COURT FILE NO.: 730/00
DATE: March 25, 2004

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

R. A. BLAIR R.S.J., GRAVELY J. AND EPSTEIN J.

IN THE MATTER OF the *Judicial Review Procedure Act*, R.S.O. 1190, c. J.1
AND IN THE MATTER OF the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, and
IN THE MATTER OF Order PO-1779 dated May 5, 2000 issued by Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario

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<tr><td>B E T W E E N:</td><td></td></tr>
<tr><td>THE CRIMINAL LAWYERS' ASSO\CIATION

Applicant</td><td>David Stratas, Jeffrey Oliver and Brad Elberg, for the Applicant</td></tr>
<tr><td>- and -</td><td></td></tr>
<tr><td>THE MINISTRY OF PUBLIC SAFETY AND SECURITY (formerly the Ministry of the Solicitor General) and TOM MITCHINSON, ASSISTANT COMMISSIONER, OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

Respondents</td><td>Shaun Nakatsuru and Priscilla Platt, for the Ministry of Public Safety and Security and the Attorney General of Ontario</td></tr>
<tr><td>- and -</td><td>John Higgins, for the Information and Privacy Commissioner</td></tr>
<tr><td>THE ATTORNEY GENERAL OF ONTARIO

Intervenor</td><td></td></tr>
<tr><td></td><td>HEARD: October 9 and 10, 2003</td></tr>
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REASONS FOR DECISION

I

OVERVIEW

R. A. BLAIR R.S.J.:

[1] The issues raised by the Criminal Lawyers' Association[1] on this judicial review concern the ambit of their right to freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and the unwritten constitutional principle of democracy.

[2] The application is to review the order made by Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario, dated May 5, 2000 (Order PO-1779). In that order, the Assistant Commissioner dismissed the CLA's appeal from a refusal of the Ministry of the Solicitor General -- now the Ministry of Public Safety and Security -- to provide the CLA with access to certain records under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("the Act").

[3] The records in question consist of a 318-page police report, a March 12, 1998 memorandum and a March 24, 1998 letter. The records relate to an Ontario Provincial Police ("OPP") investigation into findings by a Superior Court of Justice trial judge that the *Charter* rights of two men accused of murder had been violated by "abusive conduct" on the part of police and Crown officials. The Ministry refused to disclose these records on the grounds that the former constituted "law enforcement records" and the latter two consisted of documents protected by "solicitor-client privilege", relying upon the exemptions contained in ss. 14 and 19 of the Act, respectively. The CLA says this refusal violates its s. 2(b) freedom of expression and, further, that it violates the fundamental constitutional principle of democracy.

[4] The background giving rise to the judicial review is as follows.

Background

[5] In 1983, Dominic Racco was murdered. Mr. Racco was reputed to be an underworld gangster and his murder to have been a "mob hit". There was considerable public interest in the event. Four men were initially charged with his murder and ultimately pleaded guilty in 1985 to lesser charges of being an accessory to murder and conspiracy to commit murder.

[6] In 1990, two other men -- Graham Court and Peter Monaghan -- were also charged with the Racco murder. Seven years later, in 1997, these charges were stayed in a very high-profile decision of Mr. Justice Glithero in the Superior Court, *R. v. Court and Monaghan* (1997), 36 O.R. (3d) 263. Court and Monaghan had been held in pre-trial custody since their arrest. In his scathing judgment, Glithero J. held that their rights under ss. 7 and 11(d) of the *Charter* had been violated as a result of

[1] I shall refer to "the Criminal Lawyers' Association" in these Reasons as "the CLA".

"abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, [and] negligent breach of the duty to maintain original evidence" (at pp. 299-301 O.R.). He was particularly critical of the Crown in its prosecutorial role and of the police in their investigative role.

[7] Following the judgment of Glithero J., the OPP was asked to review the conduct of the police officers and Crown counsel involved. Nine months later, the OPP issued a terse press release simply stating, in effect, that it had found no evidence of any attempts to obstruct justice.

[8] 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 laconic statement and the detailed acts of abusive conduct contained in the judgment of Glithero J. Its then president, Mr. Alan Gold, submitted a request to the Ministry under the Act, seeking access to the records underlying the OPP's investigation into the Court and Monaghan affair and lying behind the conclusion expressed in its short press release.

[9] When the Ministry processed the CLA request, it found the records indicated above were responsive to the request. However, it declined to produce any of them, invoking in support of the refusal the exemptions contained in ss. 14 (law enforcement records), 19 (solicitor-client privilege) and 21 (personal privacy) of the Act. The CLA challenged this decision before the Assistant Commissioner.

[10] The Assistant Commissioner found that the records were exempt under ss. 14, 19 and 21. He concluded that there was a compelling public interest in the disclosure of the documents sufficient to override the s. 21 exemption, but that since the "public interest override" provisions of s. 23 of the Act did not apply to law enforcement records (s. 14) or to documents protected by solicitor-client privilege (s. 19), the records could not be disclosed. He rejected the CLA's claim that its s. 2(b) rights had been infringed by the denial of access to the records in question.

[11] The CLA seeks to set aside that decision.

[12] For the reasons that follow, I would dismiss the application.

II

THE STANDARD OF REVIEW

[13] Counsel agree that the standard of review for determinations of the Assistant Commissioner concerning *Charter* issues is correctness: see *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121, at p. 18 S.C.R., p. 130 D.L.R.; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658, at p. 599 S.C.R., p. 686 D.L.R.; *U.F.C.W. Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, 176 D.L.R. (4th) 607, at p. 1129 S.C.R., pp. 642-43 D.L.R.

[14] Determinations of the Assistant Commissioner regarding the interpretation and application of the provisions of the Act falling within his area of expertise are subject to a standard of reasonableness. The Court of Appeal has applied this standard to decisions involving various exemptions under the Act, including law enforcement (s. 14), personal information and privacy (ss. 2 and 21) and the public interest override (s. 23): *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108 (C.A.) at pp. 109-10, leave to appeal denied [1999] S.C.C.A. No. 134; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395, 181 D.L.R. (4th) 603 (C.A.) at pp. 400-02 O.R.; *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 at paras. 2-3 (C.A.).

[15] The Court of Appeal has also determined that the standard of review for the Commissioner's determinations under the solicitor-client privilege exemption in s. 19 is correctness: *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner, Inquiry Officer)* (2002), 62 O.R. (3d) 167, 220 D.L.R. (4th) 467 (C.A.), at p. 169 O.R., pp. 469-70 D.L.R.

III

THE RELEVANT STATUTORY PROVISION[2]

[16] The purpose of the Act is twofold; namely, (a) to provide a statutory right to access to government information where no such general right existed previously -- subject to specific exemptions -- and, (b) to protect personal privacy. Section 1 states:

> 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 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.

[17] Section 10 provides a general right of access to a government record unless the record falls within one of the exemptions set out in s. 12 to 22 of the Act, or unless the head of the institution

[2] The following outline is taken from the helpful summary contained in the Factum of the Ministry of Public Safety and Security.

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.

[18] Some of the exemptions in ss. 12 to 22 are mandatory; some are discretionary; some provide a duty on the part of the head to disclose. The exemptions are worth noting in summary, for purposes of context. They are:

a) cabinet records (s. 12);

b) advice to government by a public servant or other employee (s. 13);

c) law enforcement records (s. 14);

d) relations with other governments (s. 15);

e) defence records (s. 16);

f) commercial third party records (s. 17);

g) economic and other interests of Ontario (s. 18);

h) solicitor-client privilege (s. 19);

i) disclosure of records that can threaten the safety or health of someone (s. 20);

j) personal information about a person to a third party (s. 21);

k) disclosure of records that can put fish or wildlife species at risk (s. 21.1); and

l) information soon to be published (s. 22).

[underlining added]

[19] Section 23 of the Act is central for purposes of this judicial review. It provides a "public interest override" to *most* of the categories of exempted records. Section 23 states:

> 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.

[20] Section 23 does not apply to cabinet records (s. 12), law enforcement records (s. 14), defence records (s. 16), records that fall within the purview of solicitor-client privilege (s. 19), and information that will soon be published (s. 22).

[21] Sections 14 (law enforcement records) and 19 (solicitor-client privilege) are the other provisions central to this judicial review. It is worth noting, however, that if the CLA is correct in its submissions as to the reach of its rights to freedom of expression under s. 2(b) of the *Charter*, the same arguments would apply to the disclosure of cabinet and defence records (ss. 12 and 16).

[22] The Ministry relied upon subsection 14(2)(a) of the Act which states:

> 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[.]

[23] Section 19 of the Act states:

> 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.

IV

THE ASSISTANT COMMISSIONER'S DECISION

[24] The Assistant Commissioner found that the 318-page document containing details of the OPP investigation constituted "a report" prepared in the course of law enforcement by an agency which has the function of enforcing and regulating compliance with a law, as contemplated by s. 14 of the Act. He found that the March 12, 1998 memorandum and the March 24, 1998 letter were documents relating to legal advice regarding the laying of criminal charges following the investigation, and were therefore subject to the exemption for solicitor-client privilege under s. 19. With respect to the s. 21 exemption concerning personal information, the Assistant Commissioner held that the documents contained personal information regarding the police officers and Crown counsel in question, as well as personal information regarding witnesses, the victim, the accused and others. He accepted that there was a presumed unjustified invasion of personal privacy under para. 21(3)(b) of the Act and therefore that the records were exempt under s. 21.

[25] The Assistant Commissioner concluded, however, that there was "a compelling public interest" in disclosure that "clearly outweighed" the interest in non-disclosure and would have ordered disclosure in relation to the s. 21 exemption under the s. 23 override. Disclosure of the records could not be ordered, however, because the s. 14 "law enforcement" and s. 19 "solicitor-client privilege" exemptions are not subject to the s. 23 override.

[26] The Assistant Commissioner considered the *Charter* arguments raised by the CLA. He decided that he had the jurisdiction to determined *Charter* issues, but he accepted the Ministry's arguments that the applicant's s. 2(b) rights had not been violated.

[27] The argument that disclosure ought to be ordered based upon the principles of democracy was not raised before the Assistant Commissioner.

V

SUMMARY OF THE ARGUMENT

[28] On behalf of the CLA, Mr. Stratas makes two primary submissions[3]. He argues that the CLA's right to freedom of expression provided by s. 2(b) of the *Charter* is infringed in a fashion that is not justified by s. 1 of the *Charter*, and, further, that the constitutional principle of democracy is infringed by:

(a) the unavailability of the public interest override in s. 23 of the Act in the case of exemptions under ss. 14 and 19; and

(b) the failure of the Assistant Commissioner to take into account the CLA's rights and the constitutional principle of democracy in interpreting and applying the sections of the Act that provide for exemptions to disclosure.

[29] As a result of the foregoing, s. 23 of the Act is said to be under-inclusive, and it must therefore be "read up" to accord with s. 2(b) of the *Charter* and the constitutional principle of democracy to include ss. 14 and 19 in the sections which are specifically subject to the public interest override. The Assistant Commissioner's decision must therefore be quashed and the matter remitted to him for re-determination on that basis.

[30] An additional submission was also advanced. The Assistant Commissioner's interpretation and application of ss. 14 and 19 of the Act are said to be unreasonable because he failed to take into account the fact that the records in question "are records that are not akin to private materials" but rather -- as is the case with all records in the possession of the Crown in the criminal justice system -- are "the property of the public to be used to ensure that justice is done".[4]

[31] I shall deal with each of these submissions in order.

VI

ANALYSIS

[32] Stripped to its essentials, the applicant's position is that members of the public have a general constitutional right -- founded upon the s. 2(b) freedom of expression and the principle of democracy -- to have access to government-held information and documentation, and to comment thereon, unless a balancing exercise, conducted on a case by case basis, demonstrates that what is in the

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[3] See Factum of the CLA at para. 21.

[4] Factum of the CLA at para. 42, citing R. v. Stinchcombe, [1991] 3 S.C.R. 326 at 333

public interest favours non-disclosure. To the extent that the *Freedom of Information and Protection of Privacy Act* excludes law enforcement records and documentation protected by solicitor-client privilege from this "public interest override", it is unconstitutional.

[33] Mr. Stratas urges us to accept that this is not a case of the CLA simply seeking access to government information in order to exercise its s. 2(b) rights *more fully and completely*. Rather, it is a case of the CLA being denied the opportunity to exercise those rights *at all* with respect to a wide range of very important questions relating to the administration of justice in Ontario. The list of potential questions includes the following, for example:[5] What caused the failure of the justice system in this incident and who was responsible for that failure? What can be learned from the incident? What steps should be taken to ensure that this sort of failure never happens again? On what basis did the OPP review reject the conclusions of Glithero J.? Are the matters that led to the failure being addressed or are they being whitewashed?

[34] These questions raise important issues for the administration of justice in Ontario, to be sure. In whatever manner the argument is crafted, however, it boils down to the submission that the public has a constitutional right to know, subject to a case-by-case public interest balancing test. In my view, there is no such constitutional right in the circumstances of this case.

[35] I begin the analysis of the applicant's position with the observation that prior to the enactment of the *Freedom of Information and Protection of Privacy Act* there was no public right to have access to the types of information covered by it. The objectives of the legislation included providing access to such state-controlled information, while at the same time providing necessary and limited exceptions to that access in order to protect state and other interests (including the integrity and confidentiality of law enforcement processes and the confidentiality of legal advice and litigation preparation). Thus, the fact that the Act exempts law enforcement and privileged information does not alter the common law situation.

[36] The question, then, is whether, as a component of the CLA's s. 2(b) rights, and/or based upon the principle of democracy, government is under a positive obligation to provide access to law enforcement and privileged information, subject to reasonable limits in the public interest, in order to facilitate the CLA's expressive activity. If the answer is "No", then that is the end of the matter; the exemption provisions of the Act are unproblematic because they simply result in the government not providing the CLA with information to which it does not have a right of access in any event. If the answer is "Yes", consideration must then be given to whether s. 23 of the Act is under inclusive and, if so, whether it can be saved, or whether the remedies sought by the applicant should be granted.

[37] Mr. Stratas seeks to construct the applicant's position on the twin foundations of s. 2(b) and the unwritten constitutional principle of democracy. In my view the latter principle is of little assistance to the applicant, and I shall therefore deal with it first.

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[5] Ibid, at para. 14.

The Principle of Democracy

[38] The principle of democracy is one of several unwritten principles that the Supreme Court of Canada confirmed underpin the Canadian Constitution in *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385. Others are the principles of federalism, constitutionalism and the rule of law, and respect for minorities. At para. 49, the court described the nature of these constitutional principles as follows:

> What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.

[39] The CLA argues that the principle of democracy necessarily includes a principle that institutions fundamental to our society -- like the courts and the criminal justice system -- must be subject to scrutiny and open discussion. Information concerning their operation must be accessible to the public, based on this governing principle of openness and subject to reasonable limits and restrictions imposed in the public interest.

[40] Mr. Stratas acknowledges there are no cases affirming this right-to-know-subject-to-reasonable-limits as an aspect of the principle of democracy; but neither, he says, are there cases against it. He relies upon the jurisprudence respecting s. 2(b) as reflecting these precepts, although the principle of democracy has not been argued in them. He also relies on certain European and Asian decisions that will be reviewed later in these Reasons. Mr. Stratas submits, in any event, that even if the principle of democracy standing alone does not support the proposition he advances, the combination of that principle and s. 2(b) does.

[41] I do not accept this submission. As Professor Hogg has noted, "unwritten constitutional principles are vague enough to arguably accommodate virtually any grievance about government policy" and the courts should be cautious about invalidating government initiatives on the basis of such principles: Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed., looseleaf (Scarborough: Carswell, 1992) at pp. 15-47 to 15-48. In *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, 214 D.L.R. (4th) 193, the Supreme Court rejected the argument that s. 39 of the *Canada Evidence Act*, which allows the federal government to withhold cabinet documents from court proceedings to which the documents are irrelevant, contravened unwritten constitutional principles. At para. 55, McLachlin C.J.C. noted that "the unwritten principles must be balanced against the principle of Parliamentary sovereignty."

[42] More particularly, it does not assist to address the applicant's position through the prism of the unwritten constitutional principle of democracy, in my view. First, I am inclined to accept Mr. Higgins' submission that that principle is more concerned with matters relating to the proper functioning of responsible government, and with the proper election of legislative representatives and the recognition and protection of minority and cultural identities, than it is with promoting access to information in order to facilitate the expressive rights of individuals.[6] Secondly, and in any event, the principle of democracy already underlies and informs the freedoms outlined in s. 2(b) of the *Charter*.

[43] In this latter regard, I note that in *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, at p. 976 S.C.R., Chief Justice Dickson identified the following factors as "the principles and values underlying the vigilant protection of free expression in a society such as ours": the pursuit of truth, the encouragement of participation in social and political decision-making, and the cultivation of diversity in forms of self-fulfillment and human flourishing. These are classic hallmarks of a democratic society. See *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, at pp. 765-67 S.C.R., to the same effect.

[44] Thus it would be redundant to apply the unwritten principle of democracy as a separate ground for attacking the purported governmental restriction on the applicant's expressive activity. Moreover, to do so would undermine the equilibrium mechanism carefully put in place by the *Charter*, namely, the constitutional entrenchment of freedom of expression in s. 2(b) balanced by the s. 1 saving justification. If the unwritten constitutional principles are imbedded in the s. 2(b) freedom in the first place then it does not advance the argument to re-consider them, either separately, or under the guise of being combined with the s. 2(b) analysis. I would therefore not give effect to the applicant's submissions based upon the unwritten constitutional principle of democracy.

[45] I now turn to the s. 2(b) analysis.

The Section 2(b) Argument

[46] This case is not about the importance of the right to freedom of expression as guaranteed by s. 2(b) of the *Charter*. Innumerable authorities at the highest level have affirmed the bedrock quality of that principle in our democratic society: see *Haig v. Canada*, [1993] 2 S.C.R. 995, 105 D.L.R. (4th) 577, per L'Heureux-Dubé J. at pp. 1033-34 S.C.R., and cases cited therein. Rather, this case is about the reach of that important right. More specifically, it raises the question of whether a positive obligation on the part of government to provide access to information in order to facilitate expressive activity is a component of the s. 2(b) right. It is in this context that the question of balancing the public interest arises.

[47] In *Irwin Toy, supra*, at p. 978 S.C.R., the Supreme Court outlined the two-step analysis to be followed in determining whether there has been a s. 2(b) violation:

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[6] Factum of the Information and Privacy Commissioner at paras. 67, 69.

> When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression.

[48] Subsequent decisions have interpreted the first step in the *Irwin Toy* analysis to involve two inquiries: does the activity in question comprise expression, and, if so, is that expression protected by s. 2(b)? See *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, 106 D.L.R. (4th) 233, at pp. 1095-96 S.C.R. The second step encompasses a consideration of whether either the government's purpose or the effect of the government's actions was to restrict freedom of expression: *Irwin Toy* at pp. 978-79 S.C.R.

[49] The CLA argues that the activity at issue on this judicial review falls within the scope of s. 2(b) and is within the protected sphere of conduct (step one). It concedes that the purpose of the legislative failure to make ss. 14 and 19 of the Act subject to the s. 23 public interest override is not to restrict expression, but submits that the effect of the government action is to do so (step two). Finally, the CLA contends that the s. 2(b) violation cannot be justified under s. 1 of the *Charter* since it does not meet the rational connection, minimum impairment, and proportionality tests of *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

[50] On the other hand, Mr. Nakatsuru submits on behalf of the respondent:

a) that the CLA is not engaged in expressive activity within the meaning of s. 2(b);

b) that even if it is engaged in expressive activity, there is neither a constitutional right to know, nor any positive obligation on the part of government to disclose information to the CLA to feed its s. 2(b) rights, and therefore, the activity in question does not fall within the scope of s. 2(b);

c) that there is no evidence on the present record to demonstrate the effect of the refusal to produce the records on the CLA's freedom of expression; and, in any event,

d) that the legislative scheme is saved by s. 1 of the *Charter*.

[51] On behalf of the Assistant Commissioner, Mr. Higgins concentrated his s. 2(b) arguments on the areas covered by Mr. Nakatsuru's points (b) and (d) above.

[52] I turn to these issues now.

Expression

[53] Section 2(b) protects an individual's freedom of "expression". The jurisprudence indicates that "activity is expressive if it attempts to convey meaning": see *Irwin Toy*, at pp. 969, 978-79 S.C.R.; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 194 D.L.R. (4th) 1.

[54] Here, Mr. Nakatsuru argues that no expressive activity of the applicant is being prohibited or limited by the impugned provisions of the Act. He proposes a narrow view of the activity in question and says it is simply a request for information from the Ministry under the Act and is not the equivalent of an attempt to convey meaning. The CLA's broader desire to use the information obtained later, in order to express itself on the implications of the Court and Monaghan affair and the OPP investigation into it, is several steps removed from the conduct that is being prohibited by the Act, i.e., the inclusion of case-specific public interest considerations regarding law enforcement and privileged records. Lastly, Mr. Nakatsuru submits that the applicant is free to engage in any act to convey meaning about this subject, at any time, and anywhere. He points out that the record demonstrates the CLA had spoken out and exercised its freedom of expression liberally, and with considerable vigour, in relation to these issues, and has also had access to the detailed and voluminous court proceedings in the Superior Court and the Court of Appeal regarding the Court and Monaghan case.[7]

[55] It is arguable that the CLA's request to the Ministry *is* an attempt to convey meaning -- i.e., "we want information" -- but it is true that nothing has inhibited the applicant from making its request. In my view, however, confining the s. 2(b) "activity" in this case to simply the request by the CLA for information under the Act is approaching the analysis too narrowly. The 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 Glithero J.: the CLA also wishes to make suggestions and recommendations about how such problems may be avoided in the future. That type of expressive activity is unquestionably "[an attempt] to convey meaning". Accordingly, I would not give effect to Mr. Nakatsuru's first argument.

[56] What the CLA seeks to do falls within the meaning of "expression". The second question, however, is whether engrafting upon that expressive desire an obligation on the part of government to provide access to the information sought in order to fuel the applicant's expressive activity, subject to a public-interest balancing test, takes the expressive activity outside the sphere of s. 2(b).

Is the activity within the protected sphere of conduct?

[57] This latter question is the major issue to be determined on this application for judicial review.

[58] In my opinion, the authorities do not support the applicant's position and I would be reluctant to extend the law to establish that there is a constitutional right to know, or a positive obligation on

[7] See the Factum of the Ministry of Public Safety and Security at para. 29.

the part of government to disclose information -- even subject to public interest balancing -- in the circumstances of this case.

[59] Mr. Stratas acknowledges that there is no case in Canada establishing by itself that a denial of information by government can give rise to a constitutional objection under s. 2(b), or by reason of the principle of democracy. He submits, however, that there are "various strands" in the authorities pointing in that direction. Those various strands consist of the following:

a) the suggestion by the Supreme Court in *Haig, supra*, that, in certain circumstances, there may be a requirement for positive government action to ensure public access to certain kinds of information;

b) the principles enunciated in cases concerning access to public places and holding that individuals may be granted access to public facilities to ensure they are able to engage in meaningful expression;

c) the principles enunciated in cases dealing with the "open courts" principle and confirming that courts must be open to the public and that records placed before the court must be accessible so that expression is facilitated; and

d) statements made in certain American, European, and Indian authorities.

General Statements Concerning Section 2(b) and the Obligation to Provide Access to Information

[60] *Haig* concerned the right of an individual to vote in the 1982 referendum concerning the proposals arising out of the Charlottetown constitutional conference. There were, in fact, two referendums. One was a national referendum directed by the federal government to be held in all provinces and territories except Quebec. The other was a separate referendum to be held in Quebec. Because he had moved from Ontario and had not resided in Quebec for six months prior to the date of the referendum, Mr. Haig was not eligible to vote in the Quebec referendum. Because he was not ordinarily resident in one of the polling divisions established for the federal referendum at the enumeration date, he was not eligible to vote in Ontario. He sought a declaration, amongst other things, that the denial of his right to vote in the federal referendum violated his rights under s. 2(b) of the *Charter*. He was unsuccessful.

[61] The court held that freedom of expression did not include a constitutional right for all Canadians to be provided with a specific means of expression and that s. 2(b) does not impose on government a positive obligation to consult its citizens through the mechanism of a referendum. The government was under no constitutional obligation to extend the referendum platform for expression to anyone (at p. 1041 S.C.R.). Writing for the majority, L'Heureux-Dubé J. canvassed the cases and doctrinal writings concerning the theories underlying the concept of freedom of expression. She asked the question at p. 1034 S.C.R.: "Does freedom of expression include a positive right to be provided with specific means of expression?" In responding to that question, she noted that freedom of expression has traditionally been conceptualized (at pp. 1034, 1035 S.C.R.) "in terms of negative

rather than positive entitlements", and observed that "in colloquial terms . . . the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones." After referring to various articles and works articulating the traditional view, and to others adopting the stance that freedom of expression may, in modern times, involve more than the absence of government interference -- including the dissent of Dickson C.J. in *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, at p. 361 S.C.R. -- L'Heureux-Dubé concluded that there may be circumstances in which a court might conclude positive governmental action was required, but that such considerations did not apply in Mr. Haig's case concerning the referendum. In the passage heavily relied upon by the CLA, she stated at p. 1039 S.C.R.:

> However, as Dickson C.J. rightly observed,[8] this language cannot be used in a dogmatic fashion. The distinctions between "freedoms" and "rights", and between positive and negative entitlements, are not always clearly made, nor are they always helpful. One must not depart from the context of the purposive approach articulated by this Court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. *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*. *This might, for example, take the form of legislative intervention aimed at* preventing certain conditions which muzzle expression, or *ensuring public access to certain kinds of information*. [emphasis added]

[62] In two subsequent decisions, though, the Supreme Court has declined to apply the foregoing approach and refused to hold there is a positive obligation on the part of government in connection with s. 2(b) rights. First, in *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, 119 D.L.R. (4th) 224, the court ruled that the government's refusal to provide the applicant with funding and the right to participate in the Charlottetown Accord conference did not violate the NWAC's s. 2(b) freedom of expression. Sopinka J. observed at p. 655 S.C.R.:

> *Haig* establishes the principle that *generally the government is under no obligation to* fund or *provide a specific platform of expression* to an individual or a group. However, the decision in *Haig* leaves open the possibility that, in certain circumstances, positive governmental action may be required in order to make the freedom of expression meaningful [emphasis added].

[63] Sopinka J. concluded, however, at p. 663 S.C.R.:

> The freedom of expression guaranteed by s. 2(b) of the *Charter* does not guarantee any particular means of expression or place a positive obligation upon the Government to consult anyone. The right to a particular platform or means of expression was clearly rejected by this Court in *Haig*. The respondents had many opportunities to express their views through [other organizations] . . . .
> [underlining added]

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[8] In *Reference re Public Service Employee Relations Act (Alberta), supra* (footnote added).

[64] Secondly, in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, 176 D.L.R. (4th) 513, the Supreme Court held that the s. 2(b) rights of an RCMP officer were not violated by the fact that he was precluded from creating an independent employee association for RCMP members.[9] Writing for the majority, Bastarache J. said at pp. 1022-23 S.C.R.:

> The appellant argues, however, that the main purpose of forming a recognized association is to convey a collective message that is distinct from that of its members . . .
>
> . . .
>
> In the current situation, the message of solidarity is the same whether it is expressed by an association the employer does not recognize or by an employee organization. Only the effectiveness of the message differs from one situation to the other. The medium used to convey the message must not be confused with the message itself. Although s. 2(b) may be violated when Parliament restricts access to a medium, it does not require Parliament to make that medium available. . . .
>
> The message of solidarity the appellant wishes to express exists independently of any official form of recognition. Even if the exclusion of RCMP members by the PSSRA diminished the effectiveness of the conveyance of this message, this would not violate s. 2(b). [underlining added]

[65] There is one case in which the Supreme Court has imposed a positive obligation on government to act. In *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 207 D.L.R. (4th) 193, it required the Ontario government to include a class of individuals in labour legislation. The case concerned the exclusion of farm workers in Ontario from the labour relations regime set out in the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A. In 1994, trade union and collective bargaining rights had been extended to agricultural workers through the enactment of the *Agricultural Labour Relations Act, 1994*, S.O. 1994, c. 6 (rep. 1995, c. 1, s. 80). With a change in government, that Act was repealed. Mr. Dunmore and others challenged the repeal of the Act and their exclusion from the *Labour Relations Act* on the basis that their freedom of association under s. 2(d) of the *Charter* had been violated (as well as their equality rights under s. 15(1)). The court agreed. *Dunmore* is distinguishable from the present situation, and from the circumstances in *Haig*, *Native Women's Assn. of Canada*, and *Delisle*, however, because in it the appellants were precluded from *any* form of organization without the protection of the legislation. In those exceptional circumstances, when the individuals could not exercise their freedom of association at all, there was a positive obligation upon government to include them in the legislation. Here, the CLA is not precluded from commenting on the Court and Monaghan affair and the OPP investigation; rather, the effectiveness of its ability to convey its message has been diminished: see *Delisle*.

[66] This court has previously dealt with whether government has an obligation to provide access to information as a component of the s. 2(b) *Charter* freedom. It did so in the context of s. 14 of the

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[9] RCMP members were excluded from the application of the Public Service Staff Relations Act and Part I of the Canada Labour Code.

Freedom of Information and Protection of Privacy Act, and rejected the argument. *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197, 116 D.L.R. (4th) 498 (Div. Ct.) involved a request made under the Act by a newspaper reporter for information on funding in relation to an ongoing law enforcement investigation. There were other issues apart from the s. 2(b) argument, but in that regard Adams J., writing for an unanimous court, said at p. 203 O.R.:

> This brings us to the cross-applicant's *Charter* submissions. It is his position that freedom of the press, provided by s. 2(b) of the Charter, entails a constitutional right of access to any and all information in the possession and under the control of government, subject to whatever limitations might be justified pursuant to s. 1 of the *Charter*. It is further submitted that the inquisitorial and secrecy provisions provided for by ss. 52 and 55(1) of the Act which, it is argued, precluded Mr. Donovan from making meaningful representations to the Officer, are excessive and not tailored to minimally impact the freedom of the press as defined by counsel. No judicial authority was cited in direct support of these submissions. Rather, they are based on the principle that a democratic government must be accountable to the people and information concerning its performance is essential to such accountability. In turn, the press is a fundamental vehicle for keeping the public informed. Effectively, the submission amounts to the claim of a general constitutional right to know . . .

Adams J. continued at p. 204 O.R.:

> Against this tradition, it is not possible to proclaim that s. 2(b) entails a general constitutional right of access to all information under the control of government and this is particularly so in the context of an application relating to an active criminal investigation.

[67] The existence of a general constitutional "right to know" has been questioned as well by the Federal Court in *Travers v. Canada (Board of Inquiry on the Activities of the Canadian Airborne Regiment Battle Group in Somalia)*, [1993] F.C.J. No. 833, [1993] 3 F.C. 528 (T.D.), at para. 17, affd [1994] F.C.J. No. 932, 171 N.R. 158 (C.A.) at paras. 2, 3, and in *Yeager v. Canada (Correctional Service)*, [2001] F.C.J. No. 687 (QL), 204 F.T.R. 297 at para. 29, reversed on other grounds (2003), 223 D.L.R. (4th) 234, [2003] F.C.J. No. 73 (QL), at p. 255 D.L.R. (F.C.A.), leave to appeal denied [2003] S.C.C.A. No. 120. In *National Bank of Canada v. Melnitzer* (1991), 5 O.R. (3d) 234, 84 D.L.R. (4th) 315 (Gen. Div.) at p. 239 O.R., Justice Killeen observed -- in the context of the freedom of the press aspect of the s. 2(b) right and the open courts principle -- that, although freedom of the press is a "vital principle" it is not limitless and "is not the equivalent of a Freedom of Information Act nor does it have the effect of appointing the press as a sort of permanent and roving Royal Commission entitled at its own demand and in every circumstance to any and all information or documentation which might be extant in civil or criminal litigation".

[68] Based on the foregoing authorities, then, it would appear that the Supreme Court has left the door open to the possibility there might be circumstances in which "positive government action may be required in order to make the freedom of expression meaningful" (*Native Women's Assn. of Canada* at p. 655 S.C.R.), but in no case has that court, or any other, chosen to walk through that

door. This is so even in cases where the circumstances would seem to be as compelling as those of the present application, for example: the right to vote, in *Haig*; the right to express oneself while participating in national conference dealing with the Constitution of Canada itself, in *Native Women's Assn. of Canada*; and a request for information regarding a law enforcement investigation under the Act in *Fineberg*.

[69] Mr. Stratas seeks to couple the suggestion that positive governmental action may be required to fulfill the s. 2(b) right with the results in decisions concerning access to public facilities for purposes of expressive activity and in those dealing with the "open courts" principle.

Cases Concerning Access to Public Facilities

[70] There are a number of authorities in which the Supreme Court has held that, in certain circumstances, individuals may have a right to use public facilities in order to ensure they are able to engage in meaningful expression: see, for example, *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, 77 D.L.R. (4th) 385, which involved leafleting in the Dorval (now Pierre Elliott Trudeau) airport; and *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, 106 D.L.R. (4th) 233, which involved postering on utility poles, in contravention of a by-law prohibiting all postering on public property. These cases, however, are distinguishable from the present application. They both involve the expression of information already in the possession of the person seeking to express it. The government activity in question simply attempted to suppress the public communication of that information, and the ideas associated with it, on government property. The court held that government must refrain from prohibiting that expression. Here, the CLA is free to express the opinions it holds; but it seeks more information to be able to express those opinions more fully. There is no positive obligation on government that extends to that point. As Bastarache J. noted in *Delisle* at p. 1023 S.C.R.:

> A similar issue arose in *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, where this Court held that entirely prohibiting postering on utility poles violated s. 2(b), *but that the freedom of expression did not require the government to install notice boards to promote postering*. [emphasis added]

[71] I do not find the case law on access to public facilities in order to exercise the s. 2(b) freedom to be of assistance to the applicant.

The "Open Courts" Principle

[72] I agree with the Assistant Commissioner that the applicant's strongest argument is based on the open courts principle. However, I do not think it can carry the day.

[73] The Assistant Commissioner dealt with this argument carefully, and at length. At the conclusion of his decision, Order PO-1779, Public Record, Vol. 4, Tab 71A, he said at pp. 994-95:

> It is beyond dispute that the fair operation of the criminal justice system is one of the most fundamental aspects of a democratic society. This principle finds expression in

the time-honoured maxim that justice must not only be done, but must also be seen to be done, and in the open court principle discussed in Edmonton Journal, supra.[10] As noted previously, the Edmonton Journal case makes the connection between these concepts and the s. 2(b) right of freedom of expression, and strikes down two sections of Alberta's Judicature Act purporting to restrict publication of information about court proceedings. In my view, these concepts provide the most powerful argument in favour of finding a s. 2(b) violation in the circumstances of these appeals.

However, it is important to note that the purpose behind the principle that justice must be seen to be done, and behind the open court principle, is to ensure that our courts arrive at fair conclusions. In criminal proceedings, this relates to the importance of avoiding the wrongful conviction of innocent persons, an objective which is also reflected in s. 11(d) of the Charter. In this case, there are no outstanding criminal proceedings because the charges have all been stayed and, therefore, in my view, these interests have been satisfied. In keeping with the open court principle, the judgment staying the charges (R. v. Court and Monaghan, supra) provides considerable detail regarding the conduct of the police and Crown prosecutors in this case, and this information has already been the subject of public discussion.

Moreover, I have concluded that the information at issue in these appeals falls within the caveat articulated by the Supreme Court of Canada in C.B.C. v. New Brunswick (Attorney-General) (1996), supra.[11] As noted above, the Court concluded that it would be "untenable" to argue that s. 2(b) would entitle the public to have access to "all venues within which the criminal law is administered." The Court described this argument as a "fallacy" because it fails to recognize the distinction between courts, which have been public areas since "time immemorial", and other venues such as jury rooms, a trial judge's chambers and conference rooms, which have traditionally been private. I also note that, although the Act provides a mechanism for access to information about the criminal justice system beyond what is required by the open court principle, it includes exemptions such as those at issue in these appeals, whose purposes are consistent with the Court's analysis and conclusions about the limits of s. 2(b) in the C.B.C. case. Section 21 recognizes the important public policy interest in protecting the privacy of individuals who are, for example, investigated but not prosecuted. Sections 14 and 19 recognize the public interest in continuing to provide a zone of privacy to facilitate effective police investigations and allowing Crown prosecutors the protection of solicitor-client privilege. In my view, it would be an unwarranted expansion of the open court principle to find that s. 2(b) of the Charter guarantees access to information about police investigations and prosecutorial decision-making.

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[10] *Re Edmonton Journal and Attorney-General for Alberta* (1983), 5 D.L.R. (4th) 240 (Alta. Q.B.); aff.'d (1984), 13 D.L.R. (4th) 479 (Alta. C.A.).

[11] *Canadian Broadcasting Corp. v. New Brunswick (Attorney-General)*, [1996] 3 S.C.R. 480.

> I am reinforced in this view by the comments of the Divisional Court in Fineberg, supra. The Court acknowledged that the tradition of open courts "runs deep in Canadian society" but indicated that even the right of freedom of the press, also protected by s. 2(b), ". . . has been confined to access to the court in contrast to information not revealed and tested in open court proceedings." Although Fineberg concerns freedom of the press and relates to a broad claim for a constitutional right of access to government information, its analysis of the open court issue and its conclusion that no general right of access exists is nevertheless relevant to the Charter issue presented by these appeals.
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> Accordingly, I find that no Charter violation has occurred as a result of the application of s. 14 and 19 to these records, nor as a result of these exemptions not being included in s. 23 as exemptions subject to the "public interest override".

[74] The foregoing statement followed a very thorough analysis of the authorities and the circumstances of this case. In my view, the analysis of the Assistant Commissioner is correct.

[75] The "open court" principle is fundamental to our justice system. However, its application has been limited to assuring public access to judicial and quasi-judicial proceedings; it does not apply to investigations by non-adjudicative bodies. See, for example, *Canada (Canadian Transportation Accident Investigation and Safety Board) v. Canadian Press*, [2000] N.S.J. No. 139 at paras. 17, 46, 49 (S.C.) and *Travers, supra*. Moreover, as the Assistant Commissioner noted, the principle does not extend to other parts of the criminal justice system that have not traditionally been "public arenas": *Canadian Broadcasting Corp., supra*, at 499 S.C.R.

[76] Law enforcement investigations and matters protected by solicitor-client privilege have never been part of the public arena. In fact, for valid policy reasons, they have been the opposite, characterized by confidentiality. It would be unwarranted, in my view, to engraft the principles pertaining to the notion of the importance of public access to the courts onto the guarantee of freedom of expression under s. 2(b) of the *Charter*.

International Jurisprudence

[77] Mr. Stratas also referred us to a series of international authorities in support of the CLA's contention that openness and access to information are fundamental to a democratic society and mandate government disclosure subject to public interest balancing factors. These "strands" were put forward in support of both the s. 2(b) and the principle of democracy arguments.

[78] He first drew our attention to various United Nations' publications and a white paper from the U.K. Cabinet Office, all accentuating the importance of promoting and protecting the right to freedom of opinion and expression and of the public's right to know: see 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; *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; *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; U.K., Cabinet Office (Office for Public Service), *Your Right to Know: The Government's Proposals for a Freedom of Information Act* (White Paper) by Chancellor of the Duchy of Lancaster (London: Her Majesty's Stationery Office, 1997), c. 1-3.

[79] Not surprisingly, these sources highlight the fundamental importance of freedom of expression to the integrity of democracy and the enhancement of human dignity. They do not advance the proposition, however, that there is a positive duty on government to provide access to information in all areas of government activity, subject to a public interest balancing. Article 19(3) of the *International Covenant on Civil and Political Rights* provides that the right to freedom of expression, which includes the "freedom to seek, receive and impart information and ideas of all kinds", is subject to certain restrictions, including laws "for the protection of national security or of public order, or of public health or morals" (para. b). In the first of the above-noted reports, the Special Rapporteur notes at para. 19 that "in principle, the State is not obligated to guarantee the right with positive measures".[12] The U.K. White Paper simply deals with the British Government's proposal to introduce freedom of information legislation similar to that already in place in Canada and elsewhere. The proposal would exempt law enforcement investigations and confidential communications from disclosure.

[80] We were also referred to certain international court decisions in which minority opinions expressed the view that government may have a duty to take positive measures to disclose information as a part of the freedom of expression right. However, the majority in all cases save one -- a decision of the Supreme Court of India -- declined to find such an obligation. See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Guerra v. Italy* (1998), 26 E.H.R.R. 357; *Netherlands v. Council*, C-58/94, [1996] E.C.R. I-2169; *S.P. Gupta v. President of India and Ors*, [1982] A.I.R. (S.C.) 149.

[81] *Houchins, supra*, arose out of the refusal of prison officials to allow a broadcaster permission to inspect jail facilities and interview prisoners about problems in the jail. For the majority, Chief Justice Berger held that the American First Amendment does not guarantee a right of access to sources of information within government control, and that a special privilege of access for the media is not a right that is essential to guarantee the freedom to communicate or publish. He drew a distinction between the freedom of the press to communicate information already obtained and the argument that the constitution requires the government to provide the press with information to facilitate further comment. The minority took the view that an official prison policy of concealing knowledge about possible violations of prisoners' constitutional rights abridged the freedom of speech and of the press protected by the First and Fourteenth Amendments.

[82] *Guerra, supra*, is a decision of the European Court of Human Rights. It involved an application by a group of individuals who lived close to a high risk chemical factory and who argued,

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[12] This is qualified in the 1999 Report at para. 12 by the observation that there is a positive obligation on States *to ensure access* to information that is required to be accessible, "particularly with regard to information held by Government in all types of storage and retrieval systems - including film, microfiche, electronic capacities, video and photographs - subject only to such restrictions as referred to in article 19, paragraph 3, of the International Covenant on Civil and Political Rights."

based on Article 10 of the *European Convention*, that the State had an obligation to take steps to provide them with information about the risks related to the factory and about how to react in the event of an accident. Article 10 is a freedom of information provision. It states that everyone is entitled to the right of freedom of expression, which includes the right to hold opinions *and to receive* and impart information and ideas without interference by public authority. The freedom, however, is subject to limitations and restrictions as prescribed by law and necessary in a democratic society; included in those limitations and restrictions are such purposes as the prevention of crime and the prevention of the disclosure of information received in confidence. The majority of the court held that Article 10 was not applicable to the circumstances of the case. They concluded that the specific right *to receive* information in Article 10 "cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion" (at p. 382).

[83] *Netherlands, supra*, is a decision of the Court of Justice of the European Communities, in Luxembourg. The court rejected a challenge by the Government of the Netherlands to a Code of Conduct that had been promulgated regarding public access to documents in the possession of the Council of the European Union and in the possession of the Commission. The Code of Conduct had been established at the instance of the members of the European Community who were concerned that general rules be put in place following acceptance of the Final Act of the *Treaty on European Union* (the Maastricht Treaty) to ensure the right of public access to documents held by Community institutions. In rejecting the Government's challenge, the court relied upon the link between the public's need to have access to governmental information and the democratic nature of the Community's institutions, and pointed to various acts of affirmation of that principle subsequent to the ratification of the Treaty. The court observed that "it was in order to conform to this trend, which discloses a progressive affirmation of individuals' right to access to documents held by public authorities, that the Council deemed it necessary to amend the rules governing its internal organization" (at p. I-2197).

[84] There is strong language in *Netherlands* - in both the decision of the Advocate General and in the decision of the court affirming the Advocate General - about the connection between "democracy" and public access to government information. For example, the Advocate General stated at p. I-2182:

> [T]he basis for such a right should be sought in the democratic principle, which constitutes one of the cornerstones of the Community edifice, as enshrined now in the Preamble to the Maastricht Treaty and Article F of the Common Provisions . . . Hence it is the democratic principle and the content which it has progressively assumed in the various national systems which requires access to documents no more to be allowed only to the addressee of a measure of the public authority . . .

And, at p. I-2175 he stated:

> In the final analysis, since openness of decision-making processes constitutes an innate feature of any democratic system and the right to information, including information in the hands of the public authorities, is a fundamental right of the

> individual, the Netherlands Government -- associating itself with the European Parliament's observations on this subject in its statement in intervention -- accordingly considers that determining the procedures, conditions and limits for public access to documents of the Community institutions cannot be left to the discretion of each institution, but must be a matter for the normal "legislative" processes provided for in the Treaty and should be accompanied by the necessary guarantees as to the effectiveness of the relevant right.

[85] Nonetheless, the "procedures, conditions and limits for public access to documents of the Community institutions" that were upheld and approved in Netherlands reflected very similar limits to those of the *Freedom of Information and Protection of Privacy Act* that are at issue in this application. Article 4(1) listed the ground on which access to Council and Commission documents may not be granted, including where its disclosure would undermine the protection of the public interest (public security . . . *court proceedings, inspections and investigations*) and the protection of confidentiality. Thus, while the case is of some relevance in that it confirms a European trend connecting more open access to government information and the principle of democracy, it is of little assistance to the applicant in support of the proposition that government has a positive obligation to make law enforcement and confidential information available to the public to facilitate the public's ability to comment more fully, subject to public interest balancing.

[86] The applicant has drawn our attention as well to *Gupta, supra*. Mr. Stratas argues that this decision of the Constitution Bench of the Supreme Court of the world's largest democracy squarely supports the CLA's position, and indeed it does highlight a number of arguments put forward by the applicant. *Gupta* concerned the validity of the transfer of the Chief Justice of the Patna High Court to the Madras High Court, and the non-extension of the term of another temporary High Court judge for a fresh term. Ancillary to these issues, however, was an issue regarding the disclosure of certain correspondence between the Law Ministry and the Chief Justice of India and the Chief Justice of Delhi, and the notings made by them, with respect to these matters. Section 123 of the *Evidence Act* of India prohibited anyone giving evidence that "derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit". The court refused, however, to uphold the Government's refusal to produce the correspondence in the litigation because without it the judge complaining about the non-extension of term would not be able to show whether the extension had or had not been refused on proper grounds. It did so in ringing language emphasizing the importance of openness and disclosure in democratic societies. Notwithstanding the lack of any "public interest balancing" provision in the *Evidence Act*, the court held that it must balance the public interest in disclosure and in the integrity of the administration of justice against the public interest in non-disclosure of certain state documents. Bhagwati J., for the majority, stated at p. 234:

> The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a) [of the Constitution of India]. Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much

> as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.

Bhagwati J. continued at p. 235:

> Now we agree ... that public interest lies at the foundation of the claim for protection against disclosure enacted in S. 123 and it seeks to prevent production of a document where such production would cause public injury but we do not think . . . that the interest which comes into conflict with the claim for non-disclosure is the private interest of the litigant in disclosure. It is rather the public interest in fair administration of justice that comes into clash with the public interest sought to be protected by non-disclosure and the court is called upon to balance these two aspects of public interest and decide which aspect predominates.

[87] This language is very close, of course, to that of the submissions made to us by the CLA. *Gupta* is of no binding significance to this court, however, and in any event I am not persuaded that it goes so far as to support the proposition urged upon us by the applicant, namely that the Ministry of Public Safety and Security in Ontario has a constitutional obligation to produce law enforcement investigation reports and privileged documents to facilitate a citizen organization's expressive rights, subject to a public interest balancing exercise on a case-by-case basis. This is particularly so when -- as here -- the legislature has specifically engaged in that very public interest debate in enacting the legislation and rejected the notion of subjecting such disclosure to public interest balancing on a case-by-case basis. I shall return to this latter point in a moment.

[88] In arriving at its conclusion in *Gupta*, the Supreme Court of India nonetheless recognized that there were certain classes of documents for which class immunity would be justified. Cabinet documents were one. Another class, though, "which has always been recognised by the Court as entitled to the same immunity . . . consists of *documents evidencing the sources from which the police obtain information*" (at pp. 241-42). Moreover, the *Gupta* decision has to do with the production of privileged documents in court proceedings; it is therefore akin to the "open court" cases in Canadian jurisprudence, and properly founded on those principles. I have already concluded, however, that the open court cases do not assist the applicant in the circumstances of this case.

Legislative History and the Public Interest Debate

[89] The legislative history of the *Freedom of Information and Protection of Privacy Act* demonstrates that the framers of that legislation grappled with the very public interest balancing issue now raised by the applicant.

[90] The Act emanated from the recommendations of the Williams' Commission in 1980. The report of that Commission noted that while "there is a compelling public interest in open government, there is also a compelling public interest in effective government", and that "[a] rule of absolute openness with respect to government documents would impair the ability of governmental institutions to discharge their responsibilities effectively": Ontario, *Report of the Commission on Freedom of Information and Individual Privacy* (1980) at p. 235. The Commission

recognized that the public interest in effective government required confidentiality in the areas of law enforcement and solicitor-client privilege, at pp. 294-96 and 338-39.

[91] In introducing the legislation (Bill 34) the then Attorney General, the Hon. Ian Scott, indicated that the freedom of information portion of it was based upon three principles, namely:

a) that government information should be more readily available to the public;

b) that necessary exceptions to access to government information should be limited and specific; and

c) that decisions by ministers and government officials on what information will be disclosed should be reviewed by an independent commissioner accountable only to the assembly.

Ontario, Legislative Assembly, *Hansard Official Report of Debates*, 1st Session, 33rd Parl., No. 21 (12 July, 1985).

[92] Before the Standing Committee of the Legislative Assembly, the specific exemptions pertaining to law enforcement investigations and solicitor-client privilege were considered carefully, as was the public interest override provision. An amendment was suggested that law enforcement and privilege should be included in s. 23. It was defeated. In the legislature, a similar amendment was put forward, and was also defeated. Mr. Scott's opposition to the amendment was supported by the then opposition critic (and, recently, Attorney General himself), the Hon. Norman Sterling.

[93] Thus in enacting the present public interest override scheme, including the exclusion of ss. 14 and 19 from that scheme, the legislature considered fully -- and, indeed, conducted -- the public interest balancing exercise which the CLA now suggests should be required on a case-by-case basis.

Conclusions Respecting the Section 2(b) Argument

[94] The implications of the applicant's position are wide-ranging. In the law enforcement field it would mean that ongoing high profile criminal investigations, and some not so high profile, would be subject to requests under the Act by members of the media and by public interest groups such as the applicant. Each request would be conveyed in the ringing rhetoric of freedom of expression, the principle of democracy, and the right of the public to know. These are vitally important principles but the balancing issue has already been debated and decided -- in my view correctly -- by the legislature. The potential hindrance to such investigations, the risks inherent in publicizing confidential aspects of the investigations, and the diversion of resources and energy on the part of law enforcement officials, while the "openness" issues are battled out before the appropriate police and ministry officials, then before the Commissioner, and finally, before the courts, are self-evident. These concerns were well summarized by the Williams' Commission in its 1980 report at pp. 294-95. They include:

- The need to protect confidential informants and to ensure the continued flow of information from other law enforcement agencies;

- The concern that disclosure of law enforcement techniques would reduce their effectiveness;

- The risks of possible retaliation by offenders against informants and law enforcement personnel;

- The risk that public access to investigative files would frustrate the conduct of investigations and that premature disclosures prior to trial would impair the ability of the prosecution to present its case;

- The risk of intimidation and coercion of witnesses identified before trial; and,

- The potential of impairing an accused's right to a fair trial as a result of prejudicial pre-trial publicity.

[95] Solicitor-client privilege is not absolute, but is nonetheless jealously guarded by the courts because of its importance to the criminal justice system. Clients must be free -- and feel that they are free -- to tell everything to their lawyer without fear of disclosure. There are limited exceptions to the privilege where innocence or public safety may be at stake. Whether a document falls within such an exception is a matter for the Commissioner to consider and determine when deciding if the document is caught by s. 19 of the Act. 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*, [2001] 1 S.C.R. 445, 195 D.L.R. (4th) 513, and *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, [2002] 3 S.C.R. 209, 216 D.L.R. (4th) 257 at pp. 284-85 S.C.R., could be subject to public disclosure. I find this proposition startling.

[96] In the result, I am satisfied that the instant case is more analogous to the "platform" and "means of expression" cases (*Haig*, *Native Women's Assn. of Canada*, and *Delisle*) than to the "postering/leafleting" cases (*Committee for the Commonwealth of Canada*, *Ramsden*). *Dunmore* is distinguishable from the case at bar. While "the tradition of open courts runs deep in our society", as Adams J. noted in *Fineberg, supra*, at p. 203 O.R., the accessibility precepts of that tradition have been confined to judicial and quasi-judicial tribunals, and the courts have been cautious about extending them to wider areas of application: see *Canadian Broadcasting Corp., supra*.

[97] I am not satisfied, therefore, that the "various strands" which the Applicant asks us to splice together to create the constitutional link between the CLA's s. 2(b) rights and access to the law enforcement and privileged information here in question, enable us to do so. I reject the position that there is a constitutional obligation upon the government to provide access to the information.

[98] In my view, the expressive activity sought to be engaged in by the applicant does not fall within the sphere of s. 2(b) of the *Charter*. It is therefore unnecessary to consider further the applicant's argument about the effect of the restriction on the CLA's rights.

The Section 1 Justification

[99] Even if the scope of the CLA's s. 2(b) freedom of expression is broad enough to encompass an obligation on the part of government to provide access to the information in question here, and even if the effect of the legislation is to restrain that freedom, I am satisfied that the failure to include ss. 14 and 19 in the s. 23 public interest override would be saved by s. 1 of the *Charter*. The object of the Act in providing access to information not previously accessible to the public, while at the same time preserving certain limited and specific exemptions, is pressing and substantial. There is a rational connection between the means employed by the legislature and its objectives. The applicant's s. 2(b) rights are minimally impaired. There is an appropriate, proportional, balance between the effects of the limiting provisions and the objectives in question: see *Oakes, supra*.

[100] This court previously reached that same conclusion with respect to s. 14 in *Fineberg*.

[101] In *Oakes*, and in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, the Supreme Court articulated the criteria that must be established if a limit to a Charter right is to be held to be reasonable and demonstrably justified in a free and democratic society. The following passage from *Oakes*, per Dickson C.J.C., at p. 139 S.C.R., p. 227 D.L.R., summarizes the criteria:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd*... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Secondly, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd*... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big*

> *M Drug Mart Ltd*... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".
> [emphasis in original]

[102] There can be little debate, in my view, that the objectives of the legislature in enacting the scheme to ensure that government information is more readily available to the public, subject to limited and specific necessary exceptions, as set out in the Act "relate to concerns that are pressing and substantial in a free and democratic society". Greater accessibility to such information -- promoting, as it does, greater transparency and accountability in government -- is responsive to important principles underlying our democratic society, as the authorities referred to us by the applicant demonstrate. At the same time, however, the policy of protecting confidentiality in law enforcement investigations is deeply rooted in our society and other democratic societies as well: see *Report of the Commission on Freedom of Information and Individual Privacy, supra*, at pp. 295-96; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, 90 D.L.R. (4th) 289 at pp. 744-45 S.C.R. So, too, is the policy of ensuring that "solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance": *Lavallee, Rackel & Heintz, supra*, at pp. 284-85 S.C.R.; see also *Pritchard v. Ontario Human Rights Commission* (2003), 63 O.R. (3d) 97, 223 D.L.R. (4th) 85 (C.A.) at pp. 103-05 O.R. The objective of providing "necessary exemptions" to the general purpose of providing rights of public access to information therefore relates to concerns that are pressing and substantial in society.

[103] I am also persuaded that the measures selected by the legislature to achieve its objectives meet the *Oakes* proportionality test.

[104] First, the exemptions pertaining to law enforcement investigations and solicitor-client privilege under ss. 14 and 19 of the Act, and the exclusion of those exemptions from the public override in s. 23, are rationally connected to the need to protect the confidentiality and integrity of the records at issue. It is necessary for government to show, on a civil standard, that "the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt": *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, 81 D.L.R. (4th) 545, per Wilson J. at p. 291 S.C.R. See also *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1, per McLachlin J. at p. 339 S.C.R. and Iacobucci J. at p. 352 S.C.R. That onus is met here.

[105] Secondly, the measures adopted in the Act minimally impair the applicant's s. 2(b) freedom of expression. The standard is not one of perfection, but rather one of reasonableness, and the legislature may select among a range of reasonable options. In this case it has carefully crafted certain "limited and specific" exemptions to the general principle of greater public accessibility to government information (ss. 12-22 of the Act), and it has provided even more limited and specific exclusions to the potential public interest override of those exemptions (cabinet records (s. 12), law enforcement records (s. 14), defence records (s. 16), privileged documents (s. 19), and near-publication information (s. 22)). As McLachlin J. noted in *RJR-MacDonald* at p. 342 S.C.R.:

> The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the new law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.

[106] For this reason the fact that some of the provinces have chosen not to exempt law enforcement and privileged records from their public interest override provision is not determinative. The federal government and the legislatures of most provinces have a scheme similar to that of Ontario. Consequently, the choices Ontario has made fall within a reasonable range of alternatives.

[107] Finally, I conclude for the foregoing reasons that the relationship between the effects of the measures in question and the objectives outlined above are appropriately proportional, and strike the right balance. The *Oakes* criteria for a s. 1 justification have therefore been met.

[108] In *Fineberg* at p. 205 O.R., although he found no s. 2(b) violation, Adams J. provided the following succinct s. 1 analysis on behalf of this court (with which I agree and which in my view applies equally to both ss. 14 and 19 of the Act):

> Had there been established a s. 2(b) violation, we would have found, in these circumstances, the interests reflected in s. 14 constitute pressing and substantial objectives sufficient to support a *Charter* limitation. We would also have found, on the state of the record before us, that the institutional design of the statutory mechanisms together with the exemptions in question constitute (1) rational links between the means and the objectives, (2) minimum impairments on the right or freedom asserted, and (3) a proper balance between the effects of the limiting measures and the legislative objectives, recognizing that government need not be held to the ideal or perfect policy instrument.

[109] I therefore conclude that even if the failure of the legislature to subject the law enforcement and solicitor-client privilege exemptions of ss. 14 and 19 to the public interest override provisions of s. 23 of the Act constitutes a violation of the CLA's s. 2(b) rights under the *Charter*, the scheme of the Act is saved under s. 1 of the *Charter* as reasonable and demonstrably justified in a free and democratic society.

The Commissioner's Failure to Take into Account the Constitution in Interpreting the Exemptions.

[110] The applicant also argued that the Assistant Commissioner failed to take into account its s. 2(b) rights and the constitutional principle of democracy in interpreting and applying the ss. 14 and 19 exemptions. Therefore, his decision should be quashed and the matter remitted for further consideration on proper principles.

[111] There is no merit to this argument.

[112] First, the argument is essentially the same as the s. 2(b) and principle of democracy contentions already addressed and rejected. The argument is simply dressed in the clothing of statutory interpretation instead of that of a direct constitutional attack.

[113] Secondly, it is well established that *Charter* values are not imported in interpreting a statute that is clear and unambiguous. Where statutory provisions are open to more than one interpretation, the courts will prefer the interpretation that is consistent with the *Charter*. However, provisions that are unambiguous must be assessed directly for validity against the *Charter*, including the justification requirements of s. 1. Otherwise, the *Charter*, with its checks and balances in s. 1, may be circumvented. See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, per Lamer J. at p. 1078 S.C.R.; *Symes v. Canada*, [1993] 4 S.C.R. 695, 110 D.L.R. (4th) 470 at p. 752 S.C.R.; *R. v. Zundel*, [1992] 2 S.C.R. 731, 95 D.L.R. (4th) 202, per McLachlin J. at p. 771 S.C.R. Iacobucci J. summarized the principle in the following passage in *Bell ExpressVu Partnership v. Rex*, [2002] 2 S.C.R. 559, 212 D.L.R. (4th) 1 at pp. 598-99 S.C.R.:

> The last point touches, fundamentally, upon the proper function of the courts within the Canadian democracy. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 136-42, the Court described the relationship among the legislative, executive, and judicial branches of governance as being one of dialogue and mutual respect. As was stated, judicial review on *Charter* grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches. "The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even over-arching laws under s. 33 of the *Charter*)" (*Vriend, supra*, at para. 139).
>
> *To reiterate what was stated in Symes, supra, and Willick, supra, if courts were to interpret all statutes such that they conformed to the Charter, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on Charter grounds, where resort to the internal checks and balances of s. 1 may be had*. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the *Charter* right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret this sort of enactment in light of *Charter* principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. *As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the Charter to achieve a different result.*
>
> [underlining in original; italics added]

[114] There is no ambiguity in s. 23 of the Act. Sections 14 and 19 are simply not included in the exemption provisions to which the public interest override may be applied. *Charter* values have no place in the interpretation exercise. For similar reasons, an interpretative approach based on applying the constitutional principle of democracy is likewise inappropriate.

[115] Mr. Oliver submitted on behalf of the CLA that the notion of *Charter*-consistent interpretation comes into play when the Assistant Commissioner is asked to exercise his discretion under ss. 14 and 19 -- or, more accurately, I suppose, where the Assistant Commissioner is asked to exercise his reviewing discretion with respect to the head's exercise of discretion under those sections. He argues that there is an ambiguity built into this process because of the discretionary nature of the exercise, and therefore that the discretion must be exercised in a fashion that is consistent with *Charter* values and the principles of democracy. I do not accept this submission. It cannot prevail for the same reasons that the court does not resort to the principle of *Charter*-consistent interpretation in the case of unambiguous language. If the applicant is correct in this contention there would be no need for the s. 23 override for any of the exemptions. The submission is simply an indirect way of putting forward the applicant's main contention that there has been a s. 2(b) violation and a failure to comply with the principle of democracy.

[116] Finally, it was argued that the Assistant Commissioner erred in his application of ss. 14 and 19 of the Act by failing to take into account that the records requested by the CLA are records that are not akin to private materials. Rather, as records in the possession of the Crown, they are "the property of the public to be used to ensure that justice is done": *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1 at p. 333 S.C.R. Since the Applicant is in effect asserting that there was an abuse of process and that in order "to ensure that justice is done" it should have access to the "property of the public", *Stinchcombe* principles should apply. In my view, however, the *Stinchcombe* principles regarding disclosure to the defence in a criminal case have no application to a situation where a public interest group seeks to require government to release documents to facilitate the group's ability to comment on a matter of public interest.

VII

CONCLUSION AND DISPOSITION

[117] For all of the foregoing reasons I am satisfied that the applicant's s. 2(b) right to freedom of expression is not violated by the legislative scheme in the *Freedom of Information and Protection of Privacy Act* and, in particular, the failure of the legislature to provide for a public interest override with respect to the law enforcement records exemption in s. 14 of the Act and the exemption respecting solicitor-client privilege in s. 19. In any event, the scheme would be saved by s. 1 of the *Charter* as the measures selected by the legislature to attain its legislative objectives are reasonable and demonstrably justified in a free and democratic society.

[118] The constitutional principle of democracy is of no assistance to the applicant as a separate ground for reading in a public interest balancing provision, as the argument based on it is essentially the same argument as the s. 2(b) contention, but dressed in different garb. In any event, the

constitutional principle of democracy already underpins and informs the s. 2(b) right. It need not be put forward twice.

[119] Similarly, the argument that the Assistant Commissioner erred in failing to approach the interpretation of ss. 14, 19 and 23 of the Act in a manner consistent with the *Charter* and the constitutional principle of democracy must be rejected. There is no ambiguity in the provisions. Any other use of *Charter* values and the principle of democracy in this regard would constitute an indirect constitutional attack on the legislation without the balancing factors inherent in direct constitutional analysis.

[120] Accordingly, I would dismiss the application.

[121] If the parties cannot agree with respect to costs, brief written submissions in that regard may be filed within 30 days of the release of this decision.

[122] In closing, I would like to thank counsel for their very skillful and helpful advocacy.

R.A. BLAIR R.S.J.
GRAVELY J.
EPSTEIN J.

RELEASED: March 25, 2004

COURT FILE NO.: 730/00
DATE: March 25, 2004

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

R. A. BLAIR R.S.J., GRAVELY J. & EPSTEIN J.

IN THE MATTER OF the *Judicial Review Procedure Act*, R.S.O. 1190, c. J.1 AND IN THE MATTER OF the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, and IN THE MATTER OF Order PO-1779 dated May 5, 2000 issued by Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario

B E T W E E N:

THE CRIMINAL LAWYERS' ASSO\CIATION

Applicant

- and -

THE MINISTRY OF PUBLIC SAFETY AND SECURITY (formerly the Ministry of the Solicitor General) and TOM MITCHINSON, ASSISTANT COMMISSIONER, OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

Respondents

- and -

THE ATTORNEY GENERAL OF ONTARIO

Intervenor

REASONS FOR DECISION

R.A. BLAIR R.S.J.

Released: March 25, 2004