CITATION: The Criminal Lawyers' Association v. Ontario (Public Safety and Security)
2007 ONCA 392
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COURT OF APPEAL FOR ONTARIO

JURIANSZ, MacFARLAND and LaFORME JJ.A.

BETWEEN:

THE CRIMINAL LAWYERS' ASSOCIATION

Applicant (Appellant)

and

THE MINISTRY OF PUBLIC SAFETY AND SECURITY (formerly the SOLICITOR GENERAL), TOM MITCHINSON, ASSISTANT COMMISSIONER, OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO, and THE ATTORNEY GENERAL OF ONTARIO

Respondents (Respondents)

David Stratas, Brad Elberg, and Trevor Guy, for the applicant, appellant

Daniel Guttman and Sophie Nunnelley, for the respondent, respondent Attorney General of Ontario

David Goodis, for the respondent, respondent Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commission of Ontario

Paul Schabas and Ryder Gilliland, for the intervener Canadian Newspaper Association

Heard: November 27, 2006

On appeal from the order of Justices R.A. Blair, R.T.P. Gravely and G.J. Epstein of the Superior Court of Justice, sitting in Divisional Court, dated March 25, 2004, with reasons reported at 70 O.R. (3d) 332.

H.S. LaFORME J.A.:

[1] This is an appeal, with leave of this court, from the order of the Divisional Court, which dismissed an application for judicial review brought by The Criminal Lawyers' Association (the

"CLA") from an order of the Assistant Commissioner, Office of the Information and Privacy Commissioner (the "Assistant Commissioner"). The essence of this case is relatively simple to articulate.

[2] For many years, all provinces and territories in Canada have recognized that members of the public are entitled to access to government information. However, this recognition is an entitlement that is vested solely through legislation and not as a specific constitutional right. Indeed, the *Canadian Charter of Rights and Freedoms*, as originally drafted, intentionally rejected the right of access to government information.

[3] In this case, the Assistant Commissioner, acting under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "Act"), dismissed the CLA's appeal from a decision of the respondent Ministry of Public Safety and Security (the "Ministry").[1] The Ministry had decided not to provide any records in response to the CLA's freedom of information request submitted to it under the Act.

[4] The appellant and the intervener assert that now is the time to recognize a right of access to information in s. 2(b) of the *Charter*. Further, they say that the right to access government information is explicitly recognized in s. 10 of the Act. Moreover, they assert that, if there was no Act, the *Charter* would require it. Without going so far as the appellant and the intervener assert, for reasons that follow I would allow the appeal on the grounds that the Act, as currently structured, unjustifiably limits the appellant's right to free expression as guaranteed by s. 2(b) of the *Charter*.

BACKGROUND

[5] Domenic Racco's body was found in 1983. It was believed to be a "mob hit". In 1985, four men were charged with Mr. Racco's murder. They ultimately pled guilty to lesser charges of being an accessory to murder and conspiracy to commit murder. In 1990, two other men were charged with Racco's murder. They were initially convicted of first degree murder in 1991. The appeal of their convictions was allowed and a new trial was ordered.

[6] In 1996, during pretrial motions on the retrial, differences between the Crown and defence were revealed. A lengthy motion for a stay of proceedings was heard before Glithero J. Substantial evidence, including testimony from the trial Crowns and police officers, was called regarding allegations of police and Crown misconduct.

[7] Glithero J. found material non-disclosure and made very extensive factual findings and ultimately stayed the proceedings, releasing a lengthy and detailed decision (reported at (1997), 36 O.R. (3d) 263). He held that the accused persons' rights under ss. 7 and 11(d) of the *Charter* had

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[1] The original request was made to the Ministry of the Solicitor General. On April 15, 2002, the Ministry of Correctional Services and the Ministry of the Solicitor General were joined together to form the Ministry of Public Safety and Security. On October 23, 2003, The Ministry of Public Safety and Security was re-named the Ministry of Community Safety and Correction Services. That is the current name of the Ministry to whom the original information request was made.

been violated as a result of "abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, [and] negligent breach of the duty to maintain original evidence". He was particularly critical of the Crown in its prosecutorial role and of the police in their investigative role.

[8] Glithero J. found that the abusive conduct included: (1) failure to disclose information prepared for the 1985 prosecution; (2) failure to disclose certain information on the appeal; (3) negligent loss of evidence by the police; and (4) unreasonable delay of the trial. There was significant media coverage of the ruling.

[9] The Hamilton-Wentworth Regional Police and Halton Regional Police asked the OPP to investigate the conduct of the police and prosecution. On April 3, 1998, the OPP issued a terse press release, which concluded:

> The investigation into the missing audio tape found no evidence that the officers attempted to obstruct justice by destroying or withholding a vital piece of evidence. The investigation also found no evidence that information withheld from defence was done deliberately and with the intent to obstruct justice.

[10] The CLA is an organization actively engaged in monitoring matters concerning the integrity of the criminal justice system in Canada and in advocating for changes in that regard. It was justifiably concerned about the apparent discrepancy between the OPP's brief statement and the detailed acts of abusive conduct contained in the judgment of Glithero J. Given this discrepancy, the CLA submitted a request under the Act to the Ministry seeking records concerning the OPP review.

[11] In response to the CLA's request, the Ministry refused to disclose a 318-page police report, a March 12, 1998, memorandum and a March 24, 1998, letter. The Ministry claimed exemptions under the Act, namely, under s. 14 (law enforcement), s. 19 (solicitor-client privilege), and s. 21 (personal privacy).

[12] On appeal by the CLA, the Assistant Commissioner upheld the assertion of the Ministry's exemptions. He then considered whether he should apply the public interest override in s. 23 and found that it applied in the case of the s. 21 exemption. In his view, there was a "compelling public interest" in the disclosure of the information that clearly outweighed the confidentiality interests served by the s. 21 exemption.

[13] However, the Assistant Commissioner decided that he could not apply the s. 23 public interest override to the ss. 14 and 19 exemptions claimed by the Ministry because they are specifically excluded by the Act. He also decided that this exclusion did not violate the *Charter*.

[14] In dismissing the CLA's application for judicial review, the Divisional Court held that the public's right of access to government information is a benefit or privilege bestowed by statute, which the government can grant, qualify, modify or revoke. The court rejected the CLA's

submission that the public had a right of access to government information in s. 2(b) of the *Charter* or pursuant to the underlying constitutional principle of democracy.

Legislative provisions

[15] It will be helpful to understanding the issues involved and my analysis if I set out some of the more relevant provisions of the Act. Section 1 of the Act states:

> 1. The purposes of the 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 disclosure of government information should be reviewed independently of government; and
>
> (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.

[16] Thus, the Act has a twofold purpose: (i) to provide a statutory right of access to government information – subject to specific exemptions – and (ii) to protect personal privacy. The Ontario government, when introducing the bill for the Act, stated that the three guiding principles behind the legislation were that government information should be more readily available to the public, that necessary exemptions should be limited and specific, and that decisions by ministers and government officials on what information should be disclosed should be reviewed by an independent commissioner accountable only to the Assembly.[2]

[17] The Divisional Court decision goes on to set out other relevant provisions of the Act. I believe this is a helpful approach and therefore I will repeat what that court provided.

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[2] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 21 (12 July 1985) at 754 (Hon. Mr. Scott).

[18] Section 10 provides a general right of access to a government record unless the record falls within one of the exemptions set out in ss. 12 to 22 of the Act, or unless the head[3] of the institution is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. Subsection 10(2) requires the head to disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

[19] Some of the exemptions in ss. 12 to 22 are mandatory, some are discretionary, and some provide a duty on the part of the head to disclose. And, like the Divisional Court, I believe the exemptions are worth noting in summary, for purposes of context. They are:

- cabinet records (s. 12);
- advice to government by a public servant or other employee (s. 13);
- *law enforcement records* (s. 14);
- records relating to the *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*, and the *Prohibiting Profiting from Recounting Crimes Act, 2002* (ss. 14.1 and 14.2);
- relations with other governments (s. 15);
- national defence records (s. 16);
- commercial third party records (s. 17);
- economic and other interests of Ontario (s. 18);
- closed meetings (s. 18.1);
- solicitor-client privilege (s. 19);
- disclosure of records that can threaten the safety or health of an individual (s. 20);
- personal privacy (s. 21);
- disclosure of records that can put fish or wildlife species at risk (s. 21.1); and
- information soon to be published (s. 22).

[Emphasis added.]

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[3] Subsection 2(1) of the Act defines "head" as, in the case of the Assembly, the Speaker; in the case of a ministry, the minister of the Crown who presides over the ministry; and in the case of any other institution, the person designated as head of that institution in the regulations. "Institution" is defined as including the Assembly; a ministry of the Government of Ontario; a service provider organization within the meaning of s. 17.1 of the *Ministry of Government Services Act*; and an agency, board, commission, corporation or other body designated as an institution in the regulations.

[20] Section 23 of the Act provides a "public interest override" to many of the categories of exempted records. This section of the Act is central to this appeal and it provides that:

> 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*. [Emphasis added.]

[21] As noted, this appeal is concerned with the Ministry's reliance on the exemptions from disclosure contained in ss. 14 and 19, which are not subject to the s. 23 public interest override. It will therefore be helpful to set out the relevant language of these sections.

[22] Subsection 14(2)(a) provides that a head may refuse to disclose a record 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.

[23] Section 19, as it was at the time of the various decisions in this case, provided that "a head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation".[4]

[24] The CLA makes three main arguments in this appeal, which can be summarized as follows:

> 1. Section 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions;
>
> 2. Section 23 of the Act infringes the underlying constitutional principle of democracy by failing to extend the public interest override to the same exemptions; and,
>
> 3. Any constitutional infringement is not justified under s. 1 of the *Charter*.

[25] As I previously indicated, I would allow the appeal. In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. As a result of these conclusions, I find it unnecessary to determine whether the underlying constitutional principle of democracy affects the outcome of this appeal. I will address the appellants' arguments in order.

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[4] Section 19 has since been amended, but the amendment does not affect my decision.

ANALYSIS

1. Does s. 23 of the Act infringe s. 2(b) of the Charter?

[26] Section 2(b) of the *Charter* provides that:

> 2. Everyone has the following fundamental freedoms:
> …
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[27] The Supreme Court of Canada in *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, established an analytical approach for deciding s. 2(b) *Charter* issues. After the Divisional Court's reasons were released in 2004, the Supreme Court reaffirmed and refined the *Irwin Toy* approach in *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141 at para. 56, (*Montréal*). It outlined a three-part test to determine whether s. 2(b) has been infringed. The three-part test in this case would be expressed as follows:

> (i) Does the CLA's attempt to comment on the discrepancy between Glithero J.'s reasons and the OPP's press release have expressive content, thereby bringing it within s. 2(b) protection?
>
> (ii) If so, does the method or location of this expression remove that protection? and,
>
> (iii) If the expression is protected by s. 2(b), has the government infringed that protection, either in purpose or effect?

(i) Expressive Content

[28] The Divisional Court held (and I agree) that there is expressive content at issue here: the CLA requested the information in order to comment publicly on the discrepancies between Glithero J.'s reasons and the brief response from the OPP. This interpretation accords with the generous and liberal application of the s. 2(b) right as expressed in *Irwin Toy*. As the Supreme Court of Canada noted at 968 of that case, expression "has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content."

[29] In this case, the CLA was attempting to comment on the discrepancies between the OPP report and Glithero J.'s scathing rebuke of the police and the Crown. The request for information is therefore not the form of the content, contrary to the Ministry's arguments. Rather, the wording of the request is merely the means by which the CLA seeks to gain the information that will enable it to express itself. This expression is not possible if the information is not provided. In other words,

if the CLA does not receive the requested information, it is incapable of commenting on the discrepancy.

[30] It is true, as the Ministry argued, that the CLA will be able to comment on its inability to comment; however, this is not the same as commenting on the discrepancy itself since the CLA will have nothing substantial to say about that issue. Therefore, the expressive content at issue, in my opinion, is the potential comments the CLA would make should it receive the requested information and not the actual request for information. The expressive content, therefore, is dependent on access to the excluded material.

(ii) Excluded Expression

[31] The Divisional Court held that the expressive activity at issue does not fall within the sphere of s. 2(b). In so doing, the court framed the issue in this case as whether there is a constitutional right to know, or a positive obligation on the part of the Ministry to disclose information, subject to a public interest balancing.

[32] Respectfully, the Divisional Court's approach was misguided. In my opinion, the proper analysis in this case requires a focus on the expressive content that is central to this appeal: the CLA's attempted comments on the discrepancy between Glithero J.'s findings and the OPP press release. Although this content depends on information that resides with the Ministry, the question of whether s. 2(b) includes positive obligations on government to disclose, in my respectful view, is not applicable here.

[33] The principle issue before the Divisional Court — as it is before this court — is whether s. 23 of the Act infringed s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. The analysis, as I will explain, should have commenced with a contextual examination of the purpose of the Act.

[34] As noted previously, s. 10 of the Act establishes that every person has a right of access to a record unless that record falls within one of the statutory exemptions. Thus, unless a record falls within an exemption, the Crown is required by the Act to release the information.

[35] In the current case, had the information sought by the CLA not fallen within the exemptions, the Ministry would have been required to provide it. The Act, in other words, requires the Crown to assist the CLA with their attempt at expression through positive acts. The fact that the CLA requested information that falls within a statutory exemption does not, in my view, automatically change this requirement since the exemptions at issue are discretionary, not mandatory.

[36] Sections 14 and 19 of the Act — the sections at issue — each provide that "a head *may* refuse to disclose". By contrast, there are three exemptions — cabinet records, third party information, and

personal privacy — where the statute directs that the minister "shall" refuse to disclose the information if the record falls within the exemption.[5]

[37] Where a record falls under a discretionary exemption, the Crown does not commit a positive act if it decides to disclose the record. Rather, it commits a positive act if it *refuses* to disclose the record, because the obligation pursuant to the purpose of the Act is disclosure. Falling within a discretionary exemption does not change this position, as it would with a mandatory exemption.

[38] For example, if the Crown chooses not to act — that is, it does not commit any act in relation to the request — the information would be disclosed by law pursuant to s. 10. Clearly then, by exercising its rights pursuant to the Act, the CLA is not asking the Crown to do any more than the Crown is already obligated to do, which is to disclose.

[39] This case is quite different from those such as *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, where the issue was whether the public had a right to access an airport for the purposes of expressing itself. In that case, there was no underlying statutory or common law right to access the location in question. In *Committee for the Commonwealth* the court had to determine whether s. 2(b) ought to warrant a right of access to the location, absent a non-constitution-based right of access. In the case at bar, there already exists an underlying statutory right of access to information.[6]

[40] For the purposes of this case, there is no requirement to decide whether there is a constitutional right to know, or a positive obligation on the part of the government to disclose, the information requested by the CLA. The issue, as I have explained, is not whether the Crown's act of providing the CLA with the information it requested is a *Charter*-imposed positive act. As I see it, pursuant to the Act itself, the lack of government action would automatically lead to disclosure.

[41] The next question then becomes, whether there is any reason why the requested information should be removed from the protection of s. 2(b)? In light of *Montréal*, it is my respectful view that the Divisional Court was incorrect in its approach to determining whether the expressive content falls within the scope of s. 2(b). The approach should have been — as expressed in the second-part of the test — to determine whether the method or location of the CLA's expressive activity removes the protection of s. 2(b).

[42] In *Montréal*, McLachlin C.J. and Deschamps J., in reviewing the *Irwin Toy* approach, stated at paras. 57 and 58 that content is always protected, but form may not be. How or where content is delivered may lead to a finding that the expressive activity falls outside the scope of s. 2(b), since *Charter* protection does not extend to all forms or locations of expression. At the same time,

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[5] It is noteworthy that in such circumstances, as it was in this case, where the personal privacy exemption was cited by the Ministry, a mandatory exemption can be overruled by the public interest override, which applies to that exemption.

[6] To summarize this in simple terms, in the absence of the Act, the analysis at this stage would be entirely different.

expressive activity is presumptively protected by s. 2(b) subject to objections on the ground of method or location.

[43] As noted at para. 60 of *Montréal*, an obvious example of an excluded form of expression is any violent act that is intended to convey meaning. Regardless of the fact that the act has an expressive dimension, violence is excluded because the method by which the message is conveyed is not consonant with *Charter* protection.

[44] No one would disagree that form is not an issue in this appeal, and therefore there is no reason to exclude the expressive content on the basis of its form.

[45] Because of the restricted definition of the expressive content — that is, the comments the CLA would make — the location of the expressive content is equally straightforward. Simply put, the location of the comments the CLA wishes to make is irrelevant to their content. Whether they release a report, a press release, or speak in person at a news conference, there is nothing about the content that engages a location analysis.

[46] Thus, there is nothing about the request or the nature of the information needed to assist the CLA with its expression that would bring the form or location of the content within the exclusion contemplated by the Supreme Court of Canada in *Montréal*.

[47] For these reasons, I would set aside the conclusions of the Divisional Court on the issue of whether the CLA's request falls within the sphere of s. 2(b).

[48] Given that the expressive activity is not excluded from protection by s. 2(b), the third part of the test: has the government infringed that protection, either in purpose or effect?

(iii) Purpose

[49] In *Irwin Toy*, *supra* at 976, the majority phrases the test for a purposeful infringement as: "if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content". In this case, it appears that the purpose of the lack of a public interest override to ss. 14 and 19 of the Act — at least in part — is to directly restrict the public's ability to comment on those records. Indeed, as I have explained, the structure of the Act itself reveals an intention to restrict expression.

[50] Once again, because the exemptions at issue are discretionary, the presumption is that the record will be disclosed, unless the Minister chooses to exercise the exemption. Since the Minister has the option of not exercising the exemption by choosing to disclose, it follows that the lack of oversight of that discretion through the public interest override discloses a legislative intent to restrict expressive content.

[51] In sum, there are two reasons why I view the government's purpose in this case to amount to an infringement of s. 2(b) of the *Charter*. First, because the scheme of the Act is to primarily assist in the exercise of expression, any limits on this scheme — such as those in this case —

amounts to a restriction on expression. Second, and in the alternative, in choosing not to disclose the records necessary to enable the CLA to express itself on an issue found to be of compelling public interest, the Minister's exercise of discretion in this fashion has the effect of restricting expressive content.

(iv) Effect

[52] In *Montréal* at para. 83, citing *Irwin Toy*, the majority of the Supreme Court held that to make out an effects-based breach of s. 2(b), the CLA must show that the expression at issue promotes one of the values underlying free expression. In *Irwin Toy*, *supra* at 976, those values are summarized as:

> (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

[53] For the purposes of my analysis, I will refer to these values as "truth", "democracy", and "self-fulfillment". In this case, the CLA's expression at issue promotes the values of truth and democracy.

[54] It promotes truth because the CLA is seeking to reconcile what appears to be a discrepancy between the extensive findings of wrongdoing by Glithero J. and the OPP's conclusion that neither the Crown nor the investigating officers involved in the case committed any wrongful acts. It promotes democracy because the CLA is seeking to inform itself (and the public) as to whether the criminal justice system, a crucial component of our democratic society, functioned properly in a murder investigation and subsequent prosecution.

[55] In my opinion, the expression of the CLA promotes these values and s. 23 of the Act — the government's failure to provide for a public interest override to the ss. 14 and 19 exemptions — has the effect of infringing on that expression.

(v) Legislative Intent

[56] Before concluding this part of my analysis, I would make some brief comments on the Ministry's submissions regarding legislative intent. First, the Ministry argues that the fact that members of the House of Commons and the Senate considered and rejected an amendment to the *Charter* that expressly adopted a right to information is an important consideration in this case.

[57] I agree that the rejection of a right to information clause must be taken into account in determining the scope of s. 2(b): see *R. v. Prosper*, [1994] 3 S.C.R. 236. I would not agree, however,

that this rejection leads squarely to the conclusion that s. 2(b) cannot be applied to interpret a freedom of information statute that was passed subsequent to the adoption of the *Charter*.

[58] In this case, subsequent to the coming into force of the *Charter*, the Ontario legislature provided a platform for information disclosure when it passed the Act in 1987. To suggest that the Act cannot be subjected to *Charter* scrutiny simply because the framers rejected a constitutionally entrenched right to information would give too much weight to the rejection.

[59] The Supreme Court of Canada has often subjected government action to *Charter* scrutiny where the act is not expressly grounded in a *Charter* right. For example, in *R. v. Bartle*, [1994] 3 S.C.R. 173, the court held that law enforcement officials are required to disclose to a detained individual that a twenty-four-hour duty counsel service exists where the government provides one. Thus, even though there was no constitutional right to such a service, where the province provides it, everyone has the right to be informed of its existence.

[60] The Supreme Court of Canada's reasoning is, in my view, equally applicable in this case. Thus, where the government has passed a freedom of information statute, the statute must comply with *Charter* jurisprudence. In this case, the lack of a public interest override to certain exemptions in the Act does not comply with this jurisprudence where the omission has the effect of infringing on an applicant's freedom of expression.

[61] Second, the Ministry pointed out that the Ontario legislative debates show that in drafting s. 23, the government considered and rejected a balancing of the public interest in disclosure and materials covered by the law enforcement (s. 19) and solicitor-client privilege (s. 14) exemptions. While this explicit indicator of legislative intent may be of assistance to a statutory interpretation analysis, it is not relevant to a determination of the scope of the CLA's s. 2(b) right to express itself. If the legislature has constructed a statute in such a way that it limits a person's *Charter* rights, evidence of legislative intent cannot mitigate that limitation.

[62] In conclusion, my view is that s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. I reach this conclusion for two reasons. First, as I have said, both the purpose and effect of the Act restrict expression. In the case of the effects analysis, the expression that is restricted would promote two of the values underlying free expression — truth and democracy — and, therefore, there is an infringement of s. 2(b).

[63] Second, as I have explained, the CLA is engaging in expressive activity, and the expression is content-based, not form-based or location-based. Accordingly, applying the Supreme Court's test set out in *Montréal*, the requested information should not be removed from the protection of s. 2(b) of the *Charter*.

2. Does s. 23 of the Act infringe the underlying constitutional principle of democracy?

[64] In view of my decision above, it becomes unnecessary to decide this issue. However, I would briefly note that the unwritten constitutional principle of democracy is one of the three underlying

values that are identified in the s. 2(b) analysis. As I have concluded above, the expression at issue promotes democracy, and the effect of the Act is to restrict this expression. Therefore, in the circumstances of this case, to the extent that the s. 2(b) jurisprudence already accounts for democracy, it is unnecessary to consider this issue as a stand-alone reason to justify disclosure.

3. Is the Infringement Justified under s. 1 of the Charter?

[65] Given my conclusion that s. 23 of the Act and the decision of the Assistant Commissioner, in this case, infringe s. 2(b) of the *Charter*, it falls to the Ministry to justify these limits under s. 1. It is necessary, therefore, to apply the test in *R. v. Oakes*, [1986] 1 S.C.R. 103.

[66] The Divisional Court found that even if the impugned provisions did violate s. 2(b) they would be justified under s. 1. Applying the analysis from *Oakes*, the court held that the objective of providing necessary exemptions to the general purpose of providing rights of public access to information relates to concerns that are pressing and substantial in society. The court also held that the measures selected by the legislature met the *Oakes* proportionality test. Respectfully, I must once again disagree.

(i) Pressing and Substantial Objective

[67] In my view, the objectives of the Act, as expressed in s. 1 (including the objective to provide necessary exemptions from the right of access that are limited and specific) qualify as pressing and substantial objectives for the purposes of this test.

(ii) Rational Connection

[68] No one has argued that if there is any constitutional infringement that it fails on this portion of the test. While it is still open to this court to find that there is no rational connection between the statutory objectives of the Act and the lack of a public interest override for the exemptions at issue, I do not consider it necessary to do so.

(iii) Minimal Impairment

[69] In my view the Act does not impair the right to expression as little as possible. I know that "as little as possible" will vary depending on the government objective and on the means available to achieve it: see *Irwin Toy*, *supra* at 993. The focus of minimal impairment must, in my view, take into account the stated objectives of the Act to determine if the 2(b) infringement is "as little as possible". Therefore, for my analysis here I will focus on the objective of the legislation as stated in s. 1(a)(ii) of the Act, which stresses the need for "specific" and "limited" exemptions.

[70] Once again, the Act's structure reveals the lack of minimal impairment. The existence of a public interest override in the Act demonstrates, as I have already said, an intention to disclose information notwithstanding the Ministry's decision to apply certain exemptions. Thus, even where the Minister decides that the information should be exempt, the Information Commissioner may still

determine that the public interest in disclosure outweighs *the purpose of the exemption* and may order that the record be disclosed.

[71] The wording of the public interest override, therefore, already contains an element of balancing the competing claims of the public interest in disclosure and the purpose of the exemption. To that effect, it ensures that any infringement on free expression is limited to situations where the public interest in disclosure does not outweigh the purpose of the exemption.

[72] The presence of this balancing of interests for some exemptions demonstrates how exemptions can be "specific" and "limited", with reference to the other objectives of the Act. That is, that information should generally be available to the public, and that decisions on disclosure should be reviewed independently of government.

[73] The only way for the Act to reasonably achieve its stated objectives of only containing "specific" and "limited" exemptions is to ensure that exemptions are not so broad that they undermine the values advanced by an access to information regime. In other words, where there is no limit on an exemption, the exemption cannot reasonably accord with the Act's stated objectives. The exemption may be "specific", in that it only applies to certain types of information, but it is not "limited". The objectives of the Act, therefore, are not fulfilled in a manner that impairs the right to free expression as little as possible where, as here, the structure of the Act does not accord with the underlying spirit of those very objectives.

[74] This is not a case — as it was in *Irwin Toy* — where the government is seeking to mediate between claims of competing interest groups. The balancing in question in this case is between the government's interest in restricting access to information, which has the effect of restricting expression, and the CLA's interest in expressing itself on an issue that the Assistant Commissioner has found to be of compelling public interest.

[75] The Ministry's argument that the extension of the public interest override — an admittedly less intrusive means of achieving the objective — would be less effective, does not, in my view, properly focus on the objectives as stated in the statute. Those objectives stress that an exemption should be limited. A test that ensures that the exemptions are limited — while at the same time focusing on the purpose for the exemption — cannot be said to conflict with that objective.

[76] I turn next to access to information legislation in other jurisdictions. Two provinces (British Columbia and Alberta) currently have access to information statutes that include an unlimited public interest override. I believe it will be both informative and provide some context to set out the relevant provisions from those statutes:

> *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165
>
> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to … an applicant, information …

> (b) the disclosure of which is, for any … 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
>
> 32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose … to an applicant …
>
> (b) information the disclosure of which is, for any … reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.
>
> [Emphasis added.]

[77] I would first note that the public interest overrides in those two statutes apply to the entire Act. There are, however, two other substantive differences between those provisions and the public interest override in the Ontario Act that are also worth noting:

> (i) The lack of a need for an application: the head of a public body "must" disclose information "whether or not a request for access is made".
>
> (ii) There is no balancing between the public interest and the exemption: the test is whether disclosure is "clearly in the public interest".

[78] Thus, my conclusion that the Charter requires that s. 23 of the Ontario Act apply to every exemption does not re-fashion the s. 23 public interest override into a British Columbia- or Alberta-style provision. It would not be as strong as those provisions, because the test for determining whether or not disclosure is in the public interest here depends on the exemption that would otherwise prevent disclosure.

[79] Section 23 specifically requires that the Commissioner consider the purpose of the exemption when determining whether the public interest warrants disclosure. In my view, those purposes are not undermined by the public interest override as it is provided for in s. 23 where those purposes are worked into the equation.

[80] In short, all of the Ministry's arguments as to why s. 23 should not apply to ss. 14 and 19 are compelling arguments that are relevant to the Commissioner's decision whether or not to apply s. 23 to a given record. Since they are available at that stage, it cannot be said that the Act currently minimally impairs expression when it does not permit the public interest to *potentially* override the

purpose for the exemption. If the purpose for the exemption is as strong as the Ministry argues, then the Commissioner will only be able to exercise the public interest override in extremely limited situations.

[81] In the end, the Ministry has not proven on a balance of probabilities that the current legislative scheme constitutes a minimal impairment of the appellant's s. 2(b) rights, given the stated objectives of the Act. A complete lack of the application of s. 23 to the exemptions at issue cannot reasonably be held to be a "minimal" impairment of the *Charter*.

(iv) Salutary versus Deleterious Effects

[82] Finally, the salutary benefits of the objectives of the Act, in my view, do not outweigh its deleterious effects. Indeed, this case is a good example of this point.

[83] The Divisional Court raised the issue of the dangers of exposing law enforcement records and records subject to solicitor-client privilege to potential disclosure. While the Divisional Court conducted this analysis as part of its reasoning as to why s. 2(b) should not apply to freedom of information, and not as part of its s. 1 analysis, the court's analysis in this fashion was, respectfully, misplaced. Any consideration as to the consequences of including freedom of information under s. 2(b), in my view, more properly belongs in the analysis where government attempts to justify a *Charter* breach. I turn then to the alleged dangers.

[84] In relation to the risks to law enforcement activity, the Divisional Court was essentially of the view that a disclosure requirement would mean that ongoing criminal investigations would be subject to requests by members of the media and by public interest groups such as the appellant. This would potentially hinder investigations, risk publicizing confidential aspects of the investigations, and possibly impair an accused person's right to a fair trial. The court felt it would divert resources and the energy of law enforcement officials.

[85] Respectfully, the court's portrayal of the potential risks ignores two important facts:

(i) The Commissioner's decision to disclose a record requires her to determine that there is a compelling public interest in the record and that the public interest in disclosure clearly outweighs the purpose for the exemption; and,

(ii) The facts of this case are in connection with a trial that was stayed on the grounds of alleged abusive conduct by law enforcement officials, not with a trial that was on-going.

[86] The Divisional Court's focus on the risk to on-going proceedings recognizes that the risk of prejudicing those proceedings is very strong. Even accepting that, this factor is one that can be weighed by the Commissioner when she makes her decision as to whether the records should be disclosed. If the dangers of disclosure are as clear and palpable as the court suggests, then the

Commissioner would take this into account when determining whether or not a compelling public interest clearly outweighs the purpose for the exemption.

[87] I would respond briefly to the diversion of resources, or the increased cost of litigating disclosure requests. Barring an evidentiary record suggesting that the costs would be so prohibitive so as to impair the government's ability to fund law enforcement activities, this argument does not, in my view, justify a *Charter* infringement. As the Supreme Court of Canada noted in *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 at para. 72:

> [The] courts will continue to look with strong scepticism at attempts to justify infringements of Charter rights on the basis of budgetary constraints. To do otherwise would devalue the Charter because there are always budgetary constraints and there are always other pressing government priorities.

[88] Here, the respondent has not provided an evidentiary record that suggests that it is in any state of financial emergency similar to that which existed in *N.A.P.E.*

[89] Regarding solicitor-client privilege, the Divisional Court observed that, while it is not absolute, it is nonetheless jealously guarded by the courts because of its importance to the criminal justice system. The court went on to say at para. 95 that:

> If the CLA's position is correct, it would mean that documents which are fully covered by solicitor-client privilege and which do not meet the very limited exceptions outlined in such cases as *R. v. McClure*, and *Lavallee, Rackel & Heintz v. Canada (AG)*; *White, Ottenheimer & Baker v. Canada (AG)*; *R. v. Fink*, could be subject to public disclosure. I find this proposition startling. [Citations omitted.]

[90] I have two responses to this. First, the wording of s. 19 does not necessarily grant the Commissioner the jurisdiction to determine whether or not an exception to solicitor-client privilege is present so as to justify disclosing otherwise privileged communications. Second, the compelling reasons justifying the stringent application of exceptions to solicitor-client privilege support an inference that even if the Commissioner were to apply s. 23, in most circumstances — including, possibly, the current proceedings — she would be unlikely to find that the public interest clearly outweighs the purpose for the exemption.

[91] In my view, allowing the Commissioner the jurisdiction to consider whether the public interest clearly outweighs the reasons for a right to solicitor-client privilege would not immediately do damage to the principles surrounding privilege. It must be kept in mind that the public interest also weighs in favour of a narrow application of such an exception.

[92] I would note that, in relation to both sets of potential dangers — risk to on-going investigations and solicitor-client privilege — the issue before this court is not whether or not the documents should be disclosed; rather, it is whether or not s. 23 ought to apply to ss. 14 and 19.

[93] Even though the appellant succeeds on this appeal, the ultimate decision as to whether or not the public interest clearly outweighs the purposes for these exemptions still lies with the Commissioner. She may yet decide that although the public interest outweighs the purpose for the personal privacy exemption, it does not outweigh the purpose for the other exemptions that apply to the identified records and that disclosure is not warranted.

[94] In this case, the objectives of the Act are not met because there is no independent oversight of the Minister's decision not to disclose. This is because the Commissioner has no power to review the Minister's decision. The exemption, therefore, is not exercised in a limited way since the Act does not provide for the possibility that the public interest might outweigh the purpose for the exemption. Thus, the general right to access to information is thwarted. The only salutary effect the Ministry can point to is that it has preserved its ability to conduct reviews of the police and Crown Attorneys in private.

[95] Meanwhile, the deleterious effects of the Act, I would conclude, are quite serious: the government's failure to let the Commissioner even determine whether it is in the public interest to disclose the records arguably puts the administration of justice into disrepute. The lack of an independent means of determining whether the records should be disclosed, in light of Glithero J.'s extensive findings of specific acts of police and Crown misconduct, places us back to an era where government secrecy was the norm and disclosure was at the whim of the Minister. If the public interest outweighs the purpose for the exemption, then it cannot be said that the effect on the CLA's s. 2(b) rights is proportional, as there is no salutary benefit to point to.

[96] I would conclude, therefore, that the violation of the CLA's s. 2(b) rights cannot be justified by the Ministry under s. 1, as it fails on all aspects of the proportionality analysis.

DISPOSITION

[97] For all of the foregoing reasons, I would set aside the Ontario Superior Court of Justice (Divisional Court) judgment dated March 25, 2004 and I would grant judgment as follows:

(i) I would allow the appeal.

(ii) I would quash the Order PO-1779 of Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner/Ontario (the "Commissioner") dated May 5, 2000 (the "Order").

(iii) Sections 10, 14, 19 and 23 of the *Act* operate in such a manner as to unjustifiably deny the CLA access to the records and thus I conclude they violate s. 2(b) of the *Charter* in a manner that is unjustified under s. 1 of the *Charter*.

(iv) I would read the words "14 and 19" into s. 23 of the *Act*. And,

(v) I would remit the matter back to the Commissioner for a re-determination on the basis of s. 23 with "ss. 14 and 19" read in, in accordance with this decision.

[98] As the parties have agreed that there should be no costs in this appeal, I would order accordingly.

"H.S. LaForme J.A."

"I agree J MacFarland J.A."

JURIANSZ J.A. (Dissenting):

INTRODUCTION

[99] I have read the reasons of LaForme J.A. and find myself in disagreement. LaForme J.A. allows the appeal on the narrow basis that s. 23 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "Act") restricts the expressive activity of the Criminal Lawyers Association (the "CLA"). He thus found it unnecessary to consider the broader questions raised on the appeal, namely whether s. 2(b) of the *Charter* creates a positive obligation on the government to provide access to information, and whether s. 23 of the Act infringes the unwritten principle of democracy. Since I do not share my colleague's conclusion, I will address these questions as well.

[100] I first consider and reject the contention that s. 2(b) of the *Charter* guarantees a right of access to government information either generally or in the particular facts of this case.

[101] I reject the CLA's "effects-based" argument, on the grounds that it conflates the two steps of the analysis set out in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, and that when the Act is read as a whole, s. 23 cannot properly be seen as a restriction of an underlying statutory right of access.

[102] I also conclude that s. 23 of the Act does not infringe the unwritten principle of democracy.

[103] Finally, I express my view that even if one were to find a breach of s. 2(b) of the *Charter*, "reading in" is not an appropriate remedy in the circumstances of this case.

[104] I proceed on the basis of LaForme J.A.'s efficient statement of the facts.

I. SECTION 2(B) OF THE CHARTER DOES NOT INCLUDE A RIGHT TO GOVERNMENT DOCUMENTS

[105] The CLA, supported by Canadian Newspaper Association (the "Newspapers"), submits that s. 2(b) of the *Charter* creates a positive obligation on the government to provide access to information in its possession. The Newspapers argue that the very concept of freedom of expression itself, and hence s. 2(b), includes the substantive right to obtain government information. The Newspapers submit that if the Act did not exist, the *Charter* would require its enactment. The CLA submits that s. 2(b) of the *Charter* creates a positive obligation to provide access to information, at least in the particular circumstances of this case. I will discuss the Newspapers' position first as that discussion applies to the CLA's argument as well.

[106] The Newspapers submit that a purposive interpretation of s. 2(b) must include a right of access to government information, because information is essential to one's ability to express oneself and expression on public issues is vital to democracy. Relying on the jurisprudence enshrining the

"open courts" principle, they argue that it cannot be the case that "open courts" are necessary but "open government" is not. The CLA also argues that the weight of international legal authority now favours recognition of a constitutionally-entrenched right to access information in the government's possession.

1. A purposive approach to s. 2(b)

[107] As the CLA and the Newspapers point out, the Supreme Court has insisted on a "purposive" interpretation of the *Charter*: see e.g. *Hunter v. Southam*, [1984] 2 S.C.R. 145. In *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, Dickson C.J. explained, at 344, that a purposive interpretation takes account of the following factors: "the character and the larger objects of the *Charter* itself"; the "language chosen to articulate the specific right or freedom"; the "historical origins of the concepts enshrined"; and, where applicable, the "meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*." Dickson C.J. went on to caution that in conducting this analysis, care must be taken not to "overshoot" the actual purpose of the right or freedom in question. He pointed out that the *Charter* was not enacted in a vacuum, and it therefore must "be placed in its proper linguistic, philosophic and historical contexts." I base my analysis of s. 2(b) on this purposive approach.

(a) The text of s. 2(b)

[108] As its title indicates, the *Charter* guarantees both rights and freedoms. Section 2 of the *Charter* addresses "fundamental freedoms", while ss. 3-15 deal only with "rights". Section 2(b) provides:

> Everyone has the following fundamental freedoms:
> …
>
> > *b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[109] In *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 361, Dickson C.J. (dissenting) explained the distinction between rights and freedoms under the *Charter*:

> Section 2 of the *Charter* protects fundamental "freedoms" as opposed to "rights". Although these two terms are sometimes used interchangeably, a conceptual distinction between the two is often drawn. "Rights" are said to impose a corresponding duty or obligation on another party to ensure the protection of the right in question whereas "freedoms" are said to involve simply an absence of interference or constraint.

[110] One should not apply this distinction rigidly. Dickson C.J. warned that this conceptual approach might fail to capture "situations where the absence of government intervention may in

effect substantially impede the enjoyment of fundamental freedoms." Similarly, in *Haig v. Canada*, [1993] 2 S.C.R. 995 at 1039, L'Heureux-Dubé J. wrote for the majority that while the distinction between "rights" and "freedoms" may be helpful, it does not displace the purposive approach articulated *Big M Drug Mart*, *supra*, and that in some circumstances "positive governmental action might be required" to secure a fundamental freedom.

[111] The fundamental freedoms entrenched in s. 2 are therefore structured to guarantee a person's freedom to act without government interference or constraint. In most cases, the *Charter*'s constitutional guarantees are satisfied by government non-action. However, particular situations may arise where positive government action may be required in order to make a fundamental freedom meaningful.

[112] In my view, the extent to which positive government action may, in exceptional cases, be required to secure freedom of expression falls well short of the bold contention of the Newspapers that the right to access government information is, structurally, a component of the s. 2(b) guarantee. The distinction between a freedom and a right remains a central feature of the *Charter* and provides a basis for rejecting this general contention. Given the careful and consistent distinction the *Charter* makes between freedoms and rights, I would be reluctant to find that s. 2(b), which guarantees a freedom, has a right grafted onto it as an unexpressed component of that freedom. A consideration of the legislative history of s. 2(b) fortifies that reluctance.

(b) Legislative history of s. 2(b)

[113] Originalism is not part of the Canadian constitutional tradition. Nevertheless, the legislative history of the *Charter* is admissible to interpret its provisions and the question is what weight a court should give to the evidence introduced in a particular case.

[114] Many of the usual difficulties in determining the appropriate weight a court should give to the intent of the framers of the *Charter* are not present in this case. No question arises as to whether this court should attribute the explanations of the civil servants who drafted the *Charter*, or the individual comments made by ministers or elected members, to the body as a whole and thus use them to identify the collective intention of all the framers. Such difficulties do not arise in this case because the following clause was considered for inclusion in the *Charter*:

> Right to Information
>
> 5. Everyone has the right to have reasonable access to information under the control of any institution of any government.

[115] The Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (the "Committee"), in a formal vote, decided not to include the clause in the *Charter*. Consequently, here it is certain that the framers' collective intent was that the *Charter* should not include a guarantee of the right to access government information.

[116] In my view, the weight to be given to the framers' intent in this case may be distinguished from cases like *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486. In that case, the Supreme Court was interpreting a provision that had been included in the *Charter* and was determining how much weight it should give to speeches and comments made by individuals, including those of the civil servants, during the Committee proceedings. By contrast, in *R. v. Prosper*, [1994] 3 S.C.R. 236, the Supreme Court was faced with a specific constitutional provision that had been considered and rejected by the Committee. In distinguishing between *Prosper* and *Re B.C. Motor Vehicle Act*, Lamer C.J. wrote in *Prosper* at 267:

> In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, I stated for the majority that while these Minutes are admissible as extrinsic aids to the interpretation of *Charter* provisions, they should not be given "too much weight" …
>
> The situation here is quite different: at issue is a specific clause which was proposed, considered and rejected by our elected representatives. In my opinion, it would be imprudent for this Court not to attribute any significance to the fact that this clause was not adopted. In light of the language of s. 10 of the *Charter*, which on its face does not guarantee any substantive right to legal advice, and the legislative history of s. 10, which reveals that the framers of the *Charter* decided not to incorporate into s. 10 even a relatively limited substantive right to legal assistance (i.e., for those "without sufficient means" and "if the interests of justice so require"), it would be a very big step for this Court to interpret the *Charter* in a manner which imposes a positive constitutional obligation on governments. [Underlining in original.]

[117] In my view, Lamer C.J.'s comments apply to this case. It would be a "very big step" for the courts to interpret the *Charter* as guaranteeing a right of access to government information when such a right was proposed, considered, and rejected by Canada 's Parliamentary representatives. The framers' intent to exclude the right of access to government information from the *Charter* must be given significant weight in this case.

[118] Similarly, while the "living tree" doctrine undoubtedly allows the courts to interpret *Charter* guarantees in light of evolving societal realities, as L'Heureux-Dubé J. wrote in *Prosper*, *supra*, at 287 in dissent in the case but concurring on this issue:

> [T]he "living tree" theory has its limits and has never been used to transform completely a document or add a provision which was specifically rejected at the outset. It would be strange, and even dangerous, if courts could so alter the constitution of a country.

[119] Finally, on this point, it is worth noting that the CLA and the Newspapers identified no changed societal needs since the Committee rejected including a constitutional right of access to

government information in the *Charter*. The public's access to government information was as important for democracy then as it is now.

(c) International legal sources on a right of access to government information

[120] Both the CLA and the intervener placed great reliance on international treaties and court decisions from other countries, as well as from international tribunals, in support of their position that a right of access to government information is a necessary component of freedom of expression under s. 2(b).

[121] In particular, they asked this court to place significant weight on the *International Covenant on Civil and Political Rights*, December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 ("*ICCPR*"), by which Canada has agreed to be bound. Article 19 states:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this 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.

[122] There is no obligation on Canada to meet its obligations under the *ICCPR* by providing constitutional remedies for a breach of its provisions. The Newspapers did not argue that the access to information statutes enacted by the federal and provincial governments would be found to be deficient in meeting Canada 's obligations under Article 19. Rather, they submitted that the terms of the *ICCPR* provide useful guidance for interpreting the *Charter*. While that may be true, in drawing guidance from the *ICCPR* one should take note of textual differences between the two documents. In this case, the *ICCPR* guarantees the "the right to freedom of expression" and specifically defines that "right" to include the right to "seek, receive and impart information". Given the significant difference in the wording of Article 19 the *ICCPR* and s. 2(b) of the *Charter*, the guidance of the *ICCPR* is of limited assistance in this case.

[123] I am not persuaded that the international law sources relied upon by the CLA and the Newspapers are determinative here. While the *ICCPR* is deserving of weight, it does not require this court to read a right to access government information into s. 2(b) the *Charter*. Neither it nor the decisions of courts and tribunals of other countries or international organizations can overcome the dominating weight of the other considerations reviewed above. Section 2(b) must be interpreted in the linguistic, philosophic and historical context of its adoption by Canada.

[124] I would conclude that s. 2(b) of the *Charter* does not guarantee a substantial right of access to government information limited only by the application of s. 1 of the *Charter*.

II. THERE IS NO RIGHT OF ACCESS TO GOVERNMENT INFORMATION IN THE PARTICULAR CIRCUMSTANCES OF THIS CASE

[125] The CLA argues that s. 2(b) places a positive obligation on the government to provide access to information in the particular circumstances of this case.

[126] In arguing that there is a need for positive state action on the facts of this case, the CLA acknowledges that the Supreme Court has decided that s. 2(b) does not require the government to provide "platforms" to enable individuals to express themselves. However, it relies on three lines of authority in support of its position that the Supreme Court has left the door open to imposing a positive obligation on the government to provide access to information in some circumstances. It submits that this case presents the circumstances in which this court should impose a positive obligation on the government.

[127] The first line of authority is what the CLA calls "general dicta concerning s. 2(b)". Under this heading, the CLA points to L'Heureux-Dubé J.'s statement in Haig, supra, that the distinction between "rights" and "freedoms" is not always clear, and that the purposive approach articulated in *Big M Drug Mart*, *supra*, might require positive government action to protect fundamental freedoms in some cases.

[128] A helpful summary of this jurisprudence is found in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 at paras. 26-27, where Bastarache J. wrote:

> It is because of the very nature of freedom that s. 2 generally imposes a negative obligation on the government and not a positive obligation of protection or assistance.
>
> With respect to freedom of expression, this principle was articulated by this Court in *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1035:
>
> > The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones.
>
> The majority later qualified its remarks by stating, at p. 1039:
>
> > Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required.
>
> The general approach was subsequently confirmed in *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, in which this Court held that the government's decision not to provide financial

> assistance or extend an invitation to the association involved so that it could express its opinion during discussions on Aboriginal self-determination did not violate s. 2(b) of the *Charter*. This means then that except perhaps in exceptional circumstances, freedom of expression requires only that Parliament not interfere. [Underlining added.]

The CLA submits that this case presents such an exceptional circumstance.

[129] The second line of authority relied on by the CLA are cases concerning access to public fora, in which the Supreme Court has held that in certain circumstances a person must be granted access to public facilities in order to guarantee meaningful expression.

[130] The third line of authority concerns the "open courts" principle, which holds that court proceedings and court records must be available to the public in order to facilitate expression and promote democracy.

[131] The Divisional Court considered each of these categories and concluded that none of them assists the CLA.

[132] The Divisional Court observed that to date the Supreme Court has found the *Charter* imposed a positive obligation on the government in just one case – *Dunmore v. Ontario*, [2001] 2 S.C.R. 1016 – which concerned the wholesale exclusion of agricultural workers from Ontario's labour relations regime. In that case, the Court found that agricultural workers were too vulnerable to form associations without express legislative protection to do so, and that positive government action was required to safeguard their freedom of association under s. 2(d).

[133] The Divisional Court found that *Dunmore*, *supra*, was readily distinguishable from the case at bar. In *Dunmore*, the appellants were excluded from any form of association without the protection of legislation. By contrast, the Divisional Court observed that in this case, the CLA could comment on the Court and Monaghan affair or the OPP investigation, yet requested further information from the government to ensure its comments were more fully informed. The Divisional Court concluded that this was not a case where exceptional circumstances required positive government action.

[134] The CLA attacks the Divisional Court's premise that the government's refusal to disclose the records at issue would merely enable the CLA to engage in more informed and effective expression. The CLA submits this is incorrect and argues that the government's refusal to disclose, along with the operation of s. 23 of the Act, prevents it from engaging in any expression whatsoever. This case, the CLA counsel submits, involves a total prevention of any expression.

[135] I do not agree. The CLA understates both the force and scope of the expression it is able to convey without the undisclosed material. The CLA has the detailed decision of Glithero J. on the stay motion and it has or can obtain transcripts of the proceedings before him. It can comment, for example, on Glithero J.'s finding of "many instances of abusive conduct by state officials, involving

deliberate non-disclosure" and the OPP's conclusion that "no evidence that information withheld from defence was done deliberately and with the intent to obstruct justice." It seems to me the CLA is in a position to mount a powerful criticism of the government's failure to take action on Glithero J.'s findings without providing the public with any explanation of the discrepancy between his findings and the brief conclusion of the OPP report.

[136] I agree with the Divisional Court's analysis of this first line of authority, and add the following observation. In *Haig*, *supra*, the appellant was ineligible to vote in a national referendum on the Charlottetown Accord due to the combined effect of residency requirements under the *Canada Elections Act* and the *Election Act (Quebec)*. He claimed that the fact he could not vote in the referendum infringed his freedom of expression. L'Heureux-Dubé J. writing for the majority held that while casting a ballot is clearly expressive activity, there was no positive obligation on the government to allow the appellant to vote in the referendum. She explained, at 1040-41:

> A referendum is a creation of legislation. Independent of the legislation giving genesis to a referendum, there is no right of participation. The right to vote in a referendum is a right accorded by statute, and the statute governs the terms and conditions of participation. The Court is being asked to find that this statutorily created platform for expression has taken on constitutional status. … A government is under no constitutional obligation to extend this platform of expression to anyone, let alone to everyone. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law. [Underlining in original.]

[137] Similarly, in this case the CLA is unable to make certain comments due to the Minister's decision, authorized under ss. 14 and 19 of the Act, to refuse to disclose the requested information. It claims that this refusal, and the fact that the public interest override does not apply to these sections, violates its freedom of expression. The problem with this argument is that the right of access to government information, like the right to vote in a referendum in *Haig*, *supra*, is strictly a creation of legislation. There is no constitutional right to access government information, only a statutory right. The legislature is free to dictate the conditions and limitations on that right, provided it does not do so in a discriminatory manner.

[138] Turning to the second line of authority relied on by the CLA, the "public fora" cases, the Divisional Court distinguished both *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, which involved leafleting in the Dorval airport, and *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, which involved a by-law that prohibited postering on utility poles on city property. The Divisional Court explained that those cases involved the expression of information already in the possession of the person seeking to express it; the issue was the government's attempt to suppress the exercise of that expression on public property. By contrast, in this case the CLA is free to express the opinion it holds, but seeks more information to be able to make additional or more informed comment. The Divisional Court noted that in *Delisle*, *supra*, at para. 40, Bastarache J. explained that Ramsden established that an absolute prohibition on postering on utility poles violated

s. 2(b), but that freedom of expression "did not require the government to install notice boards to promote postering". As I explained above, here there is no prohibition of expression like there was in *Ramsden*, since the CLA can express itself, albeit not as fully and effectively as it would like.

[139] Finally, the Divisional Court examined the "open courts" cases relied on by the CLA and again concluded that they were of little assistance. The court explained that while the "open courts" principle is fundamental to our justice system, its application has been limited to ensuring access to judicial and quasi-judicial proceedings, and does not apply to investigations by non-adjudicative bodies, nor to other parts of the criminal justice system that have not traditionally been part of the "public arena". I agree.

[140] I would conclude that the CLA has failed to establish that this case falls into an exceptional category in which s. 2(b) would impose an obligation on the government to take positive steps to facilitate the CLA's freedom of expression.

III. SECTION 23 OF THE ACT DOES NOT HAVE THE EFFECT OF RESTRICTING THE CLA'S FREEDOM OF EXPRESSION

[141] The primary argument of the CLA is that s. 23 of the Act, by not permitting a public interest override of the ss. 14 and 19 exemptions, had the *effect* of restricting the CLA's freedom of expression. This argument, it says, remains available even if s. 2(b) of the *Charter* does not require the government to provide a "platform" for expression or to take any other action to facilitate expression. LaForme J.A. allows the appeal on this basis. I disagree with his conclusion and the reasoning upon which it is based.

[142] In his reasons, LaForme J.A. first classifies the comments the CLA would potentially make, should it receive the requested information, as the content of expressive activity of the CLA. Next, he finds that the CLA has a right of access to government information that arises independently of the *Charter*. He identifies the Act, particularly s. 10, as the source of that right. He then finds that the purpose and effect of s. 23 of the Act is to restrict the underlying right of access by failing to provide a public interest override to ss. 14 and 19 of the Act. Thus, he concludes that s. 23 constitutes government action which restricts the CLA's expressive activity and thereby infringes its s. 2(b) right to express itself free of government restraint. To remedy this infringement, he reads ss. 14 and 19 into s. 23.

[143] I take a different view of each step of this analysis.

i) Expressive activity

[144] The CLA argues that the comments it would make if it had access to the requested information constitute its expressive activity. The Divisional Court agreed, finding, at para. 55, that the expressive activity at issue is the CLA's "desire to comment publicly" on the discrepancy between Glithero J.'s findings and the OPP's conclusion. Similarly, LaForme J.A. characterizes the expressive activity in issue as "the potential comments the CLA would make should it receive the requested information". Certainly, if one accepts this description of the CLA's expressive activity,

it would follow that frustrating the CLA's "desire to comment" or preventing the CLA from making "potential comments" affects the CLA's ability to express itself. However, I am unable to accept this description.

[145] The CLA submits that the two-step analysis in *Irwin Toy* applies. The first step is to determine whether the claimant's activity falls within the sphere of conduct protected by s. 2(b). If it does, the second step is to determine whether the purpose or effect of the government action complained of was to restrict freedom of expression. A recent Supreme Court case, *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, added an interim step after the first step – asking whether s. 2(b)'s protection extends to the method or location of the expression. I will comment on the interim step later.

[146] The two steps of *Irwin Toy* are analytically distinct. Each step serves a different purpose and each has its own distinct focus. The first step focuses on the person claiming the protection of s. 2(b). It examines a person's activity in order to determine whether that activity prima facie falls within the scope of guaranteed free expression. At step one, the challenged government action is not relevant. The second step focuses on the challenged government action in order to determine whether its purpose or effect is to restrict freedom of expression.

[147] Clearly, any comments the CLA makes regarding the discrepancy between the findings of Glithero J. and the OPP investigation, its request for access to information, and its complaints about the government's refusal to disclose that information would be expressive activity. It is not suggested that the government has done anything to restrict that expressive activity. Rather, the CLA desires to examine the OPP report and comment on it but the government has refused to disclose the report. The focus of the CLA's *Charter* challenge is the "potential comments" that the CLA *could* make but for the government refusing to disclose information.

[148] The situation the CLA finds itself in – having the "desire to comment" and having "potential comments" – is not, in my view, expressive activity. It is, rather, the *effect* of the government's refusal to disclose information. But the effect of the government's action is not relevant at step one of the *Irwin Toy* analysis that focuses on the activity of the claimant. The effect of the government's refusal does not come into play until step two of the *Irwin Toy* analysis is reached.

[149] As I see it then, the CLA did not engage in expressive activity upon receiving notice of the government's refusal to disclose the requested information. Receipt of the requested information was the precondition for the CLA's potential expressive activity. Without it, there is no expressive activity and the government's act of refusing to disclose the information cannot, following the *Irwin Toy* analysis, create expressive activity where none existed. To use the effect of the government's decision to characterize the CLA's situation as "expressive activity" is to conflate steps one and two of the *Irwin Toy* analysis. If the restrictive effect of the government's refusal is the basis for recognizing the CLA's "potential comments" or "desire to comment" as expressive activity at step one, then the same refusal will, by definition, have the effect of restricting expression at step two. The same question will have been asked and answered at both steps. Clearly, there is a problem with the way the CLA advocates applying the *Irwin Toy* analysis.

[150] Consideration of the interim step introduced by *Montréal (City)*, *supra*, may make it clearer that there is no activity of the CLA at this stage. There is nothing that is justiciable under the interim step. There is no "method or location" of any expression to consider. It is not known what form the CLA's comments will take or the location of their delivery. It is even possible that the CLA might decide not to make comment should it receive the OPP report.

[151] While I agree that one should take an expansive view of what is "expressive activity", I would conclude that in this case there is no expressive activity at issue. The CLA cannot escape the fact that its real complaint is that the government failed to disclose information to it to facilitate its proposed expression.

[152] I now turn to the analysis of the next issue: even if the CLA's situation were identified as "expressive activity", s. 23 does not restrict that activity.

ii) Section 23 does not have the purpose or effect of restricting the CLA's expression

[153] I do not accept that for purposes of *Charter* analysis it is appropriate to view s. 23 of the Act in isolation as a stand-alone exception designed to restrict an underlying statutory right of access created earlier in the Act by s. 10. In my view, absent irreconcilable repugnancy, it is not appropriate to pit one part of a statute against another, first to find an underlying statutory right and then to find the negation of that right. The purpose and effect of s. 23 is to work in concert with the other sections to define the statutory right. Section 10, the exemptions in ss. 12 to 22, and the exception to the exemptions in s. 23 are properly seen as harmonious parts of a single coherent legislative scheme.

[154] To understand properly the Act's legislative purpose, one must read the Act as a whole. It has been long established as a matter of statutory interpretation that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament or the provincial legislature.

[155] I conclude that the statutory scheme, when read as a whole, does not support the CLA's "effects-based" analysis. A closer reading of the pertinent provisions is instructive. The legislature took care to state the purposes of the Act in s. 1:

> 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
>
> (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.

[156] With respect to the issues here, ss. 1(1)(i) and 1(a)(ii) are clear that the purpose of the Act is to provide the public with a right of access subject always to limited and specific exemptions.

[157] Section 10, the section which creates the statutory right of access that underpins the first leg of LaForme J.A.'s analysis, begins as follows:

> 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 …

[158] Section 10, properly read, does not create a general unrestricted right to government information. By its very terms, the substantive statutory right of access that s. 10 creates is subject to the exemptions set out in ss. 12 to 22.

[159] Nor does s. 23 restrict the statutory right of access created earlier in the Act. Section 23 provides:

> 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.

[160] Rather than restricting the statutory right of access created by s. 10, one can read s. 23 as expanding the scope for disclosure. Section 10 is subject to the exemptions in ss. 12 to 22. Section 23 broadens the right granted by s. 10 by creating an exception to the exemptions, albeit one that does not extend to ss. 14 and 19 (and, although not relevant to this appeal, s. 16 as well).

[161] Furthermore, since disclosure under ss. 14 and 19 is discretionary, no provision of the Act prevents disclosure. Rather, the operative cause of the restriction of the CLA's "expressive activity" is the exercise of the Ministerial discretion to refuse disclosure.

[162] The reason the CLA focuses its attack on s. 23 is not apparent to me. Using the same "effects-based" analysis, the CLA could regard the exemptions in ss. 14 and 19 of the Act and the Ministerial discretion invoking them as restricting its underlying statutory right of access to

government information. Pointedly, if the decision of LaForme J.A. is implemented, a future decision of the Commissioner that the amplified "public interest override" did not apply could be attacked as having the effect of frustrating the CLA's "expressive activity". This makes apparent that the breadth of the "effects-based" analysis is not narrow at all. A member of the public seeking government information can use it to attack any of the exemptions in ss. 12 to 22, any Ministerial decision refusing to disclose information, and any decision of Commissioner upholding a refusal of information.

[163] I would conclude there is no breach of the *Charter* because there is no "expressive activity" and because there is no underlying statutory right of access that is restricted by later provisions of the same statute.

IV. THE CONSTITUTIONAL PRINCIPLE OF DEMOCRACY

[164] As the CLA and the Newspapers argue, access to government information is an integral part of democracy and is essential to the proper functioning of a responsible government. That, however, does not mean that the courts rather than the political process should enforce that value. We are concerned here with a statutory provision enacted by the legislature composed of the democratically elected representatives of the people of Ontario. In *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, a case which concerned the government's refusal to disclose certain information on the basis of cabinet privilege, the unanimous Supreme Court observed, at para. 55, "The unwritten principles must be balanced against the principle of Parliamentary sovereignty." In Babcock, the Court rejected the argument that cabinet privilege protected by s. 39 of the *Canada Evidence Act* violated the unwritten constitutional principle of democracy.

[165] The democracy principle was explained by the Supreme Court in this way in the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 62:

> As is apparent from an earlier line of decisions emanating from this Court, including *Switzman v. Elbling*, [1957] S.C.R. 285, *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, *Boucher v. The King*, [1951] S.C.R. 265, and *Reference re Alberta Statutes*, [1938] S.C.R. 100, the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, <u>have always operated</u>. [Underlining added.]

The right of access to government information is not part of the baseline. It is a right that did not exist until the Act was enacted. The right is statutory and not constitutional.

[166] I add that I agree with the Divisional Court's observation that the principle of democracy already underlies and informs the freedoms guaranteed by s. 2(b) of the *Charter*, and it would be redundant to apply that principle as a separate ground. The CLA did not cite any case after the adoption of the *Charter* in which the Supreme Court used the unwritten principle of democracy on its own to strike down legislation.

[167] I would reject this argument.

V. " READING IN" IS NOT AN APPROPRIATE REMEDY FOR THIS CASE

[168] While "reading in" is an acceptable remedy for unconstitutional statutes in certain circumstances, it is a remedial power that must be approached with caution. When deciding whether to grant the remedy of reading in, the courts must respect the role of the legislature as well as the purposes of the *Charter*. The courts should, to the extent that it is consistent with proper respect for the protection of *Charter* rights and freedoms, minimize interference with legislative purposes.

[169] If my reasoning is wrong and s. 23 infringes the *Charter*, there is no basis in the record for assuming that if faced with the choice of adding ss. 14 and 19 (and by implication s. 16) to s. 23 of the Act or removing s. 23 from the Act entirely the legislature would choose the former.

[170] According to my reading, the legislation works as a whole. The statute provides a limited right to access government information. Section 23 as crafted by the legislature plays an important role in defining the public's right of access to information. Broadening s. 23 beyond the legislature's intention would upset the interplay between s. 10, ss. 12-22, and s. 23.

[171] If there is a *Charter* breach because of the effect of the government's refusal to disclose information on the CLA's "expressive activity", then a remedy directed to the Ministerial decision to refuse disclosure of the records is preferable, as it would leave the Act intact. Disclosure would ultimately depend on the application of s. 1 of the *Charter* rather than s. 23 of the Act.

[172] I would decline to grant the reading in remedy claimed by the CLA.

VI. DISPOSITION

[173] For these reasons, I would dismiss the appeal, without costs as agreed by counsel.

RELEASED:

"RGJ" "R.G. Juriansz J.A."
"MAY 25 2007"