Court File No. 32172

**IN THE SUPREME COURT OF CANADA**
**(APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

B E T W E E N:

**THE MINISTRY OF PUBLIC SAFETY AND SECURITY (Formerly the SOLICITOR GENERAL) and the ATTORNEY GENERAL OF ONTARIO**

Appellants (Respondents)

– and –

**THE CRIMINAL LAWYERS' ASSOCIATION**

Respondent (Appellant)

– and –

**TOM MITCHINSON, ASSISTANT COMMISSIONER, OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO**

Intervener (Respondent)

– and –

**THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF BRITISH COLUMBIA, THE ATTORNEY GENERAL OF MANITOBA, THE ATTOENRY GENERAL OF NEW BRUNSWICK, THE ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR, THE ATTORNEY GENERAL OF NOVA SCOTIA AND THE ATTORNEY GENERAL OF QUEBEC**

Interveners

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# MEMORANDUM OF THE RESPONDENT, THE CRIMINAL LAWYERS' ASSOCIATION

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**THE CRIMINAL LAWYERS' ASSOCIATION**

## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. Our justice system failed. The court had to stay, permanently, a double murder prosecution. It found "continued and systematic" delay, negligent destruction of evidence and "deliberate" non-disclosure, all supported by ample evidence. "No evidence," however, was the finding of a later police investigation.

2. The Criminal Lawyers' Association (the "CLA"), a dedicated, experienced commentator and participant in criminal justice matters, filed a request for access to information about this failure, in order to examine, discuss and study what went wrong and why, and to develop solutions, all with a view to ensuring that this failure would never happen again.

3. In response, the Appellants disclosed nothing, not a single word from a single document. Now, in this Court, they offer 40 pages of legal analysis, but they really make only one point – our Constitution has nothing that can address their blanket assertion of secrecy. The CLA disagrees. Our Constitution is not as impoverished as the Appellants say it is.

4. If the CLA succeeds in this appeal, it will fall to Ontario's Information and Privacy Commissioner to determine whether the interests in disclosure of the information sought are compelling and "clearly outweigh" the government's interests in confidentiality. Only then might there be full, partial or minimal disclosure. With disclosure, public discussion on the causes and solutions will ensue, reducing the chances that the sort of criminal justice failure that happened here will happen again. However, if the Appellants are correct and our Constitution is barren and helpless, then secrecy will prevail – and there will be silence.

## B. The CLA's position on the facts as stated by the Appellants

5. The Appellants accurately describe the general background facts of this appeal. However, the Appellants repeatedly make incorrect assertions, without any evidentiary support, about the nature of the CLA's expression and the CLA's intentions.

## C. The Appellants' unsupported and incorrect assertions

6. The Appellants assert that the CLA seeks access to information in order to speak more about subject-matters that it has already spoken about. They assert that the CLA seeks access to information "to facilitate its proposed expression" (para. 41), "to assist it in making its expression more effective" (para. 52), to engage in "further comment" (para. 43), and "to enhance [its] expression" (para. 72). They add that it is "simply not the case" that the CLA was "substantially incapable of expressing itself" (para. 72). They cite no evidence in support of these assertions. More importantly, they are wrong. The subject-matters that the CLA has already spoken about are different from the subject-matters the CLA would like to speak about but cannot.

## D. What subject-matters has the CLA spoken about?

7. It is true that the CLA has engaged in expression on certain subject-matters. The CLA has complained about the secrecy imposed in this case. It has decried the fact that a stay had to be imposed. It has noted the significant conflict between the later OPP investigation that found "no evidence" and the court's judgment finding much evidence. But the CLA's expression ends there.

> *R. v. Court and Monaghan* (1997), 36 O.R. (3d) 263 at 297-307 (Gen. Div.) *per* Glithero J. (*CLA Authorities*, Vol. VI, Tab 60): The Court found "many instances of abusive conduct by state officials" involving "negligent breach of the duty to maintain original evidence," "deliberate non-disclosure, deliberate editing of useful information," and "deliberate…suppression of virtually every piece of evidence that was of probable assistance to the defence." This conduct was

"continued and systematic," caused "irremediable prejudice," and was of a quality that would lead "a fair-minded and reasonable member of the community, fully apprised of all the circumstances in this case" to be "offended and dismayed by the conduct of this case."

Ontario Provincial Police, News Release, "No Grounds For Charges In Police Conduct Investigation" (3 April 1998) (*Appellants' Record*, pp. 175-176): "no evidence."

*Order PO-1779*, at pp. 14-15 and 21; *Appellants' Record*, pp. 17-18 and 24.

*Reasons for Judgment of the Divisional Court*, para. 7; *Appellants' Record*, pp. 89-90.

**E. What subject-matters does the CLA wish to speak about?**

8. The CLA does not seek facilitation or enhancement of its ability to speak on topics it has already spoken about. Rather, it wishes to express itself and promote more public discussion on entirely different subject-matters – subject-matters that are of great public interest but remain shrouded in secrecy. For instance, what went wrong in this case? How significant are the problems? Are the problems systemic, or just specific to this case? Who was responsible for the conduct in this case, prosecutors, police or government? Were personnel overworked? Did they have adequate support and funding? Can lessons be learned? What solutions can be devised? What remedial steps were recommended or taken? Are administrative or legislative reforms necessary or desirable? If so, what form should they take?

*Order PO-1779*, pp. 14-15; *Appellants' Record*, pp. 17-18.

*Reasons for Judgment of the Divisional Court*, paras. 53-55; *Appellants' Record*, pp. 103-104.

*Reasons for Judgment of the Court of Appeal* (majority), paras. 28-30; *Appellants' Record*, pp. 132-133.

9. The OPP's investigation and its "terse" press release raise other subject-matters for discussion. Did the OPP take the investigation of the Halton police force seriously? How many person-hours did it devote to the investigation? Who did it interview? Who had input into the

investigation? Did the OPP act independently? Is it true that it found absolutely "no evidence"? On what basis did it disagree with the court's ruling? Was Glithero J. wrong? Are there any lessons to be learned from the OPP's investigation? What solutions can be devised? Are administrative or legislative reforms necessary or desirable? If so, what form should they take?

10. To examine, study, and express itself on these issues, activities protected under s. 2(b) of the *Charter*, the CLA required information about what happened. It submitted a freedom of information request under Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "Act").

> *Reasons for Judgment of the Divisional Court*, para. 8; *Appellants' Record*, p. 90: The CLA submitted the request because it was "justifiably concerned" about the "apparent discrepancy between the OPP's laconic statement and the detailed acts of abusive conduct contained in the judgment of Glithero J."
>
> Letter of Request; *Appellants' Record*, pp. 177-178.

## F. The lack of disclosure / the secrecy

11. In response to the CLA's request, hundreds of pages of relevant documents were identified, but all have been kept secret. Although there is an obligation under s. 10(2) of the Act to sever confidential material from documents and reveal the rest, not a word has been revealed.

> Decision Letter of the Appellants; *Appellants' Record*, pp. 179-181.

12. The Assistant Information and Privacy Commissioner is the only "outsider" that has examined this material. He concluded that the public interest override in s. 23 of the Act should apply because the public interest in disclosure of these documents is "compelling" and "clearly outweighs" any interests in confidentiality associated with the "personal privacy" exemption under s. 21 of the Act.

> *Order PO-1779*, at 21-23 (*Appellants' Record*, pp. 24-26): He cited the "essential and fundamental nature" of the criminal justice system in a "free and democratic society," the "prominence of the criminal courts among Canadian public institutions," the fact that one would be "hard-pressed to come up with a subject of greater public interest," the court's conclusion that there was "an unacceptable degree of negligent conduct" was "diametrically opposed" to the subsequent

> review and finding of "no evidence," the need for "further information about what went wrong in this case, and how the government responded," and the "urgency" added to the public interest in light of our history of wrongful convictions.

13. However, the Assistant Information and Privacy Commissioner could not order any disclosure of the documents. This was because the exemptions under s. 14 (law enforcement) and s. 19 (solicitor and client privilege) applied to the documents and s. 23 did not include ss. 14 and 19 as exemptions that can be overridden in the public interest:

> **23.** An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The mere status of the documents as OPP documents was enough to keep them secret despite their public importance. The fact that the documents were ultimately put in the hands of a Crown attorney for advice was enough to trigger the solicitor and client exemption.

## G. What can the CLA or the public speak about on these subject-matters?

14. Obviously, without any government disclosure – and not a word in hundreds of pages of documents has been disclosed – the subject-matters in paragraphs 8 and 9, above, will not be discussed. Despite the fact that our justice system is an important pillar of our democracy, and that criminal prosecutions are one of the most serious enterprises undertaken by the State, most of what matters about the justice system's failure in this case will remain a secret. Outside of government, there will be no study, no discussion, no participation and no contribution.

## H. Insiders can speak

15. While the CLA and other outsiders are left silent on these subject-matters, government insiders, by virtue of being "in the know," can study and discuss everything and, if they see fit, can participate in and contribute to administrative or legislative reform. Key aspects of

expression and governance become their sole preserve. This disparity is well-illustrated by Appendix "A" to the Appellant's factum. It sets out quotations from two classes of people:

- *Insiders in government*: the Halton police chief, the lead Crown Attorney, the OPP's chief investigator, and an inspector in the Hamilton Wentworth police. Each person, "in the know" by virtue of his involvement and insider status, makes brief comments about the causes of the failure, though none offer any solutions.

- *Outsiders, like the CLA.* They can say nothing about the causes or solutions. They can only complain about the gravity of the incident and the secrecy.

## I. The nature of the Act: the CLA's position

16. The Act sets out a right of access to information (s. 10), subject to limited and specific exemptions (ss. 11 to 22). If the Act stopped there, much access to information that is necessary for public discussion would be denied. However, the Act goes further and, in s. 23, provides for a public interest override. Under s. 23, where the public interest in disclosure is compelling and clearly outweighs interests in confidentiality, disclosure is granted. Section 23 plays a critical role in ensuring that the Act can allow access to information to happen in exceptional but necessary situations.

17. The problem is that s. 23 only applies to some of the exemptions in the Act, not all. It does not apply to law enforcement documents (s. 14) or documents covered by solicitor-client privilege (s. 19). As a result, these documents are always kept secret, even if the public interest in disclosure may be extreme and the confidentiality interests trifling. The CLA's position, upheld by the Court of Appeal and consistent with the access to information legislation in three provinces, is that s. 23 is constitutionally underinclusive and must apply to these documents as well.

## J. The Appellants' unsupported and incorrect assertions about the CLA's position

18. The Appellants suggest that, if adopted, the CLA's position would "considerably alter the functioning of government," (para. 3(a)) creating "chilling effects" on law enforcement (para. 80) because of "dangers" (para. 80). Assessments of solicitor and client privilege would happen "on a case-by-case" basis, resulting in less frank legal advice (para. 83). The Divisional Court, without evidence in support, cited "potential hindrance to…investigations," "risks inherent in publicizing confidential aspects of the investigations," and the "diversion of resources and energy on the part of law enforcement officials" (see para. 94). There is no evidence at all supporting these speculations. In fact, there is strong evidence to the contrary:

- The public interest overrides in the access to information laws of British Columbia, Alberta and Nova Scotia apply to law enforcement and solicitor-client privileged documents. There is no evidence in the record of any detrimental effects arising from these uses of public interest overrides – indeed, no case has ever satisfied the tough test for a public interest override over these documents.

  > *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 25(1).
  >
  > *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 32(1).
  >
  > *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, s. 31.

- Section 11(1) of Ontario's Act allows some law enforcement and solicitor-client privileged documents to be released in other important, rarely-occurring situations (*i.e.*, a grave threat to the environment, health or safety). Again, the record is bereft of any evidence of detrimental effects from the availability of this public interest override.

- In Ontario, the test for the public interest override in s. 23 is not an automatic, frequent "case-by-case" weighing as the Appellants suggest, but rather a rarely-invoked test that is hard to meet. For law enforcement and solicitor-client

privileged documents, this would be especially so. These documents usually have high interests in confidentiality. Very exceptional would be the case where the public interests in disclosure "clearly outweigh" the interests in confidentiality associated with these documents.

> This however, may be such a case. See para. 12, above: the Assistant Information and Privacy Commissioner's finding under s. 23 that the public interest in disclosure was compelling and clearly outweighed the s. 21 exemption.

- Disclosure of law enforcement and solicitor-client privileged documents – and even secret documents about national security – happens in many other contexts. The Appellants have offered no evidence of deleterious effects arising from those disclosures.

  > See the cases at para. 48(f), below.

## PART II – ISSUES

19. The CLA agrees with the Appellants' statement of the constitutional issues.

## PART III – STATEMENT OF ARGUMENT

20. The CLA submits that the public interest override, by not applying to law enforcement or solicitor-client privileged documents, is constitutionally underinclusive and offends s. 2(b) of the *Charter* as well as the unwritten constitutional principle of democracy. Specifically, the CLA makes three submissions:

- Section 2(b) contains a component right of access to information that is necessary in order to engage in thought, belief, opinion and expression. Just as other *Charter* sections, such as s. 10, have component rights that are necessary for the meaningful exercise of the rights guaranteed, so does s. 2(b). Many other

countries' courts have found access to information to be a component right within freedom of expression, and so should this Court.

- In the alternative, if, unlike these other countries, Canada's freedom of expression guarantee does not contain a component right of access to information, access to information should be afforded in this case on the basis of the "positive rights" test in *Baier v. Alberta*, [2007] 2 S.C.R. 673. In this regard, the CLA largely adopts the submissions of the Information and Privacy Commissioner.

- The unwritten constitutional principle of democracy is both an independent ground for finding a constitutional right of access to information and also buttresses the conclusion that access to information is a component right within the s. 2(b) freedom of expression.

Finally, the CLA submits that the underinclusiveness of s. 23 of the Act cannot be justified under s. 1 of the *Charter*.

## A. A right of access to information is a component of the s. 2(b) guarantee of "freedom of thought, belief, opinion and expression"

### (1) The purposive approach to constitutional interpretation and the interpretation of s. 2(b)

21. The "purposive approach" is the primary method of interpreting the scope of *Charter* guarantees. Section 2(b) has always been interpreted purposively. Where government action has the effect of restricting expression that advances s. 2(b) purposes, s. 2(b) is infringed.

> *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 (*CLA Authorities*, Vol. IV, Tab 34). The purposes of s. 2(b) are to foster: (1) the seeking and attaining the truth which is an inherently good activity; (2) participation in social and political decision-making which is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing.

*R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 344 (*CLA Authorities*, Vol. VI, Tab 58):

> A court interpreting a constitutionally guaranteed right must apply an interpretation that will fulfill the broad purpose of the guarantee and thus secure 'for individuals the full benefit of the [constitutional] protection'.
>
> …..
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection.

*Montréal v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141 (*CLA Authorities*, Vol. V, Tab 47).

Peter Hogg, "The Charter of Rights and American Theories of Interpretation" (1987), 25 Osgoode Hall L.J. 87 at 97-98 (*CLA Authorities*, Vol. III, Tab 31): "The principle of progressive interpretation of the constitution is as firmly established in Canada as is the principle of minimal reliance on legislative history."

22. The Appellants do not apply or even mention the purposive approach to constitutional interpretation. Instead, they rely on the oft-rejected "framers' intention" or "frozen concepts" approach. To this end, the Appellants remind us (at para. 2) that the particular Senators and Members of Parliament who sat on the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada expressly considered and rejected the inclusion of a right of access to information in the *Charter*.

23. Without doubt, those politicians said many things in their Committee debates over a quarter of a century ago. For example, they disapproved of, and in other cases, if asked, would have emphatically rejected many other important *Charter* protections that this Court later upheld. Three examples, among many, are the addition of sexual orientation as an analogous ground of discrimination under s. 15, the prohibition of imprisonment on the basis of absolute liability, and the requirement that provinces provide detainees with access to duty counsel.

*Vriend v. Alberta*, [1998] 1 S.C.R. 493 (*CLA Authorities*, Vol. IX, Tab 93) (sexual orientation as an analogous ground in s. 15 of the *Charter*).

*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (*CLA Authorities*, Vol. VII, Tab 70). The *Minutes* have an "inherent unreliability" and should not be used to cause rights to "become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs."

*R. v. Prosper*, [1994] 3 S.C.R. 236 (*CLA Authorities*, Vol. VII, Tab 67). L'Heureux-Dubé J., dissenting, noted that the framers considered and rejected a proposal that detainees be provided with access to state-supplied duty counsel; the majority rejected that proposition.

*Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 at 94 *per* Rothstein J. for the Court (*CLA Authorities*, Vol. I, Tab 4): "[T]he Canadian Constitution should not be viewed as a static document but as an instrument capable of adapting with the times by way of a process of evolutionary interpretation, within the natural limits of the text, which 'accommodates and addresses the realities of modern life'."

24. Resort in the past to "framers' intention" and "frozen concepts" reasoning has taken us to unwelcome places. For example, in the 1920's the Government of Canada argued that the law, stretching back as far as Roman law, always regarded women as being "unqualified" for public office, and this "common understanding" in 1867 was enshrined in the Senate appointment provisions of our Constitution (s. 24 of the then *British North America Act*). That "framers' intention," the Government of Canada said, should continue to govern Canadians in succeeding ages. The Privy Council had the good sense to reject these submissions.

*Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.) (*CLA Authorities*, Vol. II, Tab 15).

*Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 (*CLA Authorities*, Vol. VII, Tab 73) (see discussion of *Edwards* at para. 22 and discussion of framers' intention at para. 30).

*R. v. Blais*, [2003] 2 S.C.R. 236 (*CLA Authorities*, Vol. VI, Tab 59) (framers' intention has its proper place in rare cases, *e.g.*, where a constitutional provision implements a specific historical agreement).

25. The Appellants' "framers' intention" arguments and "frozen concepts" reasoning run contrary to the most basic principles of Canadian constitutional interpretation. Our Constitution is "a living tree which, by way of progressive interpretation, accommodates and addresses the

realities of modern life." All the time, our courts structure "the exercise of power by the organs of the state in times vastly different from those in which it was crafted." Things change, and our Constitution responds. The telephone did not exist in 1867, yet our courts later had to assess whether it was an interprovincial work or undertaking under s. 92(10) of the *Constitution Act, 1867*. "Forward looking infrared" technology did not exist in 1982, yet, years later, the Supreme Court had to assess it under s. 8 of the *Charter*.

> *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at paras. 21-23 (*CLA Authorities*, Vol. VII, Tab 73).

**(2) The implications of the Appellants' position**

26. In their factum, the Appellants submit that there is no constitutional right of access to government information under any circumstances, at any time. In their view (at paras. 10, 30 and 32), shared by the dissent in the Court of Appeal (at para. 165), access to information legislation is a mere "matter of policy" that gives "right[s] of access where none would otherwise exist" – a gift, graciously and gratuitously granted that can be repossessed at any time.

27. In this case, this Court will determine the constitutional status of access to information. Its decision will govern this area for a very long time, perhaps forever.

28. Is it true, as the Appellants state, that there is a significant gap in our constitutional protections in the area of access to information? Is it true that some future government in a less fortunate time might be able to impose widespread, absolute secrecy – and our future judges, searching for a solution, will find our Constitution to be of no assistance?

29. The CLA answers this in the negative. A constitutional right of access to information exists in s. 2(b) as a necessary component of "freedom of thought, belief, opinion and expression." It is a limited right, supported by the purposive approach to constitutional interpretation, its historical roots in our democracy, and its presence in international instruments that Canada has ratified. Other nations' jurisprudence has identified this right as a necessary

component of freedom of expression. Plenty of Canadian jurisprudence is best explained by it. It is also most consistent with the unwritten constitutional principle of democracy.

### (3) Applying the purposive approach

30. While, as it will be seen, the need to know information about government was appreciated in the 19th century, government back then was small and accessible. As a result, access to information did not find its way into the text of the *Constitution Act, 1867*, except in small ways that mattered at that time.

> *Constitution Act, 1867*, s. 57 (entries into the Journal of the House), s. 133 (publication of Acts), s. 143 (government records may be admitted into evidence).
>
> The same was true in the United States and the *Bill of Rights*. See *Note, Access to Official Information: A Neglected Constitutional Right*, 27 Ind. L.J. 209 (1952), at 219 (*CLA Authorities*, Vol. V, Tab 51): "To the originators of our Constitution, who contemplated an administrative hierarchy no larger than a medium-sized corporation of today, it may have appeared sufficient to entrust this fundamental right to the ability of the press to ferret out the facts and convey them to the public."

31. Today, government is different. It has grown and has entered arenas that the framers of our Constitution could not have foreseen. Technology has changed: there is more information available and, in many respects, information has become more important to our daily lives. Today, on occasion, public sentiment is jolted by discoveries of what government has been doing without our knowledge and, as a result, some become alienated and distrustful of government, an unhealthy condition for a democratic system of government. With information and openness, our democracy flourishes, our political culture thrives.

32. Section 2(b) provides that everyone has "freedom of thought, belief, opinion and expression." But, without any information on a subject-matter, there will be no thought, belief, opinion or expression on the subject-matter. Hypotheticals abound. If Parliamentary proceedings were closed to the public, whole areas of public discussion would be eliminated, and the public would be denied democratic participation. If courts were closed and case reports forbidden, jurisprudence would not be discussed. If agencies and Ministries did not publish

annual reports, there would be little or no discussion of their activities. But there is more than just hypotheticals. Without the access to information request submitted by the *Globe and Mail*, information about the misuse of advertising funds in Quebec never would have come to light. There would have been no public discussion on the issue and the 2006 federal election might have turned out differently. The connection between, on the one hand, access to information and, on the other, public discussion, citizen participation and democratic outcomes, is indisputable.

33. Many more real examples are found abroad. History shows that one of the first things an authoritarian government does is impose secrecy over its activities. When this is done, it can become less concerned about free expression, as there is little to be expressed. The Soviet Union disclosed nothing to its population about gulags and government-created famines in the 1930's, ensuring that those matters were never discussed. The Nazi government in wartime Germany disclosed nothing to villagers about what "that factory down the street was doing," preventing any discussion from taking place. These are extreme examples, fortunately not reflective, even remotely, of Canadian life today. But they, too, illustrate the intimate connection between access to information, on the one hand, and public discussion, citizen participation, and democratic outcomes, on the other.

34. Finally, any purposive approach must bear in mind the democratic principles that lie at the foundation of the Constitution and, specifically, in s. 2(b) of the *Charter*. This Court noted in *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912 at para. 30 (*CLA Authorities*, Vol. II, Tab 18), that "[d]emocracy, of course, is a form of government in which sovereign power resides in the people as a whole." In "our system of democracy, this means that each citizen must have a genuine opportunity to take part in the governance of the country." Without information about important matters affecting our governance, we lose the opportunity to participate, affect, or discuss those important matters. Governance of the country, then, becomes the private preserve of the insiders.

35. If the rights to speak, publish, and inform in s. 2(b) are to be more than theoretical ideals, certain component rights must logically reside within s. 2(b). Section 2(b) is not about allowing

vocal chords to vibrate and make noise. It is about protecting and promoting the free and vibrant circulation of communications that is necessary to sustain and enhance Canadian democracy.

> In the United States, the First Amendment protects the structure of communications necessary for the existence of democracy: ***Grosjean v. American Press Co.***, 297 U.S. 233 at 250 (1936) (*CLA Authorities*, Vol. III, Tab 23). The court is to protect "the circulation of information to which the public is entitled in virtue of the constitutional guarantees."
>
> *Richmond Newspapers Inc. v. Virginia* (1980), 448 U.S. 555 *per* Brennan J. at 587 (*CLA Authorities*, Vol. VIII, Tab 79). The "First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government." An essential aspect of self-government is public debate, and the "antecedent assumption that valuable public debate – as well as other civil behavior – must be informed."
>
> Leon R. Yankwich, "Legal Implications of, and Barriers to, the Right to Know" (1956-1957) 40 Marq. L.R. 3 (*CLA Authorities*, Vol. IX, Tab 95).
>
> A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948), at 6-16 and see also 26-27 (*CLA Authorities*, Vol. IV, Tab 43): "Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good."
>
> A. Meiklejohn, *Political Freedom*: The Constitutional Powers of the People (1965) at 94-97 (*CLA Authorities*, Vol. IV, Tab 44).
>
> David Ivester, "The Constitutional Right to Know" (1977), 4 Hastings Const. L.Q. 109 (*CLA Authorities*, Vol. IV, Tab 35).
>
> Meredith Fuchs, "Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy (2006), 58 Admin. L. Rev. 131 (*CLA Authorities*, Vol. III, Tab 20).
>
> Note, "Access to Official Information: A Neglected Constitutional Right" (1951-1952), 27 Ind. L.J. 209 (*CLA Authorities*, Vol. V, Tab 51).

36. Our Constitution, through the "separation of powers," regulates the balance of power among branches of government. But there is another vital balance: the balance between the government and its people. In our democracy, the people have the ultimate voice, through the right to vote, over who passes legislation and who appoints the executive and judiciary (*Charter*,

s. 3). If the people's democratic will is to have validity and legitimacy, the people must have knowledge of what government is or is not doing. Knowledge, acquired through access to information, is the tool by which the people can oversee and hold government accountable for its actions.

> *New York Times Co. v. United States*, 403 U.S. 713 (1971) at 728 (*per* Stewart J. concurring) (*CLA Authorities*, Vol. V, Tab 50): "In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of democratic government."

37. If s. 2(b) is to fulfil its purposes, it must mean more than just a right to receive information from willing speakers. If it were limited to that, the flow of information would be dependent upon the willingness of the source to communicate. The power of government to withhold information on a particular topic, without any genuine or legitimate public interest in confidentiality, is just as effective as a gag: it provides the government with the means to nip in the bud any unwelcome public discussion on the topic, divert public attention elsewhere and reduce its accountability to the people. Our democracy suffers; our governance worsens.

38. If it is to achieve fully its purposes, s. 2(b) must be interpreted to include a right to access to government information. As we shall see, other nations have long recognized that such a right is inherent in, and necessary to, their freedom of expression guarantees. It is time for Canada to catch up.

### (4) The historical roots of the right of access to information

39. As part of the purposive approach to constitutional interpretation, the historical roots and context of the right or freedom in question must be examined.

> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at 344 (*CLA Authorities*, Vol. VI, Tab 58): A constitutional provision must be "placed in its proper linguistic, philosophic and *historical* contexts" [our emphasis].

> *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 *per* McLachlin J. as she then was) (*CLA Authorities*, Vol. VII, Tab 71): "The content of a *Charter* right is to be determined in a broad and purposive way, having regard to *historical* and social context" [our emphasis].

40. The Appellants suggest (at paras. 1, 30 and 32) that restricted access to government information is "part of our history and our constitutional tradition," that there is "no historical legal right to information held by government either at common law or otherwise," and any access to information that governments give us is "not a reflection of any tradition of a fundamental right to be provided with government information." The dissent in the Court of Appeal agrees (at para. 165): "It is a right that did not exist until the Act was enacted."

41. These views are wrong. When our modern democratic ideals first emerged three centuries ago, it was well-understood that a right of access to information is a necessary component of freedom of expression. In England, the writings of John Milton in the 17th century, "Cato" in the 18th century, and the early battles for the publication of Parliamentary proceedings all show a keen awareness of the importance of the public's access to information to political expression and democracy. All of the great American democratic thinkers in the 18th and 19th century – Benjamin Franklin, Thomas Jefferson, John Adams, Patrick Henry, James Madison and Thomas Payne, among others – repeatedly stressed the importance of the public's access to information and its role in ensuring a vibrant democracy. Access to government information has always been central to our concept of freedom of expression in a democracy.

> David Ivester, "The Constitutional Right to Know" (1977), 4 Hastings Const. L.Q. 109 at 115-134 (*CLA Authorities*, Vol. IV, Tab 35). This article contains an exhaustive, illuminating review of British and American writings, with many quotations. The right of access to information has a rich, ancient lineage.
>
> Harold L. Cross, *The People's Right to Know* (1953) at 128-132 (*CLA Authorities*, Vol. II, Tab 11). At 132: "The history of the struggle for freedom of speech and of the press bars any notion that the men of 1791 intended to provide for freedom to disseminate such information but to deny freedom to acquire it."
>
> Thomas L. Emerson, "Legal Foundations of the Right to Know" (1976), Wash. U.L.Q. 1 (*CLA Authorities*, Vol. II, Tab 16).
>
> Thomas C. Hennings, Jr., "The People's Right to Know" (1959), 45 A.B.A. J. 667 (*CLA Authorities*, Vol. III, Tab 30).

Eric G. Olsen, "The Right to Know in First Amendment Analysis" (1978-1979), 57 Tex. L.R. 505 (*CLA Authorities*, Vol. VI, Tab 53).

### (5) Acceptance of a right of access to information as a component of "freedom of thought, belief, opinion and expression" under s. 2(b)

#### (a) International treaties and instruments

42. By signing and ratifying treaties and international instruments, Canada has committed itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter* and human rights codes. As a result, these treaties and instruments are relevant and persuasive interpretative factors. They must be examined when considering the scope of s. 2(b) of the *Charter*.

*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665 at para. 73 (*CLA Authorities*, Vol. VI, Tab 57).

*Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (*CLA Authorities*, Vol. IV, Tab 37).

43. Canada is a party to the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 172 (see the legislative schedule to this factum), adopted unanimously by the United Nations General Assembly on December 16, 1966. Canada acceded to this instrument on May 19, 1976. Prior to accession the Federal Government obtained the agreement of the provinces, including Ontario, all of whom undertook to implement the *Covenant* in their respective jurisdictions. The *Covenant* has been applied 34 times by this Court in interpreting the nature and scope of *Charter* guarantees. The *Covenant*, in art. 19(2), expressly provides that freedom of expression "shall include freedom to…receive…information."

*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-57 (*CLA Authorities*, Vol. VIII, Tab 83), adopting Dickson C.J.C.'s comments on the use of international treaties in *Reference Re Public Service Employee Relations Act (Alta.)*,

[1987] 1 S.C.R. 313 at 349 (*CLA Authorities*, Vol. VII, Tab 72). Dickson C.J.C. also discussed the history of Canada's accession to the *Covenant*.

For examples where the *Covenant* was considered and applied, see: *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 at paras. 71 and 89 (*CLA Authorities*, Vol. III, Tab 29); *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (*CLA Authorities*, Vol. IV, Tab 37); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (*CLA Authorities*, Vol. IX, Tab 89); *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 31 (*CLA Authorities*, Vol. VII, Tab 65). A search of the Canlii database shows that this Court alone has cited the *Covenant* in 29 other cases.

44. For sixty years, Canada has been a signatory to the *Universal Declaration of Human Rights* (1948). Article 19 of the *Universal Declaration* provides that freedom of expression includes the ability "to seek, receive and impart information." In addition, consistent with the *Covenant* and the *Universal Declaration of Human Rights*, the United Nations has repeatedly viewed a right of access to information as part of freedom of expression. Similarly, other international organizations have recognized the right of access to information as an inherent component of freedom of expression.

Report of the Special Rapporteur, Mr. Abid Hussain, *Promotion and Protection of the Right to Freedom of Opinion and Expression,* UN ESC, 1994, UN Doc. E/CN.4/1995/32 (*CLA Authorities*, Vol. VIII, Tab 75).

Right to Freedom of Opinion and Expression, ESC Res. 1999/36, UN ESCOR, 1999, Supp. No. 3, UN Doc. E/CN.4/1999/167, 134 (*CLA Authorities*, Vol. VIII, Tab 76).

Report of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression, Mr. Abid Hussain, UN ESC, 1999, UN Doc. E/CN.4/1999/64 (*CLA Authorities*, Vol. VIII, Tab 77).

U.N. General Assembly's Resolution 59(1) (December 12, 1946): "Freedom of information is a fundamental human right and… the touchstone of all the freedoms to which the U.N. is consecrated."

Organization of American States, *American Convention on Human Rights*, art. 13. See also *Claude Reyes and Others v. Chile*, 19 Sept. 1996, (Inter-American Court of Human Rights) (imposition on Chile of a positive obligation to supply information under art. 13 of the *OAS Convention*) (*CLA Authorities*, Vol. VIII, Tab 78).

See also Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2d ed. (UNESCO, 2008), at 9-11 (*CLA Authorities*, Vol. V, Tab 45). This survey cites many more international declarations, resolutions and instruments that expressly provide that a right of access to information is a component of freedom of expression.

### (b) Other nations' law

45. The Appellants warn (at paras. 1, 2 and 3(a)) that the recognition of a right of access to government information in s. 2(b) is a "profound departure" from existing principles, an "entirely new and distinct right," and a "significant and unwarranted expansion" of the constitutional guarantee of freedom of expression. The CLA disagrees. This is well-established, uncontroversial law in many countries.

46. In the courts below, the CLA offered many decisions of foreign courts. Many of these, including the Supreme Court of the world's largest democracy, India, have found that their written guarantees of freedom of expression also contain a component right – the right of access to information. In many other foreign courts, a significant number of dissenting judges agree, and they might soon carry the day in their courts. All who find the right of access to information to be a component of freedom of expression employ the "purposive approach" to constitutional interpretation. Most rely on the *Covenant*, which their governments, like ours, have ratified. Canada should not be behind these countries in this area of human rights development. Instead, Canada should be in the vanguard.

See generally, Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2d ed. (UNESCO, 2008) (*CLA Authorities*, Vol. V, Tab 45).

*S.P. Gupta v. President of India and Ors*, [1982] A.I.R. (S.C.) 149 (India S.C.) at paras. 60, 63, 65-67, 72-74 (*CLA Authorities*, Vol. IX, Tab 87). Recognizing a "right to know which seems implicit in the right of free speech and expression," the Supreme Court of India stated (at 232) that "[w]here a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. …. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government.… The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic state."

*Hakata Railway Station*, case no. 1969(shi) No. 68, Supreme Court of Japan (November 26, 1969) (*CLA Authorities*, Vol. III, Tab 27): freedom of news gathering (a particular form of access to government information) is an integral part of freedom of expression under Article 21 of the Japanese Constitution.

*Fernando v. The Sri Lanka Broadcasting Corp.*, no. 81/95 (Sri Lanka S.C.) (*CLA Authorities*, Vol. II, Tab 17): right to receive information upheld as part of the freedom of expression guarantee.

*Joseph Perera v. A.G.* (1992), 1 Sri. L.R. 199 (Sri Lanka S.C.) (*CLA Authorities*, Vol. IV, Tab 36): "Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses but in the liberty of the public to hear and read what it needs."

*"Kol Ha'am" Co. Ltd. v. Ministry of the Interior*, H.C.J. 73/53 and 87/53 (Israel S.C. sitting as H.C.J.) (*CLA Authorities*, Vol. IV, Tab 39).

*On the compliance of Articles 5 and 10 of the Law of the Republic of Lithuania*, Constitutional Court of the Republic of Lithuania (December 19, 1996) (*CLA Authorities*, Vol. VI, Tab 54): access to information "eliminates ignorance [and]… makes human behaviour meaningful." (The Lithuanian Constitution does contain a specific provision guaranteeing access to information as part of its freedom of expression guarantee, but the reasoning of the Constitutional Court demonstrates the necessary linkage between the two.).

*State of U.P. v. Raj Naravan & others* (1975), 4 SCC 428 at para. 74 (*CLA Authorities*, Vol. IX, Tab 88), cited in *Mittal v. State of Rajasthan* (October 20, 2004) (High Court of Judicature for Rajasthan) (*CLA Authorities*, Vol. V, Tab 46): "The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public scrutiny. To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired."

*People's Union for Civil Liberties v. U.O.I.*, January 6, 2004 (India H.C.J.) (*CLA Authorities*, Vol. VI, Tab 56) and *Union of India v. Association For Democratic Reforms*, May 2, 2002 (India S.C.) (*CLA Authorities*, Vol. IX, Tab 92).

*Forests Survey Inspection Request case*, 1 KCCR 176, 88Hun-Ma22, September 4, 1989 (South Korea Constitutional Court) (*CLA Authorities*, Vol. II, Tab 19): a right of access to information is a fundamental right implicit in the written guarantee of freedom of expression found in the Constitution of South Korea.

*Casas Cordero et al. v. The National Customs Service*, August 9, 2007 (Constitutional Court of Chile), accessible only in Spanish at

http://www.elaw.org/system/files/CorderovNationalCustomsService%28FOIA%29.doc and mentioned in Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2d ed. (UNESCO, 2008) (*CLA Authorities*, Vol. V, Tab 45), at 21. (Court struck down a statutory provision that granted officials excessive discretion to withhold information without looking at the public interest.)

In Europe, the proposition that there is a broad "right to know" or right of access to government information within the freedom of expression guarantee has received substantial support. Interestingly, while majorities of the European Court of Justice have rejected the proposition, they have invoked other rights to grant access to information: *Guerra v. Italy* (1998), 26 E.H.R.R. 357 (*CLA Authorities*, Vol. III, Tab 24) (20 justices of the European Court of Human Rights relied upon Article 8 [respect for family life] of the *European Convention on Human Rights*, while 8 justices also relied upon the guarantee of freedom of expression, Article 10); *Netherlands v. Council*, C-58/94, [1996] E.C.R. I-2169 at paras. 33-36 (*CLA Authorities*, Vol. V, Tab 49) (see also the observations of the Advocate General at paras. 6, 16 and 19). Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2d ed. (UNESCO, 2008) (*CLA Authorities*, Vol. V, Tab 45), at 16 notes, citing *Sdruženi JihoÐeské Matky v. Czech Republic*, Decision of 10 July 2006, Application No. 19101/03, that the position under Article 10 of the *European Convention on Human Rights* may be changing toward recognition of a right of access to information.

47. The United States, in ruling that criminal courts must be open, has held that persons have a right to receive information under the First Amendment guarantee of freedom of expression, even from an unwilling speaker. In other Supreme Court cases, the proposition that there is a broad "right to know" or right of access to government information has received substantial support.

*Richmond Newspapers Inc. v. Virginia* (1980), 448 U.S. 555 (*CLA Authorities*, Vol. VIII, Tab 79). See discussion of why *Richmond* is such an important and necessary development in Eugene Cerruti, "Dancing in the Courthouse: The First Amendment Right of Access Opens a New Round" (1994-5), 29 U. Rich. L. Rev. 238 (*CLA Authorities*, Vol. IX, Tab 96). Cerruti notes that this is the first time that the Supreme Court has used the First Amendment to order disclosure from those unwilling to disclose, thereby recognizing a "right to know."

*Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (*CLA Authorities*, Vol. III, Tab 23). The Court noted (at 243) that the First Amendment enshrines the "natural right of the members of an organized society, united for their common good, to impart and *acquire* information about their common interests" [our emphasis]. The First Amendment developed in part because of opposition in the colonies to the purpose of the newspaper licensing and tax acts in England, which was "to prevent, or curtail the opportunity for, the acquisition of knowledge by

the people in respect of their governmental affairs" (at 247). The Court observed that the "aim of the struggle was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government. In the ultimate, an informed and enlightened public opinion was the thing at stake…" (at 247).

*Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (*CLA Authorities*, Vol. III, Tab 32) (3 of 7 justices find that access to information is an aspect of the First Amendment guarantee of freedom of speech; only 3 of 7 are prepared to hold that under no circumstances does the First Amendment include an "access to information" element).

Heidi Kitrosser, "Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State" (2004), 39 Harv. C.R.-C.L. L. Rev. 95 (*CLA Authorities*, Vol. IV, Tab 38).

David O'Brien, "The First Amendment and the Public's 'Right to Know'" (1979-1980), 7 Hastings L.Q. 579 (*CLA Authorities*, Vol. VI, Tab 52).

Mary-Rose Panandrea, "Under Attack: The Public's Right to Know and the War on Terror" (2005), 25 B.C. Third World L.J. 35 (*CLA Authorities*, Vol. VI, Tab 55).

### (c) Canadian jurisprudence

48. Canadian jurisprudence has evolved to the point where the recognition of a right of access to information as a component of the s. 2(b) freedom of expression is only a modest additional step, a natural development consistent with the purposive approach to constitutional interpretation:

(a) *Freedom of information cases*. This Court has already recognized the essential nature of access to information and its critical role in our democracy.

*Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (*CLA Authorities*, Vol. II, Tab 12): access to government information is fundamental and essential to our participation in both our government and our democracy. See further discussion of *Dagg* in paras. 50-51, below.

(b) *Democratic governance cases*. Freedom of expression has long been viewed as essential to citizen participation in a democracy. Further, this Court has repeatedly swept aside obstacles that inhibit direct citizen participation in their government, strongly affirming Canadians' ability to make decisions and choices concerning their government and how they are governed.

> *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912 at paras. 26 and 28 (*CLA Authorities*, Vol. II, Tab 18): "[T]he right of each citizen to participate in the political life of the country is one that is of fundamental importance in a free and democratic society…. Put simply, full political debate ensures that ours is an open society with the benefit of a broad range of ideas and opinions: see *Switzman v. Elbling*, [1957] S.C.R. 285 at 326; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 583; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1336; and *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 23. This, in turn, ensures not only that policy makers are aware of a broad range of options, but also that the determination of social policy is sensitive to the needs and interests of a broad range of citizens."
>
> *Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995 at 1031 (*CLA Authorities*, Vol. III, Tab 26): "Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative."
>
> *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 (*CLA Authorities*, Vol. III, Tab 28); *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 (*CLA Authorities*, Vol. IV, Tab 41); *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (*CLA Authorities*, Vol. IX, Tab 90): the importance of citizens' access to information in order to make democratic choices and vote.
>
> *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 763-64 *per* Dickson C.J.C. (*CLA Authorities*, Vol. VI, Tab 62): "The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered

> options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity."

(c) *General dicta concerning s. 2(b).* The Supreme Court has observed that sometimes "a posture of restraint would not be enough, and positive governmental action might be required," action that might "take the form of…preventing certain conditions that muzzle expression, or *ensuring public access to certain kinds of information*" (emphasis added). In the case at bar, if the important purposes underlying s. 2(b) are to be fulfilled (*e.g.*, participation in social and political decision-making, and furthering the search for truth), a right of access to information must be recognized.

> *Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995 at 1039 (*CLA Authorities*, Vol. III, Tab 26).
>
> *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 (*CLA Authorities*, Vol. IX, Tab 94) (this Court has just redefined and narrowed the availability of the tort of defamation so that conditions conducive to free expression will exist).

(d) *Cases concerning access to public fora.* The Supreme Court has held that, in certain circumstances, people must be granted access to facilities in order to ensure that they are able to engage in expression. In the case at bar, a right of access to information is also necessary in order to engage in expression.

> *Committee for the Commonwealth of Canada* v. *Canada*, [1991] 1 S.C.R. 139 at 155-156, 170-172, 175, 181-182, 198 (*CLA Authorities*, Vol. I, Tab 10) (access to public property).
>
> *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 at 1096-1104 (*CLA Authorities*, Vol. VII, Tab 69) (access to public property).
>
> *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 (*CLA Authorities*, Vol. IX, Tab 91) (access to private property).

(e) *The "open courts" principle*. The Supreme Court, examining s. 2(b) of the *Charter*, has held that courts must be open to the public and that records placed before the courts must be accessible so that expression is facilitated. The reasoning is that courts and the justice system are institutions that are fundamental to a democracy, and they must be open so that citizens can engage in discussion concerning them, their proceedings, and specific matters they adjudicate. In the case at bar, s. 23 of the Act and the governmental assertions of secrecy have the effect of preventing any further discussion concerning the important issues surrounding the *Court and Monaghan* case and the problem of disclosure in criminal cases more generally.

> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at paras. 20-21, 23 (*CLA Authorities*, Vol. I, Tab 6): "Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place."
>
> *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3 at paras. 52-53 (*CLA Authorities*, Vol. VIII, Tab 80): ss. 51(2)(a) and 51(3) of the *Privacy Act*, which mandate *in camera* and *ex parte* hearings, offend s. 2(b) of the *Charter*.
>
> *Committee for the Commonwealth of Canada* v. *Canada*, [1991] 1 S.C.R. 139 at 172 (*CLA Authorities*, Vol. I, Tab 10).
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> *R.* v. *Kopyto* (1987), 24 O.A.C. 81 at 90 (C.A.) (*CLA Authorities*, Vol. VII, Tab 63), cited with approval in *Committee for the Commonwealth of Canada* v. *Canada*, [1991] 1 S.C.R. 139 at 182 (*CLA Authorities*, Vol. I, Tab 10).
>
> *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1326 at 1336 (*CLA Authorities*, Vol. II, Tab 14).

(f) *Secrecy cases*. There have been many cases where this Court has rejected claims of absolute secrecy and has required disclosure, subject to appropriate editing, so that person can pursue expressive activities, most often the activity of making

submissions. Even assertions of Crown privilege, solicitor-client privilege, and national security give way, in exceptional and absolutely necessary circumstances, so that other interests, often expressive interests, can be pursued. In the case at bar, in stark opposition to the thrust of all these cases, the Appellants claim absolute, all-encompassing secrecy.

> *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 (*CLA Authorities*, Vol. I, last half of Tab 9); *Canada (Justice) v. Khadr*, 2008 SCC 28 (*CLA Authorities*, Vol. I, Tab 5); *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (*CLA Authorities*, Vol. I, first half of Tab 9); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (*CLA Authorities*, Vol. IX, Tab 89) (right to disclosure of information in national security proceedings so that submissions [expressive activities], can be made).
>
> *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3 (*CLA Authorities*, Vol. VIII, Tab 80) (disclosure and openness in *Privacy Act* proceedings).
>
> *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3 at para. 28 (*CLA Authorities*, Vol. I, Tab 2) (the public interest in disclosure of documents covered by Crown privilege must be considered).
>
> *Solicitor General of Canada, et al. v. Royal Commission (Health Records)*, [1981] 2 S.C.R. 494 (*CLA Authorities*, Vol. IX, Tab 86) (disclosure of police informers can occur when disclosure of the informer's identity, in the trial of a defendant for a criminal offence, could help show the defendant was innocent).
>
> *Smallwood v. Sparling*, [1982] 2 S.C.R. 686 (*CLA Authorities*, Vol. VIII, Tab 84) and *Carey v. Ontario*, [1986] 2 S.C.R. 637 (*CLA Authorities*, Vol. I, Tab 7) (production of cabinet documents). See also *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia* (2002), 8 B.C.L.R. (4th) 281 (S.C.) for an example of disclosure of very sensitive documents, including Cabinet documents, for the purposes of permitting submissions (expression) to be made.
>
> *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32 (*CLA Authorities*, Vol. III, Tab 22); *Smith v. Jones*, [1999] 1 S.C.R. 455 (*CLA Authorities*, Vol. IX, Tab 85); *R. v. McClure*, [2001] 1 S.C.R. 445 (*CLA Authorities*, Vol. VII, Tab 64) (exceptions to solicitor-client privilege based on "absolute

necessity": innocence of the accused, criminal conversations and the public safety exception)

*R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (*CLA Authorities*, Vol. VII, Tab 68) and *R. v. Garofoli*, [1990] 2 S.C.R. 1421 (*CLA Authorities*, Vol. VI, Tab 61) (disclosure to accused persons: sensitive information may be edited).

*R. v. O'Connor*, [1995] 4 S.C.R. 411 (*CLA Authorities*, Vol. VII, Tab 66) (disclosure of the private counselling records of sexual assault complainants).

Gomery Commission, *Restoring Accountability – Recommendations*, v. 1, ch. 10 ("Transparency and Better Management"), at 183 (*CLA Authorities*, Vol. III, Tab 21) (in all cases, requested information should be disclosed unless it is established that disclosure would cause injury).

### (6) The unwritten constitutional principle of democracy

49. Our Constitution contains a series of unwritten principles that "constitute substantive limitations upon government action." These principles may be used by aggrieved parties to strike down contravening legislation, government action or decisions. This Court has emphasized that, while these principles are not necessarily found elsewhere in the written text of the Constitution, they are independent and actionable, and can buttress other sections of the *Charter*, affecting their interpretation. One recognized constitutional principle is the principle of democracy. Actionable in itself, it also buttresses the interpretation, set out above, of s. 2(b) of the *Charter*.

*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 54, 61-69 (*CLA Authorities*, Vol. VIII, Tab 74).

*Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505 (C.A.), especially at 116 (*CLA Authorities*, Vol. IV, Tab 40). ("The unwritten principles of the Constitution do have normative force.")

McLachlin C.J.C., "Unwritten Constitutional Principles: What is Going on?" (2005 Lord Cooke Lecture, Wellington, New Zealand, December 1, 2005) at p. 2 (*CLA Authorities*, Vol. IV, Tab 42): "[T]here exist fundamental norms of justice so basic that they form part of the legal structure of governance and must be

> upheld by the courts, whether or not they find expression in constitutional texts. And the idea is important, going to the core of governance and how we define the respective roles of Parliament, the executive and the judiciary."

50. The case of *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (*CLA Authorities*, Vol. II, Tab 12) recognizes that access to information is an integral and important part of democracy. The CLA submits that the principle of democracy requires that there be a right of access to information, subject to reasonable and necessary restrictions in the public interest. Suppose, for example, that Parliament passed a law that abolished *Hansard* and made all proceedings of the House of Commons and its committees *in camera*. In such a case, surely the principle of democracy would intervene to ensure openness.

> *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 *per* La Forest J. dissenting (the majority not disagreeing with this analysis) at 432-434 (*CLA Authorities*, Vol. II, Tab 12). Access to information has been called "the oxygen of democracy". It "helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry." It "allows people to scrutinize the actions of a government, and is the basis for proper, informed debate of those actions." If people "do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society."
>
> At para. 61 of *Dagg* (*CLA Authorities*, Vol. II, Tab 12), La Forest J. cites Donald C. Rowat, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479 at 480: "Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view."
>
> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 68 (*CLA Authorities*, Vol. VIII, Tab 74) ("a functioning democracy requires a continuous process of discussion").
>
> Gomery Commission, *Restoring Accountability – Recommendations*, v. 1, ch. 10 ("Transparency and Better Management"), at 179-85 (*CLA Authorities*, Vol. III, Tab 21): "An appropriate access to information regime is a key part of the transparency that is an essential element of modern public administration." Public access to the workings of government was termed "critical."

51. The Divisional Court rejected these submissions, suggesting without authority that the principle of democracy was entirely co-extensive with s. 2(b) of the *Charter*, did not go further, and was "redundant" (see para. 44). Although the Supreme Court of Canada expressly stated in the *Secession Reference* (at para. 64) that the democracy principle was "not simply concerned with the process of government," the Divisional Court held that it was "inclined" to accept the proposition that the democracy principle only concerned "matters relating to the proper functioning of responsible government" (see para. 42). Having defined the democracy principle in that way, the Divisional Court failed to ask the next question: is some access to government information an integral part of "the proper functioning of responsible government"? Justice La Forest in *Dagg* answered that question with a resounding "yes." Leading authorities around the world agree that a right of access to information is a key part of any concept of democracy.

> *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 *per* La Forest J. dissenting (the majority not disagreeing with this analysis) at 432-434 (*CLA Authorities*, Vol. II, Tab 12).
>
> *Richmond Newspapers Inc. v. Virginia* (1980), 448 U.S. 555 at 587-89 (*CLA Authorities*, Vol. VIII, Tab 79). (Brennan J., Marshall J. concurring, emphasized the role that access to information plays in a healthy, functioning democracy.)
>
> *Attorney-General v. Times Newspapers Ltd.*, [1974] A.C. 273 (H.L.) (*CLA Authorities*, Vol. I, Tab 1). (Lord Simon of Glaisdale observed that "[p]eople cannot adequately influence the [governmental] decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions.")
>
> *People's Union for Civil Liberties v. U.O.I.*, [2004] INSC 17, January 6, 2004 (Ind. H.C.J.) (*CLA Authorities*, Vol. VI, Tab 56). The Court observed that "[t]o ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the Government and the basis thereof. Democracy, therefore, expects openness and openness is a concomitant of a free society. Sunlight is the best disinfectant."
>
> *R.P. Limited v. Proprietors, Indian Express Newspapers, Bombay, Pvt. Ltd.* (1988), 4 SCC 592 at 613, cited in *Mittal v. State of Rajasthan* (October 20, 2004) (High Court of Judicature for Rajasthan) (*CLA Authorities*, Vol. V, Tab 46). The Indian Supreme Court "held that the right to know is a necessary ingredient of participatory democracy." It added that the right to hold an opinion includes a right to "sustain and nurture that opinion" and to do that, access to information is required.

*On the compliance of Articles 5 and 10 of the Law of the Republic of Lithuania*, Constitutional Court of the Republic of Lithuania (December 19, 1996) (*CLA Authorities*, Vol. VI, Tab 54). The Constitutional Court stated: "The implementation of human rights and freedoms is directly linked with the individual's opportunity to obtain information from various sources and make use of it. This is one of pluralistic democracy's achievements ensuring the progress of society."

*Hakata Railway Station*, case no. 1969(shi) No. 68, Supreme Court of Japan (November 26, 1969) (*CLA Authorities*, Vol. III, Tab 27). The Supreme Court of Japan observed that in Japan's "democratic society" news reports offer "important materials for the people to make their judgments in participating in the government and make a contribution to the realization of their 'right to know information'."

*"Kol Ha'am" Co. Ltd. v. Ministry of the Interior*, H.C.J. 73/53 and 87/53 (Israel S.C. sitting as H.C.J.) (*CLA Authorities*, Vol. IV, Tab 39). The Supreme Court of Israel engaged in a very rich discussion of the role of access to information and freedom of expression in a democracy.

*Shalit v. Peres*, H.C.J 1601/90, H.C.J 1602/90, H.C.J 1603/90, H.C.J 1604/90 (Israel S.C.) *per* Shamgar P. at para. 5 (*CLA Authorities*, Vol. VIII, Tab 82): The sharing of information with the public is "an integral part of a democratic regime" and "[p]ublic scrutiny is not only an expression of the right to know, but it is also an expression of the right to control."

See also *Shalit v. Peres*, H.C.J 1601/90, H.C.J 1602/90, H.C.J 1603/90, H.C.J 1604/90 (Israel S.C.) *per* Barak J. at paras. 4-7 (*CLA Authorities*, Vol. VIII, Tab 82) (discussion of the role of access to information in a democracy and the need for a balance between disclosure and secrecy) and at para. 2 citing *Shiran v. Broadcasting Authority*, 41(3) P.D. 255, H.C. 1/81: "The system of democratic government draws sustenance from – and is even dependent on – a free flow of information, to and from the public, regarding prominent matters which affect the lives of people in general and of the individual in particular."

### (7) Summary: the application of these principles to this case

52. In this case, s. 23 of the Act and the Appellants' assertions of secrecy all prevent any access to information concerning a matter quite central to our democracy: the functioning of the justice system.

53. The CLA wishes to engage in thought, study, opinion, and expression concerning the subject-matters set out in paragraphs 8 and 9, above. This is "expression" under s. 2(b) of the *Charter*. The Divisional Court held (as the Information and Privacy Commissioner held) that "[t]he expressive activity at issue here is the CLA's desire to comment publicly on the *Court and Monaghan* affair, the OPP investigation into it, and the discrepancies between the short OPP conclusion and the detailed indictment of the police and Crown officials by Justice Glithero: the CLA also wishes to make suggestions and recommendations about how such problems may be avoided in the future." In its view, "[t]hat type of expressive activity is unquestionably '[an attempt] to convey meaning'." These are findings of mixed fact and law to which deference should be accorded. The majority of the Court of Appeal for Ontario was also correct in finding that the CLA was engaged in "expression" within the meaning of s. 2(b) of the *Charter*.

*Order PO-1779*, pp. 14-15; *Appellants' Record*, pp. 17-18.

*Reasons for Judgment of the Divisional Court*, paras. 53-56; *Appellants' Record*, pp. 103-104.

*Reasons for Judgment of the Court of Appeal* (majority), paras. 28-30; *Appellants' Record*, 132-133.

*Irwin Toy v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 967-971 (*CLA Authorities*, Vol. IV, Tab 34).

*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (*CLA Authorities*, Vol. IV, Tab 33).

*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 (*CLA Authorities*, Vol. III, Tab 25).

54. Once the CLA's "expression" in this case is properly characterized, it becomes apparent that the CLA is not seeking a "platform" for expression or any positive state action to facilitate expression. This is not a case where the CLA is seeking a bare right to government disclosure to "fuel…expressive activity" as the Divisional Court put it (at para. 56). Nor, contrary to the Divisional Court's suggestion, is this a case like *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 (*CLA Authorities*, Vol. V, Tab 48), in which the claimants sought an unqualified right to government funding in order to participate in discussions with the federal government regarding constitutional reform. This is also not a situation where the CLA is able to speak out on an issue and seeks government assistance to speak more or louder. Rather, as the

majority of the Court of Appeal for Ontario found, this is a situation where, unless further information is forthcoming, the CLA will *not* be able to discuss the differences between the OPP report and the judgment of Justice Glithero, nor discuss, study, or think about the issues identified in paragraphs 8 and 9, above.

55. Under s. 10 of the Act, the CLA is permitted disclosure of information that it requires in order to comment on an important public issue. But an underinclusive provision, s. 23, prevents that disclosure. Section 23 means that documents that are subject to the solicitor-client and law enforcement exceptions will *always* be secret, even in cases where the disclosure interests are extreme, the confidentiality interests are trifling, and the need for public discussion is sky-high. That may be the case here, where the Assistant Information and Privacy Commissioner has already used the s. 23 public interest override to oust the personal privacy exemption under s. 21. The imposition of blanket secrecy in this case stops the CLA's freedom of expression and public discussion of the matters in paragraphs 8 and 9, above.

> *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at para. 104 (*CLA Authorities*, Vol. I, Tab 8) (when government sets up rights within a statutory regime, it can derogate from those rights only in accordance with the *Charter*).

**B. The CLA's position also satisfies the *Baier* positive rights test under s. 2(b)**

56. The Appellants submit that the test for "positive rights" under s. 2(b), as explained in *Baier v. Alberta*, [2007] 2 S.C.R. 673 at para. 30 (*CLA Authorities*, Vol. I, Tab 3), must be followed in this case. But *Baier* is a different case. *Baier* is about an individual who was seeking the ability to be elected to a government position, namely a trusteeship on a school board. She could express herself on educational issues as much as any other person, but she claimed a right to a facility – a government position – in order to speak more effectively. She was claiming a positive right to a platform in which to engage in expression.

57. The CLA claims that its right of access to government information under s. 2(b) of the *Charter* has been infringed by s. 23 of the Act, and by the Appellants' assertions of secrecy. As noted in paras. 54-55, above, this is not a claim for a right to a facility, a position or a platform in

order to speak more effectively. Rather, it is a claim that an existing right has been infringed. Unless that right is vindicated, there will be no expression on the important issues set out in paragraphs 8 and 9, above.

58. Nevertheless, as the Information and Privacy Commissioner also submits in its factum, the CLA's claim satisfies the test for recognition of "positive rights" in *Baier* (at para. 30):

- As explained in paras. 30-51, above, the CLA's claim is grounded in a fundamental freedom of expression and an unwritten constitutional principle, and not just in access to a particular statutory regime.

- As mentioned in paras. 14 and 52-55, above, s. 23 of the Act and further non-disclosure of the requested information will mean that there will be no discussion or expression about the important subject-matters in paragraphs 8 and 9, above. This constitutes substantial interference with the s. 2(b) freedom.

- Finally, the government, by designing s. 23 of the Act in an underinclusive way and in asserting secrecy over the requested information, is responsible for the CLA's inability to express itself on the important subject-matters in paragraphs 8 and 9, above.

## C. Section 1 justification

59. As discussed in para. 18, above, the Appellants have failed to adduce any s. 1 evidence. Other Canadian jurisdictions permit the disclosure of documents covered by the solicitor-client privilege and law enforcement exemptions where the interest in disclosure is compelling and "clearly outweighs" the interests in confidentiality. Ontario, itself, allows for the disclosure of such documents under s. 11(1) where the head of a government institution has reasonable and probable grounds to believe that it is in the public interest to disclose a record that reveals a

grave environmental, health or safety hazard. There is not a scintilla of evidence in this record to show that there are problems in any of these other jurisdictions, or in Ontario.

60. In conducting the s. 1 analysis, one must properly characterize the *Charter* right being asserted. The *Charter* right being asserted is a right of access to government information on a particular subject-matter, where such access is absolutely necessary in order to engage in any meaningful discussion on that subject-matter. This right can be limited or qualified in a particular case by competing considerations. Ontario's Act, quite properly and, it is submitted, constitutionally, limits the exercise of this right in a well-tailored way. It provides for access to information in s. 10, requires government to excise only the information necessary for confidentiality in s. 10(2), makes access to information subject to exceptions in ss. 11-22, and provides for a public interest override of some of these exemptions in s. 23. The CLA submits that the high test specified under s. 23 – that an exemption can be overridden where the interests in disclosure are compelling and clearly outweigh the interests in confidentiality – is a constitutionally-valid test that appropriately balances the competing interests. As *Irwin Toy* tells us, the Legislature is entitled to a measure of deference as it seeks to balance, mediate, and compromise the competing interests at stake.

61. However, s. 23, as drafted, goes way too far, unnecessarily. Section 23 permits complete secrecy over documents covered by the solicitor and client privilege and law enforcement exemptions even where the interests in confidentiality are non-existent or trifling, but the interests in disclosure and free expression on a topic of public importance are overwhelming. The total exclusion of law enforcement and solicitor-client privileged documents from the appropriate balancing of interests under s. 23 of the Act is nothing more than an unjustified assertion of secrecy over these documents, for nothing more than secrecy's sake, at the expense of important, meaningful discussion on issues of great public interest. This legislative design of s. 23 infringes s. 2(b) of the *Charter* in an unjustified way. In a democracy, no one in government should be able to pull curtains of secrecy around matters which can be revealed without injury to the public interest.

> See Gomery Commission, *Restoring Accountability – Recommendations*, v. 1, ch. 10 ("Transparency and Better Management"), at 183 (*CLA Authorities*, Vol. III, Tab 21). The Gomery Commission, on the recommendation of the Canadian

> Information Commissioner, favoured the abandonment of the current approach, evident in Ontario's Act, which exempts whole categories of information from access. It favoured, instead, an "injury" approach where only documents whose disclosure would be "injurious" could be kept confidential. It advocated this even for law enforcement reports.

62. The CLA's submissions do not threaten to expose all matters covered by law enforcement investigations and solicitor-client privilege. Far from it. The CLA does not take issue with the standard in s. 23 that there be a "compelling public interest" that "clearly outweighs the purpose of the exemption". The CLA's submissions only require that the public interest in favour of disclosure *be considered and assessed*, and not completely disregarded as s. 23 currently dictates. This is not new law: as noted in para. 48(f), above, this Court has consistently required that there be a balancing of interests and an evaluation of the public interest when assessing assertions of secrecy.

63. In a given case, it would be relatively rare that the public interest in accessing information covered by law enforcement or solicitor-client privilege would be so great that it "clearly outweighs" the important interests favouring non-accessibility. That seems to be the situation concerning the comparable public interest override provisions in British Columbia, Alberta and Nova Scotia, where there have been no cases on point.

## D. Remedy

64. The CLA submits that s. 23 of the Act would be consistent with s. 2(b) of the *Charter* and the principle of democracy if s. 14 (the law enforcement exemption) and s. 19 (the solicitor-client privilege exemption) were added to the exemptions set out in s. 23 (or were "read into" s. 23). This would make the public interest override in that section available in the case of ss. 14 and 19 exemptions.

65. Reading-in is used as a remedy when it is consistent with legislative intent. In this case, it must be asked whether the legislature would prefer that s. 23 be struck, with the result that

there would be no public interest override for any exemptions, or whether ss. 14 and 19 should be read into s. 23. The latter is the less intrusive option and, therefore, the most appropriate remedy. Along with reading ss. 14 and 19 into s. 23, this Court should order that the matter be remitted back to the Information and Privacy Commissioner to consider whether the public interest override ought to apply and the requested records be released, if necessary with appropriate severance of confidential material (as required by s. 10(2) of the Act).

> *Schachter v. Canada*, [1992] 2 S.C.R. 679 (*CLA Authorities*, Vol. VIII, Tab 81) (description of reading-in remedy).
>
> *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 (*CLA Authorities*, Vol. II, Tab 13) (remedies like reading-in should vindicate the right in question while burdening government as little as necessary).
>
> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (*CLA Authorities*, Vol. IX, Tab 93) (example of reading-in, rather than striking down the constitutionally-underinclusive section).

## PART IV – SUBMISSIONS ON COSTS

66. In the courts below, the parties have agreed that there shall be no costs. The Appellants submit there should be no costs in this Court. The CLA agrees.

## PART V – ORDER SOUGHT

67. The CLA respectfully requests an order dismissing the appeal, without costs. The constitutional questions should be answered as follows:

> 1. Does s. 23 of the *Freedom of Information and Protection of Privacy Act* infringe s. 2(b) of the *Charter* by failing to extend the public interest override to the exemptions found in s. 14 and 19 of the Act? – Yes.

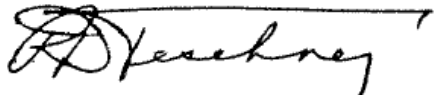
2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1? – No.

3. Does s. 23 of the Freedom of Information and Protection of Privacy Act offend the constitutional principle of democracy? – Yes.

All of which is respectfully submitted, this 9th day of July, 2008,

David Stratas

Brad Elberg



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Counsel wish to acknowledge, with thanks, the assistance of Jon Smithen, Andrew Bourns and Ilana Bleichert in the research and preparation of this factum.

## PART VI – TABLE OF AUTHORITIES

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***Canadian Charter of Rights and Freedoms*, ss. 1, 2, 24 /**
***Charte canadienne des droits et libertés*, arts. 1, 2, 24:**

*Guarantee of Rights and Freedoms*

**1.** The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

*Garantie des droits et libertés*

**1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

*Fundamental Freedoms*

**2.** Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication.

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

*Libertés fondamentales*

**2.** Chacun a les libertés fondamentales suivantes:

*a)* liberté de conscience et de religion;

*b)* liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

*c)* liberté de réunion pacifique;

*d)* liberté d'association.

*Enforcement*

**24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the

*Recours*

**24.** (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi,

circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

***Constitution Act, 1867*, (U.K.), 30 & 31 Victoria, c. 3, ss. 57, 133, 143 /**
***Loi constitutionnelle de 1867* (R.-U.), 30 & 31 Vict., c. 3:**

**57.** A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until, within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of Canada.

**57.** Un bill réservé à la signification du bon plaisir de la Reine n'aura ni force ni effet avant et à moins que dans les deux ans à compter du jour où il aura été présenté au gouverneur-général pour recevoir la sanction de la Reine, ce dernier ne signifie, par discours ou message, à chacune des deux chambres du parlement, ou par proclamation, qu'il a reçu la sanction de la Reine en conseil.

Ces discours, messages ou proclamations, seront consignés dans les journaux de chaque chambre, et un double dûment certifié en sera délivré à l'officier qu'il appartient pour qu'il le dépose parmi les archives du Canada.

**133.** Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

**133.** Dans les chambres du parlement du Canada et les chambres de la législature de Québec, l'usage de la langue française ou de la langue anglaise, dans les débats, sera facultatif; mais dans la rédaction des archives, procès-verbaux et journaux respectifs de ces chambres, l'usage de ces deux langues sera obligatoire; et dans toute plaidoirie ou pièce de procédure par-devant les tribunaux ou émanant des tribunaux du Canada qui seront établis sous l'autorité de la présente loi, et par-devant tous les tribunaux ou émanant des tribunaux de Québec, il pourra être fait également usage, à faculté, de l'une ou de l'autre de ces langues.

Les lois du parlement du Canada et de la législature de Québec devront être imprimées et publiées dans ces deux langues.

**143.** The Governor General in Council may from Time to Time order that such and so many of the Records, Books, and Documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the Property of that Province; and any Copy thereof or Extract therefrom, duly certified by the Officer having charge of the Original thereof, shall be admitted as Evidence.

**143.** Le gouverneur-général en conseil pourra de temps à autre ordonner que les archives, livres et documents de la province du Canada qu'il jugera à propos de désigner, soient remis et transférés à Ontario ou à Québec, et ils deviendront dès lors la propriété de cette province; toute copie ou extrait de ces documents, dûment certifiée par l'officier ayant la garde des originaux, sera reçue comme preuve.

***Constitution Act, 1982*, s. 52(1) / *Loi Constitutionnelle de 1982*, art. 52(1) :**

**52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

**52.** (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

***Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 / *Accès à l'information et la protection de la vie privée (Loi sur l')*, L.R.O. 1990, c. F.31:**

*Purposes*

**1.** The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

*Objets*

**1.** La présente loi a pour objets :

a) de procurer un droit d'accès à l'information régie par une institution conformément aux principes suivants :

(i) l'information doit être accessible au public,

(ii) les exceptions au droit d'accès doivent être limitées et précises,

(iii) les décisions relatives à la divulgation de l'information ayant trait au gouvernement devraient faire l'objet d'un examen indépendant du gouvernement;

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information. R.S.O. 1990, c. F.31, s. 1.

*Definitions*

**2.** (1) In this Act,

"close relative" means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption; ("proche parent")

"educational institution" means an institution that is a college of applied arts and technology or a university; ("établissement d'enseignement")

"head", in respect of an institution, means,

(0.a) in the case of the Assembly, the Speaker,

(a) in the case of a ministry, the minister of the Crown who presides over the ministry, and

(b) in the case of any other institution, the person designated as head of that institution in the regulations; ("personne responsable")

"Information and Privacy Commissioner" and "Commissioner" mean the Commissioner appointed under subsection 4 (1); ("commissaire à l'information et à la protection de la vie privée", "commissaire")

"institution" means,

(0.a) the Assembly,

(a) a ministry of the Government of Ontario,

(a.1) a service provider organization within the meaning of section 17.1 of the *Ministry of*

b) de protéger la vie privée des particuliers que concernent les renseignements personnels détenus par une institution et accorder à ces particuliers un droit d'accès à ces renseignements. L.R.O. 1990, chap. F.31, art. 1.

*Définitions*

**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.

«banque de renseignements personnels» Ensemble de renseignements personnels systématisés et susceptibles de récupération d'après le nom d'un particulier, d'après un numéro d'identification ou un signe individuel qui lui est attribué. («personal information bank»)

«commissaire à l'information et à la protection de la vie privée» et «commissaire» Le commissaire nommé en vertu du paragraphe 4 (1). («Information and Privacy Commissioner», «Commissioner»)

«conjoint» S'entend :

a) soit d'un conjoint au sens de l'article 1 de la *Loi sur le droit de la famille*;

b) soit de l'une ou de l'autre de deux personnes qui vivent ensemble dans une union conjugale hors du mariage. («spouse»)

«document» Document qui reproduit des renseignements sans égard à leur mode de transcription, que ce soit sous forme imprimée, sur film, au moyen de dispositifs électroniques ou autrement. S'entend en outre :

a) de la correspondance, des notes, livres, plans, cartes, dessins, diagrammes, illustrations ou graphiques, photographies, films, microfilms, enregistrements sonores, bandes magnétoscopiques, documents lisibles par

*Government Services Act*, and

(b) any agency, board, commission, corporation or other body designated as an institution in the regulations; ("institution")

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b); ("exécution de la loi")

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to

machine, de tout autre matériel documentaire sans égard à leur forme ou à leurs caractéristiques et de toute reproduction de ces éléments d'information;

b) sous réserve des règlements, du document qui n'a pas pris forme mais qui peut être constitué au moyen de matériel et de logiciel informatiques ou d'autre matériel de stockage de données, ainsi que des connaissances techniques normalement utilisés par une institution, à partir de documents lisibles par machine que celle-ci a en sa possession. («record»)

«établissement d'enseignement» Institution qui est un collège d'arts appliqués et de technologie ou une université. («educational institution»)

«exécution de la loi» S'entend, selon le cas :

a) du maintien de l'ordre;

b) des enquêtes ou inspections qui aboutissent ou peuvent aboutir à des instances devant les tribunaux judiciaires ou administratifs, si ceux-ci peuvent imposer une peine ou une sanction à l'issue de ces instances;

c) du déroulement des instances visées à l'alinéa b). («law enforcement»)

«institution» :

0.a) l'Assemblée;

a) un ministère du gouvernement de l'Ontario;
a.1) une organisation de prestation de services au sens de l'article 17.1 de la *Loi sur le ministère des Services gouvernementaux*;

b) un organisme, un conseil, une commission, une personne morale ou une autre entité désignés comme institution dans les règlements. («institution»)

that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual; ("renseignements personnels")

"personal information bank" means a collection of personal information that is organized and capable of being retrieved using an individual's name or an identifying number or particular assigned to the individual; ("banque de renseignements personnels")

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

(a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and

(b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution; ("document")

"regulations" means the regulations made under this Act; ("règlements")

"responsible minister" means the minister of the Crown who is designated by order of the

«ministre responsable» Le ministre de la Couronne nommé par décret du lieutenant-gouverneur en conseil aux termes de l'article 3. («responsible minister»)

«personne responsable» À l'égard d'une institution, s'entend :

0.a) du président, dans le cas de l'Assemblée;
a) du ministre de la Couronne qui le dirige, dans le cas d'un ministère;

b) de la personne désignée dans les règlements comme personne responsable, dans le cas d'une autre institution. («head»)
«proche parent» Le père ou la mère, un enfant, un grand-parent, un petit-enfant, un frère, une soeur, un oncle, une tante, un neveu ou une nièce, qu'ils soient liés par le sang ou l'adoption. («close relative»)

«règlements» Les règlements pris en application de la présente loi. («regulations»)
«renseignements personnels» Renseignements consignés ayant trait à un particulier qui peut être identifié. S'entend notamment :

a) des renseignements concernant la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial ou familial de celui-ci;

b) des renseignements concernant l'éducation, les antécédents médicaux, psychiatriques, psychologiques, criminels ou professionnels de ce particulier ou des renseignements reliés à sa participation à une opération financière;

c) d'un numéro d'identification, d'un symbole ou d'un autre signe individuel qui lui est attribué;

d) de l'adresse, du numéro de téléphone, des empreintes digitales ou du groupe sanguin de ce particulier;

Lieutenant Governor in Council under section 3; (“ministre responsable”)

“spouse” means,

(a) a spouse as defined in section 1 of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage. (“conjoint”) R.S.O. 1990, c. F.31, s. 2 (1); 2002, c. 34, Sched. B, s. 3; 2005, c. 28, Sched. F, s. 1 (1, 3); 2006, c. 19, Sched. N, s. 1 (1); 2006, c. 34, Sched. C, s. 1; 2006, c. 34, Sched. F, s. 1 (1).

e) de ses opinions ou de ses points de vue personnels, sauf s’ils se rapportent à un autre particulier;

f) de la correspondance ayant explicitement ou implicitement un caractère personnel et confidentiel, adressée par le particulier à une institution, ainsi que des réponses à cette correspondance originale susceptibles d’en révéler le contenu;

g) des opinions et des points de vue d’une autre personne au sujet de ce particulier;

h) du nom du particulier, s’il figure parmi d’autres renseignements personnels qui le concernent, ou si sa divulgation risque de révéler d’autres renseignements personnels au sujet du particulier. («personal information») L.R.O. 1990, chap. F.31, par. 2 (1); 2002, chap. 34, annexe B, art. 3; 2005, chap. 28, annexe F, par. 1 (1) et (3); 2006, chap. 19, annexe N, par. 1 (1); 2006, chap. 34, annexe C, par. 1 (1) et (2); 2006, chap. 34, annexe F, par. 1 (1).

*Personal information*

(2) Personal information does not include information about an individual who has been dead for more than thirty years. R.S.O. 1990, c. F.31, s. 2 (2).

*Renseignements personnels*

(2) Les renseignements personnels excluent ceux qui concernent un particulier décédé depuis plus de trente ans. L.R.O. 1990, chap. F.31, par. 2 (2).

*Business identity information, etc.*

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity. 2006, c. 34, Sched. C, s. 2.

*Renseignements sur l’identité professionnelle*

(3) Les renseignements personnels excluent le nom, le titre, les coordonnées et la désignation d’un particulier qui servent à l’identifier par rapport à ses activités commerciales ou à ses attributions professionnelles ou officielles. 2006, chap. 34, annexe C, art. 2.

*Same*

(4) For greater certainty, subsection (3) applies

*Idem*

(4) Il est entendu que le paragraphe (3)

even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling. 2006, c. 34, Sched. C, s. 2.

s'applique même si le particulier exerce des activités commerciales ou des attributions professionnelles ou officielles depuis son logement et que ses coordonnées se rapportent à ce logement. 2006, chap. 34, annexe C, art. 2.

## PART II
## FREEDOM OF INFORMATION
### ACCESS TO RECORDS

## PARTIE II
## ACCÈS À L'INFORMATION
### ACCÈS AUX DOCUMENTS

*Right of access*

**10.** (1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. 1996, c. 1, Sched. K, s. 1.

*Droit d'accès*

**10.** (1) Chacun a un droit d'accès à un document ou une partie de celui-ci dont une institution a la garde ou le contrôle, sauf dans l'un ou l'autre des cas suivants :

a) le document ou la partie du document fait l'objet d'une exception aux termes des articles 12 à 22;

b) la personne responsable est d'avis, fondé sur des motifs raisonnables, que la demande d'accès est frivole ou vexatoire. 1996, chap. 1, annexe K, art. 1.

*Severability of record*

(2) If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. 1996, c. 1, Sched. K, s. 1.

*Extrait du document*

(2) Si une institution reçoit une demande d'accès à un document qui contient des renseignements faisant l'objet d'une exception aux termes des articles 12 à 22 et que la personne responsable de l'institution n'est pas d'avis que la demande est frivole ou vexatoire, elle divulgue la partie du document qui peut raisonnablement en être extraite sans divulguer ces renseignements. 1996, chap. 1, annexe K, art. 1.

*Obligation to disclose*

**11.** (1) Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and

*Obligation de divulguer un document*

**11.** (1) Malgré toute autre disposition de la présente loi, la personne responsable qui a des motifs raisonnables et probables de croire qu'il y va de l'intérêt public, divulgue au public ou

probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public. R.S.O. 1990, c. F.31, s. 11 (1).

aux personnes intéressées dans les meilleurs délais, compte tenu des circonstances, le document révélateur d'un grave danger pour la santé ou la sécurité du public ou pour l'environnement. L.R.O. 1990, chap. F.31, par. 11 (1).

*Notice*

(2) Before disclosing a record under subsection (1), the head shall cause notice to be given to any person to whom the information in the record relates, if it is practicable to do so. R.S.O. 1990, c. F.31, s. 11 (2).

*Avis*

(2) La personne responsable fait aviser dans la mesure du possible toutes les personnes concernées par les renseignements que contient le document visé au paragraphe (1) avant d'en divulguer la teneur. L.R.O. 1990, chap. F.31, par. 11 (2).

*Contents of notice*

(3) The notice shall contain,

(a) a statement that the head intends to release a record or a part of a record that may affect the interests of the person;

(b) a description of the contents of the record or part that relate to the person; and

(c) a statement that if the person makes representations forthwith to the head as to why the record or part thereof should not be disclosed, those representations will be considered by the head. R.S.O. 1990, c. F.31, s. 11 (3).

*Teneur de l'avis*

(3) L'avis comporte :

a) une déclaration portant que la personne responsable a l'intention de communiquer la totalité ou une partie d'un document et que cette divulgation peut avoir une incidence sur les intérêts de la personne;

b) une description de la teneur du document ou de la partie du document qui concerne cette personne;

c) une déclaration portant que la personne responsable tiendra compte des observations que lui présentera sans délai cette personne, si cette dernière expose les motifs pour lesquels le document ne devrait pas être divulgué, même en partie. L.R.O. 1990, chap. F.31, par. 11 (3).

*Representations*

(4) A person who is given notice under subsection (2) may make representations forthwith to the head concerning why the record or part should not be disclosed. R.S.O.

*Observations*

(4) La personne qui reçoit l'avis visé au paragraphe (2) peut présenter sans délai à la personne responsable ses observations exposant les motifs pour lesquels ce document

1990, c. F.31, s. 11 (4).

EXEMPTIONS

*Cabinet records*

**12.** (1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

(f) draft legislation or regulations. R.S.O. 1990, c. F.31, s. 12 (1).

ne devrait pas être divulgué, même en partie. L.R.O. 1990, chap. F.31, par. 11 (4).

EXCEPTIONS

*Documents du Conseil exécutif*

**12.** (1) La personne responsable refuse de divulguer un document qui aurait pour effet de révéler l'objet des délibérations du Conseil exécutif ou de ses comités, notamment :

a) l'ordre du jour, le procès-verbal ou un autre relevé des délibérations ou des décisions du Conseil exécutif ou de ses comités;

b) le document qui relate un choix de politiques ou des recommandations qui ont été ou qui seront présentées au Conseil exécutif ou à ses comités;

c) le document qui ne relate pas le choix de politiques ou les recommandations visées à l'alinéa b) mais qui contient les données de base ou les études menées sur certaines questions qui ont été ou qui seront présentées au Conseil exécutif ou à ses comités comme guides dans l'élaboration de leurs décisions avant que ces décisions ne soient prises ou mises à effet;

d) le document consulté ou qui est le fruit d'une consultation entre ministres de la Couronne sur des questions reliées à l'élaboration de décisions gouvernementales ou à la formulation de politiques gouvernementales;

e) le document destiné à un ministre de la Couronne et qui concerne des questions qui ont été ou qui seront présentées au Conseil exécutif ou à ses comités ou qui font l'objet d'une consultation entre les ministres relativement aux décisions gouvernementales ou à la formulation des politiques gouvernementales;

f) les projets de loi ou de règlement. L.R.O. 1990, chap. F.31, par. 12 (1).

*Exception*

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

(a) the record is more than twenty years old; or

(b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given. R.S.O. 1990, c. F.31, s. 12 (2).

*Exception*

(2) Malgré le paragraphe (1), la personne responsable ne doit pas refuser de divulguer un document en vertu de ce paragraphe si, selon le cas :

a) le document date de plus de vingt ans;

b) le Conseil exécutif concerné donne son consentement à la divulgation. L.R.O. 1990, chap. F.31, par. 12 (2).

*Advice to government*

**13.** (1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution. R.S.O. 1990, c. F.31, s. 13 (1).

*Conseils au gouvernement*

**13.** (1) La personne responsable peut refuser de divulguer un document qui aurait pour effet de révéler les conseils ou les recommandations émanant d'un fonctionnaire, d'une personne employée par une institution ou d'un expert-conseil dont les services ont été retenus par cette institution. L.R.O. 1990, chap. F.31, par. 13 (1).

*Exception*

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

(b) a statistical survey;

(c) a report by a valuator, whether or not the valuator is an officer of the institution;

(d) an environmental impact statement or similar record;

(e) a report of a test carried out on a product for the purpose of government equipment

*Exceptions*

(2) Malgré le paragraphe (1), la personne responsable ne doit pas refuser, en vertu de ce paragraphe, de divulguer un document qui comporte l'un des éléments suivants :

a) de la documentation portant sur des faits;

b) un sondage statistique;

c) le rapport d'un estimateur, que ce dernier soit ou non un dirigeant de l'institution;

d) un rapport sur d'éventuelles répercussions sur l'environnement ou un document semblable;

testing or a consumer test report;

(f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

(g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;

(h) a report containing the results of field research undertaken before the formulation of a policy proposal;

(i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

(j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

(k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

(l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,

e) le rapport qui porte sur l'essai d'un produit relié à la mise à l'épreuve de pièces d'équipement appartenant au gouvernement ou le résultat d'un test mené à l'intention des consommateurs;

f) le rapport ou le résultat d'une étude relative au rendement ou à l'efficacité d'une institution, que ce rapport ou cette étude soient d'ordre général ou portent sur un programme ou une politique en particulier;

g) une étude de faisabilité ou autre étude technique, y compris une estimation des coûts, reliée à une politique ou à un projet gouvernementaux;

h) le rapport qui comporte les résultats d'une recherche effectuée sur le terrain préalablement à la formulation d'une politique proposée;

i) la proposition ou le plan définitifs en vue de la modification d'un programme existant ou de l'établissement d'un nouveau programme d'une institution, y compris son estimation budgétaire, que cette proposition ou ce plan soient subordonnés ou non à une approbation quelconque, sauf s'ils doivent être présentés au

Conseil exécutif ou à ses comités;

j) le rapport du groupe de travail d'un comité interministériel ou d'une entité semblable ou celui d'un comité ou d'un groupe de travail internes d'une institution chargés de dresser un rapport sur une question précise, sauf si ce rapport doit être présenté au Conseil exécutif ou à ses comités;

k) le rapport d'un comité, d'un conseil ou d'une autre entité liés à une institution et constitués dans le but de mener des enquêtes suivies de rapports ou de recommandations destinés à cette institution;

l) les motifs à l'appui de la décision, de

(i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or

(ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling. R.S.O. 1990, c. F.31, s. 13 (2).

l'arrêté, de l'ordonnance, de l'ordre ou de la directive définitifs du dirigeant d'une institution et rendus à la fin ou au cours de l'exercice d'un pouvoir discrétionnaire conféré par un texte législatif ou un projet mis en application par cette institution, ou en vertu de ceux-ci, qu'il soit permis ou non aux termes du texte législatif ou du projet d'interjeter appel de ces décisions, arrêtés, ordonnances, ordres ou directives. Ce qui précède s'applique, que ces motifs :

(i) figurent ou non dans une note de service qui émane de l'institution ou dans la lettre d'un dirigeant ou d'un employé de cette institution, destinée à une personne donnée,

(ii) aient été ou non exposés par le dirigeant qui a rendu cette décision ou directive ou cet ordre que ces motifs y soient incorporés par renvoi ou non. L.R.O. 1990, chap. F.31, par. 13 (2).

*Idem*

(3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy. R.S.O. 1990, c. F.31, s. 13 (3).

*Idem*

(3) Malgré le paragraphe (1), la personne responsable ne doit pas refuser, en vertu de ce paragraphe, de divulguer un document si le document date de plus de vingt ans ou si la personne responsable l'a publiquement cité comme ayant servi de fondement à une décision ou à la formulation d'une politique. L.R.O. 1990, chap. F.31, par. 13 (3).

*Law enforcement*

**14.** (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding

*Exécution de la Loi*

**14.** (1) La personne responsable peut refuser de divulguer un document s'il est raisonnable de s'attendre à ce que la divulgation ait pour effet, selon le cas :

a) de faire obstacle à une question qui concerne l'exécution de la loi;

or from which a law enforcement proceeding is likely to result;

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(f) deprive a person of the right to a fair trial or impartial adjudication;

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) jeopardize the security of a centre for lawful detention; or

(l) facilitate the commission of an unlawful act or hamper the control of crime. R.S.O. 1990, c. F.31, s. 14 (1); 2002, c. 18, Sched. K, s. 1 (1).

b) de faire obstacle à l'enquête menée préalablement à une instance judiciaire ou qui y aboutira vraisemblablement;

c) de révéler des techniques et procédés d'enquête qui sont présentement ou qui seront vraisemblablement en usage dans l'exécution de la loi;

d) de divulguer l'identité d'une source d'information confidentielle reliée à l'exécution de la loi ou de divulguer des renseignements obtenus uniquement de cette source;

e) de constituer une menace à la vie ou à la sécurité physique d'un agent d'exécution de la loi ou d'une autre personne;

f) de priver une personne de son droit à un procès équitable ou à un jugement impartial;

g) de faire obstacle à l'obtention de renseignements secrets reliés à l'exécution de la loi à l'égard de certaines organisations ou de certaines personnes ou de les révéler;

h) de révéler un document qui a été confisqué à une personne par un agent de la paix, conformément à une loi ou à un règlement;

i) de compromettre la sécurité d'un immeuble ou d'un véhicule servant au transport de certains articles ou au système ou mode de protection de ces articles, dont la protection est normalement exigée;

j) de faciliter l'évasion d'une personne légalement détenue;

k) de compromettre la sécurité d'un centre de détention légale;

l) de faciliter la perpétration d'un acte illégal ou d'entraver la répression du crime. L.R.O. 1990, chap. F.31, par. 14 (1); 2002, chap. 18,

annexe K, par. 1 (1).

*Idem*

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

(b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;

(c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or

(d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority. R.S.O. 1990, c. F.31, s. 14 (2); 2002, c. 18, Sched. K, s. 1 (2).

*Refusal to confirm or deny existence of record*

(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply. R.S.O. 1990, c. F.31, s. 14 (3).

*Exception*

(4) Despite clause (2) (a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate

*Idem*

(2) La personne responsable peut refuser de divulguer un document, selon le cas :

a) qui constitue un rapport dressé au cours de l'exécution de la loi, de l'inspection ou de l'enquête menées par un organisme chargé d'assurer et de réglementer l'observation de la loi;

b) qui est relié à l'exécution de la loi et dont la divulgation constituerait une infraction à une loi du Parlement;

c) qui est relié à l'exécution de la loi s'il est raisonnable de s'attendre à ce que la divulgation ait pour effet d'exposer à la responsabilité civile l'auteur du document ou la personne qui y est citée ou paraphrasée;

d) où figurent les renseignements reliés aux antécédents, à la surveillance ou à la mise en liberté d'une personne confiée au contrôle ou à la surveillance d'une administration correctionnelle. L.R.O. 1990, chap. F.31, par. 14 (2); 2002, chap. 18, annexe K, par. 1 (2).

*Refus de confirmer ou de nier l'existence d'un document*

(3) La personne responsable peut refuser de confirmer ou de nier l'existence du document visé au paragraphe (1) ou (2). L.R.O. 1990, chap. F.31, par. 14 (3).

*Exception*

(4) Malgré l'alinéa (2) a), la personne responsable divulgue le document qui constitue un rapport dressé dans le cadre d'inspections de routine effectuées par un organisme autorisé

compliance with a particular statute of Ontario. R.S.O. 1990, c. F.31, s. 14 (4).

*Idem*

(5) Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections. R.S.O. 1990, c. F.31, s. 14 (5).

*Civil Remedies Act, 2001*

**14.1** A head may refuse to disclose a record and may refuse to confirm or deny the existence of a record if disclosure of the record could reasonably be expected to interfere with the ability of the Attorney General to determine whether a proceeding should be commenced under the *Civil Remedies Act, 2001*, conduct a proceeding under that Act or enforce an order made under that Act. 2001, c. 28, s. 22 (1); 2002, c. 18, Sched. K, s. 2; 2007, c. 13, s. 43 (1).

*Prohibiting Profiting from Recounting Crimes Act, 2002*

**14.2** A head may refuse to disclose a record and may refuse to confirm or deny the existence of a record if disclosure of the record could reasonably be expected to interfere with the ability of the Attorney General to determine whether a proceeding should be commenced under the *Prohibiting Profiting from Recounting Crimes Act, 2002*, conduct a proceeding under that Act or enforce an order made under that Act. 2002, c. 2, ss. 15 (1), 19 (4); 2002, c. 18, Sched. K, s. 3.

à assurer et à réglementer l'observation d'une loi particulière de l'Ontario. L.R.O. 1990, chap. F.31, par. 14 (4).

*Idem*

(5) Les paragraphes (1) et (2) ne s'appliquent pas au document qui a trait au degré de succès atteint dans le cadre d'un programme d'exécution de la loi, y compris les analyses statistiques, sauf si la divulgation de ce document est susceptible de nuire, de faire obstacle ou de porter atteinte à la poursuite des objectifs visés à ces paragraphes. L.R.O. 1990, chap. F.31, par. 14 (5).

*Instances introduites en vertu de la Loi de 2001 sur les recours civils*

**14.1** La personne responsable peut refuser de divulguer un document et peut refuser de confirmer ou de nier l'existence d'un document s'il est raisonnable de s'attendre à ce que sa divulgation ait pour effet de faire obstacle à la capacité du procureur général de décider si une instance devrait être introduite en vertu de la *Loi de 2001 sur les recours civils*, de conduire une instance en vertu de cette loi ou d'exécuter une ordonnance rendue en application de cette loi. 2001, chap. 28, par. 22 (1); 2002, chap. 18, annexe K, art. 2; 2007, chap. 13, par. 43 (1).

*Loi de 2002 interdisant les gains tirés du récit d'actes criminels*

**14.2** La personne responsable peut refuser de divulguer un document et refuser de confirmer ou de nier l'existence d'un document s'il est raisonnable de s'attendre à ce que sa divulgation ait pour effet de faire obstacle à la capacité du procureur général de décider si une instance devrait être introduite en vertu de la *Loi de 2002 interdisant les gains tirés du récit d'actes criminels*, de conduire une instance en vertu de cette loi ou d'exécuter une ordonnance rendue en application de cette loi. 2002, chap.

2, par. 15 (1) et 19 (4); 2002, chap. 18, annexe K, art. 3.

*Relations with other governments*

**15.** A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

(b) reveal information received in confidence from another government or its agencies by an institution; or

(c) reveal information received in confidence from an international organization of states or a body thereof by an institution,
and shall not disclose any such record without the prior approval of the Executive Council. R.S.O. 1990, c. F.31, s. 15; 2002, c. 18, Sched. K, s. 4.

*Rapports avec d'autres autorités gouvernementales*

**15.** La personne responsable peut refuser de divulguer un document s'il est raisonnable de s'attendre à ce que la divulgation ait pour effet, selon le cas :

a) de nuire à la poursuite des rapports intergouvernementaux entretenus par le gouvernement de l'Ontario ou par une institution;

b) de révéler des renseignements confidentiels confiés à une institution par un autre gouvernement ou par l'un de ses organismes;

c) de révéler des renseignements confidentiels confiés à une institution par une organisation internationale d'États ou l'une de leurs entités.
La personne responsable ne doit pas divulguer ce document sans l'autorisation préalable du Conseil exécutif. L.R.O. 1990, chap. F.31, art. 15; 2002, chap. 18, annexe K, art. 4.

*Defence*

**16.** A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council. R.S.O. 1990, c. F.31, s. 16; 2002, c. 18, Sched. K, s. 5.

*Défense*

**16.** La personne responsable peut refuser de divulguer un document s'il est raisonnable de s'attendre à ce que la divulgation ait pour effet de nuire à la défense du Canada ou d'un État étranger qui est allié ou associé au Canada ou d'entraver la détection, la prévention ou la répression de l'espionnage, du sabotage ou du terrorisme. Elle ne doit pas divulguer ce document sans l'autorisation préalable du Conseil exécutif. L.R.O. 1990, chap. F.31, art. 16; 2002, chap. 18, annexe K, art. 5.

*Third party information*

**17.** (1) A head shall refuse to disclose a

*Renseignements de tiers*

**17.** (1) La personne responsable refuse de

record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute. R.S.O. 1990, c. F.31, s. 17 (1); 2002, c. 18, Sched. K, s. 6.

*Tax information*

(2) A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax. R.S.O. 1990, c. F.31, s. 17 (2).

*Consent to disclosure*

(3) A head may disclose a record described in subsection (1) or (2) if the person to whom the

divulguer un document qui révèle un secret industriel ou des renseignements d'ordre scientifique, technique, commercial, financier ou qui ont trait aux relations de travail, dont le caractère confidentiel est implicite ou explicite, s'il est raisonnable de s'attendre à ce que la divulgation ait pour effet, selon le cas :

a) de nuire gravement à la situation concurrentielle ou d'entraver gravement les négociations contractuelles ou autres d'une personne, d'un groupe de personnes ou d'une organisation;

b) d'interrompre la communication de renseignements semblables à l'institution, alors qu'il serait dans l'intérêt public que cette communication se poursuive;

c) de causer des pertes ou des profits indus à une personne, un groupe de personnes, un comité, une institution ou un organisme financiers;

d) de divulguer des renseignements fournis à un conciliateur, un médiateur, un agent des relations de travail ou une autre personne nommée pour régler un conflit de relations de travail, ou de divulguer le rapport de l'une de ces personnes. L.R.O. 1990, chap. F.31, par. 17 (1); 2002, chap. 18, annexe K, art. 6.

*Renseignements sur l'impôt*

(2) La personne responsable refuse de divulguer un document qui révèle des renseignements qui ont été relevés dans une déclaration d'impôt ou recueillis à des fins d'établissement de l'assujettissement à l'impôt ou de perception fiscale. L.R.O. 1990, chap. F.31, par. 17 (2).

*Consentement à la divulgation*

(3) La personne responsable peut divulguer un document visé au paragraphe (1) ou (2) si la

information relates consents to the disclosure. R.S.O. 1990, c. F.31, s. 17 (3).

*Economic and other interests of Ontario*

**18.** (1) A head may refuse to disclose a record that contains,

(a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

(b) information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

(g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or

personne concernée par les renseignements y consent. L.R.O. 1990, chap. F.31, par. 17 (3).

*Intérêts économiques et autres de l'Ontario*

**18.** (1) La personne responsable peut refuser de divulguer un document qui comporte :

a) des secrets industriels ou des renseignements d'ordre financier, commercial, scientifique ou technique qui sont la propriété du gouvernement de l'Ontario ou d'une institution et qui ont une valeur pécuniaire actuelle ou éventuelle;

b) des renseignements résultant d'une recherche effectuée par l'employé d'une institution s'il est raisonnable de s'attendre à ce que leur divulgation ait pour effet de retirer à l'employé la primauté de la publication;

c) des renseignements s'il est raisonnable de s'attendre à ce que leur divulgation ait pour effet de nuire aux intérêts économiques d'une institution ou à sa situation concurrentielle;

d) des renseignements s'il est raisonnable de s'attendre à ce que leur divulgation ait pour effet de nuire aux intérêts financiers du gouvernement de l'Ontario ou à sa faculté de diriger l'économie de la province;

e) des positions, projets, lignes de conduite, normes ou instructions devant être observés par le gouvernement de l'Ontario, l'une de ses institutions ou pour son compte dans le cadre d'une négociation actuelle ou éventuelle;

f) les projets relatifs à la direction du personnel ou à la gestion d'une institution qui n'ont pas encore été mis en application ou rendus publics;

g) des renseignements, y compris les projets, les politiques ou les entreprises proposés d'une

loss to a person;

(h) information relating to specific tests or testing procedures or techniques that are to be used for an educational purpose, if disclosure could reasonably be expected to prejudice the use or results of the tests or testing procedures or techniques;

(i) submissions in respect of a matter under the *Municipal Boundary Negotiations Act* commenced before its repeal by the *Municipal Act, 2001*, by a party municipality or other body before the matter is resolved. R.S.O. 1990, c. F.31, s. 18 (1); 2002, c. 17, Sched. F, Table; 2002, c. 18, Sched. K, s. 7; 2005, c. 28, Sched. F, s. 2.

*Exception*

(2) A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,

(a) the testing was done as a service to a person, a group of persons or an organization other than an institution and for a fee; or

(b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing. R.S.O. 1990, c. F.31, s. 18 (2).

institution, s'il est raisonnable de s'attendre à ce que leur divulgation ait pour effet d'entraîner la divulgation prématurée d'une décision de politiques qui est en instance ou des pertes ou avantages financiers indus pour une personne;

h) des renseignements concernant des tests précis ou des méthodes ou techniques d'évaluation précises devant servir à des fins éducatives, s'il est raisonnable de s'attendre à ce que leur divulgation ait pour effet de nuire à l'utilisation ou aux résultats des tests ou des méthodes ou techniques d'évaluation;

i) des observations relatives à une question visée par la *Loi sur les négociations de limites municipales* soumise avant son abrogation par la *Loi de 2001 sur les municipalités* qui sont faites par une municipalité en cause ou par une autre entité avant sa résolution. L.R.O. 1990, chap. F.31, par. 18 (1); 2002, chap. 17, annexe F, tableau; 2002, chap. 18, annexe K, art. 7; 2005, chap. 28, annexe F, art. 2.

*Exceptions*

(2) La personne responsable ne doit pas refuser aux termes du paragraphe (1), de divulguer le document qui donne le résultat de l'essai d'un produit ou d'essais relatifs à l'environnement effectués par une institution ou pour son compte, sauf si ces essais, selon le cas :

a) étaient effectués moyennant rémunération à titre de service en faveur d'une personne, d'un groupe de personnes ou d'une organisation qui n'est pas une institution;

b) étaient de nature préliminaire ou expérimentale en vue de l'élaboration de nouveaux modes d'essais. L.R.O. 1990, chap. F.31, par. 18 (2).

*Information with respect to closed meetings*

**18.1** (1) A head may refuse to disclose a record that reveals the substance of deliberations of a meeting of the governing body or a committee of the governing body of an educational institution if a statute authorizes holding the meeting in the absence of the public and the subject-matter of the meeting,

(a) is a draft of a by-law, resolution or legislation; or

(b) is litigation or possible litigation. 2005, c. 28, Sched. F, s. 3.

*Exception*

(2) Despite subsection (1), the head shall not refuse to disclose a record under subsection (1) if,

(a) the information is not held confidentially;

(b) the subject-matter of the deliberations has been considered in a meeting open to the public; or

(c) the record is more than 20 years old. 2005, c. 28, Sched. F, s. 3.

*Application of Act*

(3) The exemption in subsection (1) is in addition to any other exemptions in this Act. 2005, c. 28, Sched. F, s. 3.

*Solicitor-client privilege*

**19.** A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

*Renseignements concernant les réunions à huis clos*

**18.1** (1) La personne responsable peut refuser de divulguer un document qui révèle l'essentiel des délibérations du corps dirigeant d'un établissement d'enseignement ou d'un comité de ce corps dirigeant lors d'une réunion si une loi autorise la tenue de cette réunion en l'absence du public et que l'objet de la réunion est, selon le cas :

a) un projet de règlement administratif, de résolution ou de loi;

b) un litige ou un litige éventuel. 2005, chap. 28, annexe F, art. 3.

*Exception*

(2) Malgré le paragraphe (1), la personne responsable ne doit pas refuser de divulguer un document en vertu de ce paragraphe si, selon le cas :

a) les renseignements ne sont pas détenus de façon confidentielle;

b) l'objet des délibérations a fait l'objet d'une réunion ouverte au public;

c) le document date de plus de 20 ans. 2005, chap. 28, annexe F, art. 3.

*Application de la Loi*

(3) L'exception prévue au paragraphe (1) s'ajoute aux autres exceptions prévues par la présente loi. 2005, chap. 28, annexe F, art. 3.

*Secret professionnel de l'avocat*

**19.** La personne responsable peut refuser de divulguer un document qui, selon le cas :

a) est protégé par le secret professionnel de

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

(c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation. 2005, c. 28, Sched. F, s. 4.

l'avocat;

b) a été élaboré par l'avocat-conseil de la Couronne, ou pour le compte de celui-ci, qui l'utilise soit dans la communication de conseils juridiques, soit à l'occasion ou en prévision d'une instance;

c) a été élaboré par l'avocat-conseil employé ou engagé par un établissement d'enseignement, ou pour le compte de cet avocat-conseil, qui l'utilise soit dans la communication de conseils juridiques, soit à l'occasion ou en prévision d'une instance. 2005, chap. 28, annexe F, art. 4.

*Danger to safety or health*

**20.** A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual. R.S.O. 1990, c. F.31, s. 20; 2002, c. 18, Sched. K, s. 8.

*Menace à la santé ou à la sécurité*

**20.** La personne responsable peut refuser de divulguer un document s'il est raisonnable de s'attendre à ce que la divulgation ait pour effet de compromettre gravement la santé ou la sécurité d'un particulier. L.R.O. 1990, chap. F.31, art. 20; 2002, chap. 18, annexe K, art. 8.

*Personal privacy*

**21.** (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

(b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

(c) personal information collected and maintained specifically for the purpose of creating a record available to the general

*Vie privée*

**21.** (1) La personne responsable ne divulgue des renseignements personnels qu'au particulier concerné par ceux-ci, sauf, selon le cas :

a) à la demande écrite ou du consentement préalables du particulier concerné si ce dernier a lui-même le droit d'y avoir accès;

b) lors d'une situation d'urgence où il existe un risque immédiat pour la santé ou la sécurité d'un particulier, si un avis de la divulgation est ensuite envoyé par courrier au particulier concerné par les renseignements à sa dernière adresse connue;

c) les renseignements personnels recueillis et conservés dans le but précis de constituer un

public;

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

(e) for a research purpose if,

(i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,

(ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and

(iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or

(f) if the disclosure does not constitute an unjustified invasion of personal privacy. R.S.O. 1990, c. F.31, s. 21 (1).

*Criteria re invasion of privacy*

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

(b) access to the personal information may promote public health and safety;

(c) access to the personal information will

document accessible au grand public;

d) en vertu d'une loi de l'Ontario ou du Canada qui autorise expressément la divulgation;

e) à des fins de recherche si les conditions suivantes sont réunies :

(i) la divulgation est conforme aux conditions ou à l'utilisation envisagées au moment où ces renseignements ont été divulgués, recueillis ou obtenus,

(ii) les fins de recherche à l'origine de la divulgation ne peuvent être raisonnablement atteintes que si les renseignements sont divulgués sous une forme qui permette l'identification individuelle,

(iii) la personne devant recevoir le document a accepté de se conformer aux conditions relatives à la sécurité et au caractère confidentiel qui sont prescrites par les règlements;

f) la divulgation ne constitue pas une atteinte injustifiée à la vie privée. L.R.O. 1990, chap. F.31, par. 21 (1).

*Critères : atteinte injustifiée à la vie privée*

(2) Aux fins de déterminer si la divulgation de renseignements personnels constitue une atteinte injustifiée à la vie privée, la personne responsable tient compte des circonstances pertinentes et examine notamment si :

a) la divulgation est souhaitable parce qu'elle permet au public de surveiller de près les activités du gouvernement de l'Ontario et de ses organismes;

b) l'accès aux renseignements personnels peut promouvoir une amélioration de la santé et de la sécurité publiques;

promote informed choice in the purchase of goods and services;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record. R.S.O. 1990, c. F.31, s. 21 (2).

*Presumed invasion of privacy*

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

c) l'accès aux renseignements personnels rendra l'achat de biens et de services susceptible d'un choix plus judicieux;

d) les renseignements personnels ont une incidence sur la juste détermination des droits qui concernent l'auteur de la demande;

e) le particulier visé par les renseignements personnels risque d'être injustement lésé dans ses intérêts pécuniaires ou autres;

f) les renseignements personnels sont d'une nature très délicate;

g) l'exactitude et la fiabilité des renseignements personnels sont douteuses;

h) le particulier visé par les renseignements personnels les a communiqués à l'institution à titre confidentiel;

i) la divulgation est susceptible de porter injustement atteinte à la réputation d'une personne dont il est fait mention dans le document. L.R.O. 1990, chap. F.31, par. 21 (2).

*Atteinte présumée à la vie privée*

(3) Est présumée constituer une atteinte injustifiée à la vie privée, la divulgation de renseignements personnels qui, selon le cas :

a) sont relatifs aux antécédents, au diagnostic, à la maladie, au traitement ou à l'évaluation d'ordre médical, psychiatrique ou psychologique;

b) ont été recueillis et peuvent être identifiés comme partie du dossier d'une enquête reliée à une contravention possible à la loi, sauf dans la mesure où la divulgation est nécessaire aux fins d'instituer des poursuites judiciaires ou de continuer l'enquête;

(c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

c) sont relatifs à l'admissibilité aux prestations d'aide sociale ou de service social ou à l'établissement du niveau des prestations;

(d) relates to employment or educational history;

d) ont trait aux antécédents professionnels ou académiques;

(e) was obtained on a tax return or gathered for the purpose of collecting a tax;

e) ont été relevés dans une déclaration d'impôt ou recueillis à des fins de perception fiscale;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

f) précisent la situation financière, le revenu, l'actif, le passif, la situation nette, les soldes bancaires, les antécédents ou les activités d'ordre financier ou la solvabilité d'un particulier;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

g) comportent des recommandations ou des évaluations personnelles, des renseignements ayant trait à la moralité ou à des évaluations de personnel;

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations. R.S.O. 1990, c. F.31, s. 21 (3).

h) indiquent la race, l'origine ethnique, l'orientation sexuelle ou les croyances ou allégeances religieuses ou politiques du particulier. L.R.O. 1990, chap. F.31, par. 21 (3).

*Limitation*

*Restrictions*

(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

(4) Malgré le paragraphe (3), ne constitue pas une atteinte injustifiée à la vie privée, la divulgation portant sur les renseignements suivants :

(a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;

a) le classement, les barèmes de traitement et d'avantages sociaux ou les responsabilités professionnelles d'un particulier qui est ou a été dirigeant ou employé d'une institution ou membre du personnel d'un ministre;

(b) discloses financial or other details of a contract for personal services between an individual and an institution;

b) les modalités d'ordre financier ou autres d'un contrat de louage de services personnels intervenu entre un particulier et une institution;

(c) discloses details of a licence or permit or a similar discretionary financial benefit

c) les modalités d'une licence, d'un permis ou

conferred on an individual by an institution or a head under circumstances where,

(i) the individual represents 1 per cent or more of all persons and organizations in Ontario receiving a similar benefit, and

(ii) the value of the benefit to the individual represents 1 per cent or more of the total value of similar benefits provided to other persons and organizations in Ontario; or

(d) discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons. R.S.O. 1990, c. F.31, s. 21 (4); 2006, c. 19, Sched. N, s. 1 (2).

*Refusal to confirm or deny existence of record*

(5) A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy. R.S.O. 1990, c. F.31, s. 21 (5).

*Fish and wildlife species at risk*

**21.1** (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to lead to the killing, capturing, injuring or harassment of fish or wildlife that belong to a species at risk or to interference with the habitat of fish or wildlife that belong to a species at risk. 1997, c. 41, s. 118 (1); 2002, c. 18, Sched. K, s. 9.

d'un autre avantage financier semblable que l'institution ou la personne responsable accorde à sa discrétion au particulier dans des circonstances où :

(i) d'une part, ce particulier représente 1 pour cent ou plus de l'ensemble des personnes et organisations de l'Ontario qui bénéficient d'un avantage semblable,

(ii) d'autre part, l'avantage pour le particulier représente 1 pour cent ou plus de la valeur totale des avantages semblables procurés à d'autres personnes et organisations de l'Ontario;

d) des renseignements personnels concernant un particulier décédé qui sont divulgués à son conjoint ou à un de ses proches parents, si la personne responsable est convaincue, compte tenu des circonstances, que la divulgation est souhaitable pour des motifs de compassion. L.R.O. 1990, chap. F.31, par. 21 (4); 2006, chap. 19, annexe N, par. 1 (2).

*Refus de confirmer ou de nier l'existence d'un document*

(5) La personne responsable peut refuser de confirmer ou de nier l'existence d'un document dont la divulgation constituerait une atteinte injustifiée à la vie privée. L.R.O. 1990, chap. F.31, par. 21 (5).

*Espèces de poisson et d'animaux sauvages en péril*

**21.1** (1) La personne responsable peut refuser de divulguer un document s'il est raisonnable de s'attendre à ce que la divulgation ait pour effet que soient tués, capturés, blessés ou harcelés des poissons ou animaux sauvages qui appartiennent à une espèce en péril ou que soit perturbé leur habitat. 1997, chap. 41, par. 118 (1); 2002, chap. 18, annexe K, art. 9.

**Definitions**

(2) In this section,

"fish" and "wildlife" have the same meanings as in the *Fish and Wildlife Conservation Act, 1997*. 1997, c. 41, s. 118 (1).

*Note: Effective June 30, 2008 or on an earlier day to be named by proclamation of the Lieutenant Governor, section 21.1 is repealed by the Statutes of Ontario, 2007, chapter 6, section 61 and the following substituted:*

*Species at risk*

**21.1** A head may refuse to disclose a record where the disclosure could reasonably be expected to lead to,

(a) killing, harming, harassing, capturing or taking a living member of a species, contrary to clause 9 (1) (a) of the *Endangered Species Act, 2007*;

(b) possessing, transporting, collecting, buying, selling, leasing, trading or offering to buy, sell, lease or trade a living or dead member of a species, any part of a living or dead member of a species, or anything derived from a living or dead member of a species, contrary to clause 9 (1) (b) of the *Endangered Species Act, 2007*; or

(c) damaging or destroying the habitat of a species, contrary to clause 10 (1) (a) or (b) of the *Endangered Species Act, 2007*. 2007, c. 6, s. 61.

*See: 2007, c. 6, ss. 61, 63 (1).*

**Définitions**

(2) Les définitions qui suivent s'appliquent au présent article.
«animal sauvage» et «poisson» S'entendent au sens de la *Loi de 1997 sur la protection du poisson et de la faune*. 1997, chap. 41, par. 118 (1).

*Remarque : Le 30 juin 2008 ou à la date antérieure que le lieutenant-gouverneur fixe par proclamation, l'article 21.1 est abrogé par l'article 61 du chapitre 6 des Lois de l'Ontario de 2007 et remplacé par ce qui suit :*

*Espèces en péril*

**21.1** La personne responsable peut refuser de divulguer un document s'il est raisonnable de s'attendre à ce que la divulgation ait pour effet, selon le cas :

a) que soit tué, harcelé, capturé ou pris un membre vivant d'une espèce, ou qu'il y soit nui, contrairement à l'alinéa 9 (1) a) de la *Loi de 2007 sur les espèces en voie de disparition*;

b) que soit possédé, transporté, collectionné, acheté, vendu, loué ou échangé, ou soit visé par une offre d'acheter, de vendre, de louer ou d'échanger un membre, vivant ou mort, d'une espèce, une partie d'un membre, vivant ou mort, d'une espèce ou quoi que ce soit qui est dérivé d'un membre, vivant ou mort, d'une espèce, contrairement à l'alinéa 9 (1) b) de la *Loi de 2007 sur les espèces en voie de disparition*;

c) que soit endommagé ou détruit l'habitat d'une espèce, contrairement à l'alinéa 10 (1) a) ou b) de la *Loi de 2007 sur les espèces en voie de disparition*. 2007, chap. 6, art. 61.
*Voir : 2007, chap. 6, art. 61 et par. 63 (1).*

*Information soon to be published*

**22.** A head may refuse to disclose a record where,

(a) the record or the information contained in the record has been published or is currently available to the public; or

(b) the head believes on reasonable grounds that the record or the information contained in the record will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it. R.S.O. 1990, c. F.31, s. 22.

*Exemptions not to apply*

**23.** An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. R.S.O. 1990, c. F.31, s. 23; 1997, c. 41, s. 118 (2).

*Publication prochaine des renseignements*

**22.** La personne responsable peut refuser de divulguer un document si, selon le cas :

a) le document ou les renseignements qu'il comporte ont déjà été publiés ou sont accessibles au public;

b) la personne responsable a des motifs raisonnables de croire que le document ou les renseignements seront publiés par une institution dans les quatre-vingt-dix jours de la demande ou au cours de la période de temps additionnelle nécessaire à leur impression ou à leur traduction à cette fin. L.R.O. 1990, chap. F.31, art. 22.

*Non-application des exceptions*

**23.** L'exception à la divulgation visée aux articles 13, 15, 17, 18, 20, 21 et 21.1 ne s'applique pas si la nécessité manifeste de divulguer le document dans l'intérêt public l'emporte sans conteste sur la fin visée par l'exception. L.R.O. 1990, chap. F.31, art. 23; 1997, chap. 41, par. 118 (2).

***Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, s. 31:**

*Disclosure in public interest*

**31.** (1) Whether or not a request for access is made, the head of a public body may disclose to the public, to an affected group of people or to an applicant information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people; or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Before disclosing information pursuant to subsection (1), the head of a public body shall, if practicable, notify any third party to whom the information relates.

(3) Where it is not practicable to comply with subsection (2), the head of the public body shall mail a notice of disclosure in the prescribed form to the last known address of the third party.

(4) This Section applies notwithstanding any other provision of this Act. *1993, c. 5, s. 31.*

***Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 25(1):**

**25.** (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

***Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 32(1):**

**32(1)** Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant

(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or

(b) information the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

***International Covenant on Civil and Political Rights*, art. 19:**

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; the right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carried with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order, or of public health or morals.

**U.N. General Assembly, *Resolution 59(1)*, 14 December 1946:**

Freedom of information is a fundamental human right and… the touchstone of all the freedoms to which the UN is consecrated.

***Universal Declaration of Human Rights*, UN General Assembly Resolution 217A(III), 10 December 1948:**

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

***American Convention on Human Rights*, art. 13, O.A.S. Treaty Series No. 36, entered into force 18 July 1978:**

1. Every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.

2. The authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the private sector.

Court File No. 32172

**IN THE SUPREME COURT OF CANADA**
**(APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

B E T W E E N:

**THE MINISTRY OF PUBLIC SAFETY AND SECURITY (Formerly the SOLICITOR GENERAL) and the ATTORNEY GENERAL OF ONTARIO**
Appellants (Respondents)

– and –

**THE CRIMINAL LAWYERS' ASSOCIATION**
Respondent (Appellant)

– and –

**TOM MITCHINSON, ASSISTANT COMMISSIONER, OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO**
Intervener (Respondent)

– and –

**THE ATTORNEY GENERAL OF CANADA, ET AL.**
Interveners

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# MEMORANDUM OF THE RESPONDENT, THE CRIMINAL LAWYERS' ASSOCIATION

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