Walker* at para 62.
[37] *CLA* at para 49.

between an adversarial *amicus* and a partisan one from *Hanan,* above, is worthy of reflection. The trial judge cannot test the evidence, does not know what is in disclosure, and cannot see how the trial will unfold in advance. Lack of an adversarial process may go to the heart of whether the trial functions as a trial at all. Submissions or examinations may need to be adversarial to restore the balance and assist the trial judge. What *amicus* must and will never have, however, is a partisan stake in the process. The absence of duties to the defendant, and the presence of a duty to the Court, keep these appointments – even where adversarial – in service of the trial judge's obligation to ensure a fair trial, and control their process.

F. Conclusion

[30] The approach in these difficult cases would be aided by a clearer articulation of the values, relevant facts and issues that are being evaluated. It is clear from *CLA* what should concern trial judges, but the law offers less information to guide them in specifically identifying the rights at stake, and the ways they might identify threats to trial fairness and the defendant's interests. What might appear to be an irreconcilable tension between societal interests and defendant autonomy may be revealed as less of an impasse when the particulars of each competing interest are identified. Trial judges trying to do justice would be well served by clearer analytical tools allowing them to weigh these issues more precisely and recognize the valuable role that quasi-defence *amicus* may play in some cases.

PART III - STATEMENT CONCERNING COSTS

[31] The CCLA does not seek costs and asks that no costs be awarded against it.

PART IV - ORDER SOUGHT

[32] The CCLA takes no position on the appropriate disposition of the Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of February 2023.

Signed at Calgary, Province of Alberta,

for: _____
Sarah Rankin / Heather Ferg
Counsel for the Intervener CCLA

PART V – TABLE OF AUTHORITIES

JURISPRUDENCE	PARAS CITED
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