By Hand

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Subject: *The Ministry of Public Safety and Security et al. v. The Criminal Lawyers' Association, et al.*, Court file 32172

Dear Colleagues:

Please find enclosed the Motion Record of the Intervener, the Information Commissioner of Canada, in Response to the Appellants' Motion and Book of Authorities served upon you in accordance with the *Supreme Court Rules* with respect to the above-noted file.

Yours very truly,

Daniel Brunet
General Counsel

Encl.

File Number 32172

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

BETWEEN:

THE MINISTRY OF PUBLIC SAFETY AND SECURITY (Formerly the Solicitor General) AND THE ATTORNEY GENERAL OF ONTARIO

Appellants
(Respondents)

and

THE CRIMINAL LAWYERS' ASSOCIATION

Respondent
(Appellant)

and

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

Intervener
(Respondent)

and

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF BRITISH COLUMBIA, THE ATTORNEY GENERAL OF MANITOBA, THE ATTORNEY GENERAL OF NEW BRUNSWICK, THE ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR, THE ATTORNEY GENERAL OF NOVA SCOTIA, THE ATTORNEY GENERAL OF QUEBEC, THE INFORMATION COMMISSIONER OF CANADA, CANADIAN BAR ASSOCIATION, FEDERATION OF LAW SOCIETIES OF CANADA, CANADIAN NEWSPAPER ASSOCIATION and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

MOTION RECORD BY THE INTERVENER, THE INFORMATION COMMISSIONER OF CANADA, IN RESPONSE TO THE APPELLANTS' MOTION

(Pursuant to Rule 49 of the *Rules of the Supreme Court of Canada*)

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Table of Contents

Court File No. 32172

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

BETWEEN:

THE MINISTRY OF PUBLIC SAFETY AND SECURITY and THE ATTORNEY GENERAL OF ONTARIO

Appellants (Respondents)

-and-

THE CRIMINAL LAWYERS' ASSOCIATION

Respondent (Appellant)

-and-

TOM MITCHINSON, ASSISTANT COMMISSIONER, OFFICE OF THE INFORAMTION AND PRIVACY COMMISSIONER OF ONTARIO

Intervener (Respondent)

-and-

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

Interveners

-and-

INFORMATION COMMISSIONER OF CANADA, CANADIAN BAR ASSOCIATION, FEDERATION OF LAW SOCIETIES OF CANADA, CANADIAN NEWSPAPER ASSOCIATION and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

PUBLIC AFFIDAVIT OF SIMONE POIRIER

I, Simone Poirier, of the City of Gatineau, in the province of Quebec, AFFIRM THAT:

1. I am a paralegal officer at the Office of the Information Commissioner of Canada and as such I have knowledge of the matters herein deposed to, except where they are stated to be based on information and belief in which case I believe them to be true.

2. Now shown to me and attached as **Exhibit "A"** is a copy of a letter and attached document received by fax from Ryan Teschner, of Heenan Blaikie on behalf of the Criminal Lawyers' Association on November 6, 2008. The letter confirms that the attachment is the September 7, 1999 submissions of the Ministry of Solicitor General and Correctional Services to the

Information and Privacy Commissioner of Ontario in the matter which resulted in Order PO-1779, and which appeared at Tab 29 (pages 110-121) in the Public Record before the Ontario Superior Court of Justice, Divisional Court, File No. 730/00 and in the Public Record before the Ontario Court of Appeal, File No. C42156.

Affirmed before me at)
the City of Ottawa, in the)
Province of Ontario on the 6th day)
of November, 2008.)

Commissioner for taking oaths

Simone Poirier

Heenan Blaikie

Of Counsel
The Right Honourable Pierre Elliott Trudeau, P.C., C.C., C.H., Q.C., FRSC (1984-2000)
The Right Honourable Jean Chrétien, P.C., Q.C.
The Honourable Donald J. Johnston, P.C., Q.C.
Pierre Marc Johnson, FRSC
The Honourable Michel Bastarache
The Honourable John W. Morden
Peter M. Blaikie, Q.C.
André Bureau, O.C.

FACSIMILE TRANSMISSION SHEET

This is Exhibit " A "
referred to in the Affidavit of
Simone Poirier
dated this 6 th day of
November 2008

RECIPIENT(S)	Daniel Brunet General Counsel Office of the Information Commissioner F 1-613-947-5252
SENDER	Ryan Teschner T 416 643.6890 • F 1 866 615.8283
DATE	November 6, 2008
OUR REFERENCE	032328-0001
SUBJECT	***The Ministry of Public Safety and Security (formerly the Solicitor General) and The Attorney General of Ontario v. The Criminal Lawyers' Association;* Court File No. 32172**

Number of pages, including this cover page: 14

If you did not receive all these pages or have any problems receiving, please call 416 360.6336, ext. 2057.

Message:

Please see the attached.

HBdocs - 5421433v1

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Heenan Blaikie

Via facsimile

November 6, 2008

Daniel Brunet
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Legal Affairs
112 Kent Street
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Ottawa, Ontario
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File No: 032328-0001

Re: ***The Ministry of Public Safety and Security (formerly the Solicitor General) and The Attorney General of Ontario v. The Criminal Lawyers' Association;*** **Court File No. 32172**

Dear Mr. Brunet:

I write to confirm that the enclosed attachment is the September 7, 1999 representations of the Ministry of the Solicitor General, which were provided to the Information and Privacy Commissioner/Ontario, in the matter which resulted in Order PO-1779.

These representations appeared at Tab 29 of the Public Record of Proceedings of the Respondent Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario, before the Ontario Superior Court of Justice (Divisional Court), File No. 730/00, and were also part of the Exhibit Book before the Ontario Court of Appeal, File No. C42156.

Yours very truly,

Heenan Blaikie LLP

RD Teschner

Ryan Teschner
RT/dk
Encl. (Sept 7/99 representations)

HBdocs - 5421359v1

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RECEIVED
SEP 09 1999
INFORMATION AND PRIVACY
COMMISSIONER/ONT.

September 7, 1999

Ms. Norma Thorney
Tribunal Administrative Coordinator
Information and Privacy
Commissioner/Ontario
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Dear Ms. Thorney:

SUBJECT: **Appeal PA-980338-1**
Our File: 98-0432

Please find attached Ministry representation on the above Notice of Inquiry. Should any further information be required I can be reached at (705) 494-3090.

Sincerely,

Dennis Hogan
Deputy Coordinator
Freedom of Information and
Protection of Privacy Services

REPRESENTATIONS
MINISTRY OF THE SOLICITOR GENERAL

APPEAL NUMBER P-980338-1

REQUEST FILE NUMBER 980432

This submission is confidential and is provided to the Information and Privacy Commissioner/Ontario (IPC) in confidence, pursuant to Section 52(1) and (13) of the Freedom of Information and Protection of Privacy Act (the "Act"). The Ministry requests that all correspondence and information provided to the Appeals Officer during the appeal process be included and considered as part of these representations. The Ministry objects to disclosure of the representations to any other party without its consent. The Ministry also objects to detailed disclosure of the representations in the Order disposing of the issues raised in the appeal.

BACKGROUND

On May 1, 1998, the Ministry received a request from the appellant seeking access to an investigation undertaken by Criminal Investigation Bureau, Major Cases Section, of the Ontario Provincial Police (OPP). The Ministry responded to the appellant on November 27, 1998, denying access to the records. Attached to the decision letter the Ministry supplied the appellant copies of IPC Orders P-613 and P-1244 to assist the appellant with regard to his request. The Ministry received a Confirmation of Appeal on February 1, 1999 and the Notice of Inquiry on July 22, 1999.

RECORDS

The records at issue in the appeal consist of the 318 page police report, the March 12, 1998, memorandum and the March 24, 1998, letter.

HISTORY

On July 29, 1997, the Major Cases Unit, Criminal Investigation Bureau, of the Ontario Provincial Police (OPP) received a request to conduct an independent criminal investigation. The request for this investigation originated from other police services. This independent criminal investigation was to look into two matters, the disappearance of an audio tape and issues surrounding disclosure of evidence to the defence. These matters related to a previous specified criminal proceeding. The purpose of this investigation was to determine if any person(s) committed an offence contrary to the Criminal Code, a Federal Statute.

The approach taken by the OPP with regard to this investigation was unique. In order to properly gather evidence to determine if any criminal offences had been committed, the investigators needed to search and assemble information and records from previous investigations and prosecutions. In addition to those records, statements were also taken from witnesses, as well as subject persons. The information in the record may appear to be historical, however, it was compiled for the purpose of gathering evidence, and to put context to specific persons who's duties or responsibilities this information related to.

Steps which the investigators applied were :

- Conducted a review into the investigative files of named police services.
- Conducted interviews with specific members of these police services as to their roles and responsibilities in relation to the previous criminal proceeding.
- Conducted a review of the Crown Attorney's files, transcripts and other documents.
- Conducted interviews with members of the Ministry of Attorney General as to their responsibilities and actions in relation to a previous prosecution.

The results of the investigation were prepared in a report, the record at issue, and was then submitted to the Crown counsel to determine the applicability of criminal charges being laid against those persons who were subject to the investigation. The investigation concluded determining that no evidence was found to supported criminal charges being laid by the OPP.

On page 47 of the record is a list statements. For clarification and to assist the IPC, persons related to tab 1, 2, 4, 10, and 11 were witnesses. The remaining statements were persons who were subject to the criminal investigation.

Exemptions:

Section 47(1) of the ACT gives individuals a general right of access to their own personal information held by a government body. Section 21 provides a number of exceptions to this general right of access.

The Ministry is of the view that disclosure of the severed information would constitute an unjustified invasion of the privacy of the other individuals referred in the records as set out in Section 21 of the ACT. In reaching this conclusion, the Ministry reviewed the relevant factors set out in Sections 21(2), (3) and (4) as well as Section 23 of the ACT.

The Ministry will be relying on sections 14(2)(a), 19, 21(2(e), (2)(f), 21(2)(i) and 21(3)(b), for the records at issue.

Issue A:

Section 19 of the ACT states that:

> *A head may refuse to disclose a record that is subject to the 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.*

The Ministry will be relying on branch two of the section for the purposes of this inquiry.

The records at issue are prepared by the police for the Crown counsels providing them with advice during the investigation. The record is the report of the police findings into the investigation and it is the normal manner through which police communicate to the Crown counsel when determining whether charges will be laid. The Crown report is used by Crown counsel in the formulating and provision of advice with regard to the laying of charges. The documents contain the underlying factual material and considerations in relation to giving legal advice for this investigation.

The investigators were contacted and confirm that the record at issue was provided to Crown counsel. The Ministry submits that had charges been laid against individuals who were subject to this investigation, that the record at issue would have been used by Crown counsel in the prosecution of those individuals.

The memorandum of March 12 and letter of March 24, 1998, document the meetings between Crown counsel and the OPP investigators and a review of the records at issue which were provided to Crown counsel related to the investigation. The letter of March 24, 1998, responds to the consultation and speaks to the issue of criminal charges arising from the police investigation in the matter. As clearly indicated in the wording of the letter, the communication was given for the purpose of giving legal advice in contemplation of litigation, that being, the laying of criminal charges. The witness statements commencing on page 48 of the record are headed "anticipated evidence".

In IPC Order P-613 Inquiry Officer Fineberg states:

> *In my view, it is clear that the Crown brief was prepared by members of the OPP for Crown counsel. I also accept the submissions of the Ministry that it was prepared in contemplation of litigation. In my opinion, the fact that the litigation did not materialize does not undermine the purpose for which the record was initially prepared.*
> *I have considered the Ministry's representations regarding its decision to rely on this provision to exempt the Crown brief and copies of statements. I find nothing improper in the determination which has been made.*

It is the position of the Ministry that the records at issue formed part of the Crown Brief which was then submitted to Crown counsel for the purposes of litigation, that being, the laying of Criminal charges as a result of an offence(s) against the Criminal Code, a Federal Statute.

ISSUE B:

The introductory wording of the definition of personal information in section 2(1) of the ACT includes in part,

"... recorded information about an identifiable individual.

Personal information is further defined in section 2(1) to include in part:

(a) information relating to the ... age ... of the individual;

(b) information relating to the ... criminal or employment history of the individual ...

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

(d) the address telephone number, fingerprints ... of the individual

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

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

(h) the individuals name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individuals;

The Ministry submits that portions of the information contained in the records are recorded information about identifiable individuals, other than the requester, in accordance with section 2(1) of the ACT

The Ministry submits, that the report contains the personal information of identifiable individuals who were the subject of or questioned during the criminal investigation (page 47). The record details the views and opinions of witnesses, and of the individuals who were subject to the investigation. And the statements are titled "anticipated evidence".

The report also contains sensitive personal information which identifies individuals who were subject to previous police investigations and prosecutions.

Also contained in the record is comments from Justice Glithro's ruling. The Ministry submits that the full text ruling would be a record to which the public would have access. In the context of this report, however, and in keeping with the unique circumstances of the investigation, the purpose of referring to the ruling was to provide investigators with an avenue in which to pursue evidence related to specific persons.

The Ministry submits that personal information is restricted to the above list. Information which tends to identify or would identify persons in future would also be considered personal information.

Issue C:

Specifically, section 21(2)(f) states:

(f) the personal information is highly sensitive.

The records detail the views and opinions of persons with respect to the actions of identifiable persons in the record. These comments are presented in a candid and subjective manner. The Ministry submits this information is highly sensitive and the release of the statements would cause personal distress to persons. This is highlighted by the fact that there were no charges laid with respect to this investigation, the nature of the investigation itself and the passage of time since the investigations were conducted.

The Ministry submits that the test has been met and the requester should be denied the record.

section 21(2)(e) states:

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

The Ministry submits that the earlier criminal matter over and the OPP investigation has concluded. Further release of the records would continue to expose the persons to more reminders of the occurrence. The release of the record is to the world not necessarily to the appellant. It is unknown the purpose for which the record will be used. In Order P-1167 Inquiry Officer Fineberg speaks to the issue of "closed".

> *I accept that disclosure of the records at this time could expose the complainants unfairly to harm in the form of a continuing, and potentially public, reminder of these unpleasant events.*

The Ministry submits the test has been met and the appellant be denied the record.

Section 21(2)(i) states:

> *The disclosure may unfairly damage the reputation of any person referred to in the record.*

In IPC Order P-1415 Inquiry Officer Hale commented on information in a record at issue. The records related to police officers who were charged, but ultimately acquitted, of criminal offences.

> *In my view, it is reasonable to expect that the disclosure of information which identifies these individuals by name may unfairly damage their reputations. As such, I find that the consideration listed in section 21(2)(I) applies to the personal information in the records at issue.*

The Ministry submits that the records detail a criminal investigation undertaken by the OPP to determine if the were violations of the Criminal Code as it related to specific police officers and a Crown Attorney. Although no criminal charges were laid, as there was insufficient evidence to support a criminal charge, that fact that individuals were subject to a criminal investigation is a factor which could unfairly damage their reputations especially in light of the fact that no charges were laid.

Section 21(3) of the Act outlines when the disclosure of personal information is presumed to be an invasion of privacy and specifically, Section 21(3) states:

"was compiled and is identifiable as part of an investigation into a possible

violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;'

The Ministry submits that all personal information contained in the record was compiled and is identifiable as part of an OPP investigation into a possible violation of law, in accordance with 21(3)(b) of the ACT.

The Police Services Act, as amended, establishes the OPP and provides for its composition, authority and jurisdiction. Section 19 sets out the responsibilities of the OPP which in part include:

- Providing Police Services in respect of the parts of Ontario that do not have municipal police forces other than by-law enforcement officers.

- Maintaining investigative services to assist municipal police forces on the Solicitor General's Direction or at the Crown Attorney's request.

There are also circumstances due to the specific allegations that police services request an independent investigation to be conducted . This is done to ensure the impartiality of the investigation and that it is not only seen but in fact is conducted at arms length from the requesting police service. This was the circumstances in regard to this investigation.

The entire record at issue was compiled during the course of a law enforcement investigation. The OPP was requested to conduct an independent criminal investigation to determine if any offences contrary to the Criminal Code, a Federal Statute, were committed. As a result of this investigation personal information was gathered in order to determine is any violation of the law occurred. The OPP is an agency which has the function of enforcing and regulating compliance with a law and in these circumstances the criminal investigation unit conducted the investigation.

The Ministry submits that the application of this section of the Act is not dependent upon whether charges are actually laid (Orders P-223 and P-237).

The Ministry submits that this clearly was a law enforcement investigation in which the record was compiled to determine if there were any violations of the criminal code.

Issue D:

In order for information to qualify for an exemption under "law enforcement", the information must fit the definition of law enforcement.

Section 2(1) of the Act states:

"law enforcement" means,

(a) policing,

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

(c) the conduct of proceedings referred to in clause (b).

The Ministry submits that the entire record falls within all three parts of the definition of "law enforcement".

Part (a) policing, encompasses the activities of police forces. These activities include the investigation and prosecution of offences, the collection and analysis of intelligence information, the prevention of crime, the maintenance of law and order and the provision of protective services.

Part (b) investigations or inspections, encompasses the activities of police forces to enforce compliance with standards, duties and responsibilities set out in statute or regulation.

Part (c) the conduct of proceedings is in effect the end result of parts (a) and (b) and encompasses the laying of charges and the prosecution of these charges.

The term policing is not defined in the Act or in the Police Services Act. The Police Services Act of Ontario provides the primary statutory base for the existence of the OPP, its composition, authority, jurisdiction, discipline and other pertinent matters. Its responsibilities in regard to policing are set out in section 19 which states in part:

1. Providing police services in respect of the parts of Ontario that do not have municipal police forces other than by-law enforcement officers.

The two primary functions of a police service are the prevention of crime and the apprehension of offenders. Some insight as to what policing involves can be found in Sections 1 and 42 of the Police Services Act which state:

1. Police services shall be provided throughout Ontario in accordance with the following principles:

1. The need to ensure the safety and security of all persons and property in Ontario;

2. The importance of safeguarding the fundamental rights guaranteed by the Canadian Charter of Rights and Freedoms and the Human Rights Code, 1981.

42. The duties of a police officer include,

(b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;

(d) apprehending criminals and other offenders and others who may lawfully be taken into custody;

(e) laying charges, prosecuting and participating in prosecutions.

It is submitted that the definitions as above are part of what is included in the term policing found in the Act. It is the position of the Ministry that the investigation conducted was done by the OPP who have the function of enforcing and regulating a law.

Issue - Law Enforcement Report

Section 14(2) of the Act states in part that:

> 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*

Although the Act does not define the word "report", the institution referred to a number of Orders made by the Information and Privacy Commissioner and various definitions of the word "report" in determining the scope of the word "report".

In considering the definition of a report in Order 37 Commissioner Linden stated:

The Act does not define the word "report". However, "report" is defined in the Oxford Dictionary as: "an account given or opinion formally expressed after investigation or consideration or collation of information" (emphasis added)

Black's Law Dictionary defines the term "report" as "an official or formal statement of facts or proceedings". It furthers defines "fact" as "a thing done; an action performed or an incident transpiring, an event or circumstance; and actual occurrence". Finally, Black's Law Dictionary defines "official" as "pertaining to an office; invested with the character of an officer; proceeding from, sanctioned by, or done by, an officer".

Order 170 states as follows:

> Finally it might be noted that the term "report" embraces a broad range of documents. In Order 37 (Appeal Number 880074) at page 6, the Commissioner derived assistance from the dictionary definition of the word "report" as "an account given or opinion formally expressed after investigation or consideration coverage to documents which might formally be referred to by some such phrase as "Investigative Reports", but, rather, may include any one of a broad range of documents providing information or opinions that have been prepared in the documents providing information or opinions that have been prepared in the course of law enforcement inspections or investigations.

In Order 200 Commissioner Wright established the following three part test which the institution must meet to successfully exempt a record under subsection 14(2)(a): 119

> In my view, in order to qualify for an exemption under subsection 14(2)(a) of the Act, a record must satisfy each part of the following three part test:
>
> 1. the record must be a report; and
> 2. the report must have been prepared in the course of law enforcement, investigations or inspections; and
> 3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

Finally, Commissioner Wright provides us with some further insight into the three part test in Order 221. Commissioner Wright states that:

> "The word "report" is not defined in the Act. However, it is my view that in order to satisfy the first part of the test, i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.

The Ministry submits that the portions of the record which have been exempted pursuant to section 14(2)(a) meet the three part test as outlined by Commissioner Wright for the following reasons:

- this report was the official formal accounting of facts regarding the investigation which was conducted. This report provided information and/or opinions gathered as a result of interviews with the subjects of the investigation. The information was assessed, evaluated and were then submitted as a report with a final disposition.
- this report was prepared by Major Cases, Criminal Investigation Branch of the OPP, an agency which has the function of enforcing and regulating compliance with a law.
- the information was gathered and prepared during a law enforcement matter and / or investigation. The matter at hand specifically relates to the request for an independent investigation of individuals from a complaint that there had been a breach of the Criminal Code a Federal Statute

The Ministry submits that the record A is clearly a police report and as such, should not be released to the appellant.

<u>Issue G:</u>

It has been established in a number of orders of the Commissioner's office that in order for section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the invasion of privacy.

With regard to the above test, the Ministry submits that the request for the record, which contains sensitive personal information, that the interest is not public , but rather, as evidenced in the request itself, only for the purposes of the association to which the requester is part of.

Section 21 itself embodies the principle of a balancing of the rights of privacy to which individuals are entitled as against the rights of the public to have access to information under the control of institutions.

In Order P-1363, the Commissioner said:

> *Important considerations in this balance are the principle of severability and the extent to which withholding the information is consistent with the purpose of the exemption.*

The Ministry submits in the circumstances of this request, to withhold the personal information in the record is consistent with the purpose of the exemption.

We submit that it is an important consideration that the exemption contained in section 21 is mandatory. As the Commissioner said in Order P-568:

> *section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.*

The Ministry further submits that the Legislature in passing the FIPPA intended that the privacy of individuals should be protected by making this exemption mandatory. It is noteworthy that the Legislature passed subsection 21(4) which takes certain information to which the Legislature intended the public should have access out of the section 21 exemption.

Given that the purpose of the mandatory section 21 exemption is clear, in our submission there is no public interest to be served that would clearly outweigh such a purpose. The OPP investigation did provide a press release which outlined the results of this investigation and provided the public an opportunity to be aware of the investigative results.

The Ministry submits that the section 23 public interest override does not apply to the personal information discussed above in that there is no compelling public interest that clearly outweighs the purpose of the exemption.

Conclusion:

The Ministry is mindful of the right of persons to seek access to records held by institutions and the requirements that the ACT place on institutions in determining the release of that information

The Ministry, however, submits that the release of any part of the record at issue would result in the various harms outlined and therefore the record cannot be reasonably severed in these circumstances.

Sincerely;

Dennis Hogan
Deputy Coordinator
Information and Privacy Services

Court File No. 32172

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

BETWEEN:

THE MINISTRY OF PUBLIC SAFETY AND SECURITY and THE ATTORNEY GENERAL OF ONTARIO

Appellants (Respondents)

-and-

THE CRIMINAL LAWYERS' ASSOCIATION

Respondent (Appellant)

-and-

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

Intervener (Respondent)

-and-

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

Interveners

-and-

INFORMATION COMMISSIONER OF CANADA, CANADIAN BAR ASSOCIATION, FEDERATION OF LAW SOCIETIES OF CANADA, CANADIAN NEWSPAPER ASSOCIATION and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

RESPONSE TO THE APPELLANTS' MOTION
BY THE INTERVENER, THE INFORMATION COMMISSIONER OF CANADA
(Pursuant to Rule 49 of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

(A) Overview

[1] The Appellants have brought a motion before a Judge of this Honourable Court, *inter alia* seeking an order expunging certain portions of the factum of the Intervener the Information Commissioner of Canada (ICC) and therefore limiting the content of the oral argument that the ICC will be permitted to make at the hearing of the within appeal.

[2] The ICC respectfully submits that the portions of its factum impugned in the Appellants' motion are fully consistent with the ICC's motion to intervene and the order of Justice Rothstein dated July 31, 2008. Further, these portions fall within the scope of appropriate and permissible argument by an intervener. The impugned portions do not constitute "new issues" in the relevant sense of this Court's *Rules* and practice. The ICC submissions challenged by the Appellants – that the Ministry was required by law to consider the public interest in the exercise of its discretion – were squarely raised by the ICC in its motion to intervene. The unlawful exercise of discretion by the Minister is plain and obvious on the record before the Court. No further light could have been thrown upon this question by placing additional evidence before the IPC, because the Minister's refusal before the IPC to acknowledge the existence of any public interest means that no further evidence material to this question could have been adduced. The ICC thus submits that the aspects of the Appellants' motion concerning the ICC ought to be dismissed.

[3] The overarching position expressed in the ICC's factum is that there is a fundamental weakness in the constitutional framing of this case. This Honourable Court is entitled to determine that the constitutional issues regarding s. 23 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F-31 ["*FIPPA*"] do not arise in this case.

[4] The ICC takes no position with respect to the other orders sought by the Appellants in this motion relating to the Information and Privacy Commissioner of Ontario (IPC) and the Appellants' proposed reply factum.

(B) Facts

[5] The ICC participates in the within appeal pursuant to its motion to intervene dated June 3, 2008. The Appellants consented to the ICC's motion to intervene.[1] Justice Rothstein granted

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1 Response to the motions for leave to intervene from the Appellants' counsel Dan Guttman, dated June 16, 2008.

leave to intervene to the ICC by order dated July 31, 2008, specifying that "[t]he interveners shall not be entitled to raise new issues or to adduce further evidence or otherwise to supplement the record of the parties". By further order dated September 29, 2008, Justice Rothstein granted the ICC permission to present 10 minutes of oral argument at the hearing.

PART II – QUESTIONS IN ISSUE

[6] The ICC's response addresses the Appellants' request that certain specified portions of the ICC's factum be ordered expunged, and that the content of the ICC's oral argument be limited accordingly. These aspects of the Appellants' motion raise the following question:

- Do the impugned portions of the ICC factum fall within the scope of appropriate argument by an intervener, and otherwise comply with the terms of the order by which the ICC was granted intervener status in the within appeal?

PART III – ARGUMENT

(A) This Court is not obliged to answer stated constitutional questions, regardless of the desires of the parties.

[7] In its factum, the ICC submits that "it is not necessary to respond to the stated constitutional questions in this case", as "[o]n a proper construction of the statutory regime, and a full consideration of the relevant s. 2(b) interests, the constitutional questions simply do not arise".[2] This submission has provoked indignation on the part of the Appellants, which assert that "[t]he constitutional issues must be decided in this appeal" as "[t]he *raison d'être* for the Appellants' appeal is to have that finding [of the Court of Appeal concerning the constitutionality of s. 23 of *FIPPA*] reversed, which cannot be done if the constitutional issues are not addressed".[3]

[8] The Appellants' implicit contention that this Honourable Court is somehow obliged in an appeal to answer stated constitutional questions is clearly without legal foundation, and indeed is contrary to this Court's well-established jurisprudence and practice:

> The parties are generally left wide latitude by the Chief Justice or other judges of this Court in formulating the constitutional questions which they submit for approval. However, <u>it does not follow that the Court is bound by these questions, and that it is required to answer them if it may dispose of the appeal without doing so or if it appears that the facts of the case do not provide a basis for such questions. The questions may not be used as a means of transforming an ordinary proceeding into a reference</u>...[4]

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2 ICC factum on the appeal, ¶2; see also ¶3, 5, 23.

3 Appellants' factum on the within motion, ¶7.

4 *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 at 71 [emphasis added], citing *Vadeboncoeur v. Landry*, [1977] 2 S.C.R. 179 at 187-88. See also *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 357; *Bell ExpressVu Ltd.*

[9] Questions concerning the constitutionality of a statutory provision are generally of importance not only to the parties, but also to many other Canadians as well as the federal and provincial governments. Accordingly, this Court has indicated that it is not bound by party concessions concerning constitutional questions.[5] Moreover, "if the facts of the case do not require that constitutional questions be answered, the Court will ordinarily not do so", as the "policy of the Court not to deal with abstract questions is of particular importance in constitutional matters".[6] In the absence of a factual foundation *requiring* resolution of stated constitutional issues, this Court has frequently declined to provide an answer to the constitutional questions presented by the parties.[7] In addition, this Court has indicated its inclination to exhaust common law and administrative law principles, before turning to *Charter* analysis.[8]

[10] Given these established and sound principles, it is evident that the desires of a party to an appeal – or the parties' efforts to frame an appeal in a particular manner, so as to apparently require that the constitutional questions be considered – cannot in law compel the Court to answer a particular constitutional issue. In any given appeal, if the Court's choice to resolve the case on the basis of one of a number of possible legal arguments renders it unnecessary to answer the stated constitutional questions, it is entirely appropriate for the Court to decline to do so.

(B) The portions of the ICC's factum that the Appellant seeks to expunge clearly fall within the scope of the argument set out in the ICC's motion to intervene.

[11] In its factum supporting its motion for leave to intervene, the ICC described as follows the position it intended to take if it were granted intervener status:

> [22] The Information Commissioner will take the following position, if granted leave to intervene:
>
> (a) Each time the head of a government institution must make a decision in response to an access request, if that decision-maker finds that a discretionary exemption may apply to the records responsive to a request, the decision on whether or not to invoke that exemption must be arrived at reasonably;
>
> (b) In order for such a decision to be reasonable, the decision-maker must consider all the relevant factors before deciding to invoke the discretionary exemption to refuse to disclose the information requested. The relevant factors include:
>
> i. The principle that government information should be available to the public;

Partnership v. Rex, [2002] 2 S.C.R. 559 at ¶58-59.

5 *M. v. H.*, [1999] 2 S.C.R. 3 at ¶45.

6 *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572 at 1580; see also *Bell ExpressVu Ltd.*, *supra* at ¶59.

7 See, *inter alia*, *Moysa*, *supra* at 1580; *Borowski*, *supra*; *Baron v. Canada*, [1993] 1 S.C.R. 416 at 452; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at 1099; *R. v. Skoke-Graham*, [1985] 1 S.C.R. 106 at 121-122.

8 See, for example, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at ¶11.

ii. The public interest in disclosure of the requested record;

iii. The interest in facilitating freedom of expression and other *Charter* rights;

iv. The underlying constitutional principle of democracy;

v. The purpose of the exemption and the extent to which a decision to apply the exemption to refuse disclosure of the record would meet that purpose;

(c) The independent bodies that review these decisions are under the obligation to verify that the decisions to invoke discretionary exemptions were arrived at in a manner that satisfies the reasonableness standard of review.

(d) When these principles are applied, freedom of information legislation does not impose a "rule of secrecy" that would infringe freedom of expression.[9]

[12] Leave to intervene was granted to the ICC on the basis of this proposed position.[10] In its factum on the appeal, the ICC developed its argument concerning the principles governing the lawful exercise of discretion by the Ministry, as it had proposed in its motion to intervene, and applied this legal argument to the circumstances of the case before the Court. The Appellants now seek to have significant portions of the ICC's factum expunged, asserting that these portions were not addressed in the ICC's motion to intervene. The ICC respectfully submits that the Appellants' argument in this regard must be rejected. The Appellants are certainly at liberty to respond during oral argument to the substance of the legal argument advanced in the ICC factum, and indeed could have sought leave to file a responding factum, as they have done in respect the international and foreign law arguments raised by the Media Interveners. However, the radical remedy the Appellants have sought instead is unwarranted.

[13] The ICC submits that paragraph 22 of its motion to intervene factum gave clear notice to the parties that the ICC would argue that all relevant factors had to be considered by a *FIPPA* decision-maker in a reasonable manner if a decision to invoke a discretionary exemption was to be considered a lawful exercise of discretion. Paragraph 22 also notified the parties that the ICC would argue that the independent bodies reviewing such decisions, such as the IPC, are under an *obligation* to verify that the exercise of discretion in a particular case was reasonable.

[14] The portions of the ICC factum impugned by the Appellants in this motion can be divided into the following classes. As described in greater detail below, the content of each of these classes falls within the scope of the legal argument proposed by the ICC in its leave materials.

(a) Development of the legal principles governing the lawful exercise of discretion by the

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9 ICC factum on motion to intervene, ¶22.

10 Order of Rothstein J., July 31, 2008.

Ministry, if this Honourable Court accepts that the *FIPPA* request in this case engages s.2(b) rights – paragraphs 5(B), 12-15;

(b) Development of the legal principles governing the lawful exercise of discretion by the Ministry, if (in the alternative) this Honourable Court concludes that the Respondent's *FIPPA* request is not expressive activity protected by s. 2(b) – the term "*Charter* values" as it appears in paragraphs 5(C), 17, 18 and 21;

(c) Application of the legal principles governing the lawful exercise of discretion by the Ministry to the circumstances of the case before the Court – paragraphs 3 (except first sentence), 16 and 21; and

(d) Statement of the ICC's position that the constitutional questions need not be answered if its proposed legal analysis is adopted – first two sentences of paragraph 2.

[15] In the impugned paragraphs within class (a), the ICC applies established administrative law principles concerning the lawful exercise of discretion to the particular context of the *FIPPA* statutory regime, based on an assumption that this Honourable Court will accept that a *FIPPA* request may engage s. 2(b) rights. In its motion to intervene factum, the ICC expressly advised that it would take the position that *Charter* rights have to be considered by the Ministry if the exercise of discretion is to be reasonable. If this Honourable Court accepts that the *FIPPA* request in this case engages s. 2(b) rights, and a denial of the request violates s. 2(b) – a conclusion advocated by the Respondent and the IPC, and supported by the ICC[11] – then the fact of a *Charter* infringement clearly must be taken into account in the exercise of discretion. Furthermore, if the infringement of a *Charter* right arises from the exercise of discretion, the exercise is by definition unreasonable and unlawful, unless it can be saved under s. 1. Hence, when a violation of a *Charter* right will arise, an evaluation of the principles governing the lawful exercise of discretion – the legal issue clearly proposed in the ICC's leave materials – must proceed to consider whether a s. 1 justification arises. In suggesting that the *Dagenais/Mentuck*[12] approach provides a ready framework for the evaluation and balancing of factors relevant to s. 1 justification in this context, paragraphs 12-16 of the ICC factum thus follow directly from the position set out in the ICC's leave materials, corresponding to factor (iii) of paragraph 22(b) of the ICC's motion to intervene factum. Moreover, if the discretion is employed in a manner that conforms to the *Dagenais/Mentuck* approach, any s. 2(b) infringement will be justified, the legislation will be *Charter*-compliant, and the stated constitutional questions will not arise (as indicated by the ICC in the impugned class (d) portions of its factum).

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[11] See ICC factum on the appeal, ¶6-9. The Appellants have not sought to have these paragraphs expunged.

[12] *Dagenais v. Canadian Broadcasting Co*, [1994] 3 S.C.R. 835 at 878; *R. v. Mentuck*, [2001] 3 S.C.R. 442 at ¶32.

[16] The impugned paragraphs within class (b) also develop the administrative law legal principles governing the lawful exercise of discretion by the Ministry. This portion of the ICC factum is an alternative submission, proceeding on the assumption that this Court will conclude that no infringement of *Charter* rights arises in the *FIPPA* context. The legal argument developed by the ICC at paragraphs 17-20 of its factum clearly falls within the scope of the argument set out in the ICC's leave materials – and indeed, the Appellants appear generally to concede this point, as their challenge to these paragraphs is solely directed to the term "*Charter* values".

[17] The ICC takes the position that since its leave materials expressly indicated that it would argue that "*Charter* rights", "the interest in facilitating freedom of expression" and "the underlying constitutional principle of democracy" were factors to be considered in the Ministry's exercise of discretion,[13] the Appellants had ample notice that "*Charter* values" would also be raised. Since these values, principles and rights inform each other,[14] it is illogical to interpret reference to "*Charter* rights" as excluding "*Charter* values", as the Appellants appear to suggest.

[18] The impugned paragraphs within class (c) merely apply the legal principles concerning the lawful exercise of the Ministry's discretion, which were developed in the respective preceding portions of the ICC factum, to the particular circumstances of the case at bar. As Rule 42(2)(e)(ii) expressly confirms, interveners are permitted to advocate a position with respect to the proper disposition of the legal issues on which they intervened. In this case, as proposed in its original leave materials, the ICC has intervened with respect to the proper legal principles governing the lawful exercise of discretion by the Ministry. In paragraphs 16 and 21 of its factum, the ICC explained, by reference to the facts of the case at bar, the basis for its position as to the disposition of this legal issue in this case. This position – that the Ministry failed to exercise his discretion, and did not consider the required relevant factors, including the public interest – is also articulated by the ICC in the impugned portion of paragraph 3.

[19] The ICC thus respectfully submits that no effect ought to be given to the Appellants' contention that the impugned portions of the ICC factum fall outside of the scope of the ICC's leave materials, as this allegation is without merit.

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[13] See ICC factum on motion to intervene, ¶22(b)(iii).
[14] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at ¶48-82

(C) The determination of the Ministry's unlawful exercise of discretion is not a "new issue" in the relevant sense of Rule 59(3), and does not require additional facts.

[20] The Appellants' final argument in support of its request to expunge certain portions of the ICC factum is that the ICC has impermissibly raised one or more "new issues", contrary to the terms of the order granting the ICC intervener status. The Appellants seek to bolster this argument by suggesting that the record required to consider the purportedly "new issues" is not before this Court. Beyond these bald assertions, the Appellants have provided no analysis of why this Court is not equipped to consider the ICC's arguments on the record before it, or how such consideration would be unfair to the parties. In response, the ICC submits that the determination of the Ministry's unlawful exercise of discretion as advocated in this case is not a "new issue" in the relevant sense of this Court's *Rules* and practice, especially as a complete assessment of this legal argument requires no additional facts and hence creates no prejudice to the parties.

[21] The term "new issue" has a particular meaning within this Court's jurisprudence in relation to the permissible scope of intervener argument. A "new issue" in this context certainly cannot be interpreted as simply referring to an argument that is not also raised in this Court by one of the parties. After all, as a condition of their standing to participate, interveners are required to bring a fresh perspective,[15] which would be difficult if not impossible to achieve if interveners were essentially restricted to commenting upon the arguments already raised by the parties.

[22] The principles governing the role of an intervener in an appeal were recently summarized by this Court in *Mikisew Cree First Nation v. Canada* as follows:

> It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the Court, provided that in doing so its legal argument does not require additional facts, not proven in evidence at trial or raise an argument that is otherwise unfair to one of the parties. An intervener is in no worse a position than a party who belatedly discovers some legal argument that it ought to have raised earlier in the proceedings but did not, as in *Lamb v. Kincaid* (1907), 38 S.C.R. 516, where Duff J. stated, at p. 539:
>
> > A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.[16]

[23] The facts in *Mikisew* that gave rise to an objection concerning the scope of intervener argument are instructive. Before the Federal Court of Appeal, an intervener raised an argument

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[15] Rules 55-59; *Reference Re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 2 S.C.R. 335.

[16] [2005] 3 S.C.R. 388 at ¶40. See also *Athey v. Leonati*, [1996] 3 S.C.R. 458 at ¶51-52; *Tordenskjold (The) v. Horn Joint Stock Co. of Shipowners* (1908), 41 S.C.R. 154; *McKelvey v. Roi Mining Co.* (1902), 32 S.C.R. 664.

involving a different legal interpretation of facts established on the existing record. In disposing of the appeal, Rothstein J.A. (as he then was) adopted the intervener's argument, which had not been advocated by any of the parties. While this Court ultimately allowed the appeal for different reasons, it indicated that the intervener had not overstepped its proper role:

> Even granting that the Mikisew can fairly say the [intervener] Attorney General of Alberta frames the non-infringement argument differently than was done by the federal Minister at trial, the Mikisew have still not identified any prejudice. Had the argument been similarly formulated at trial, how could "further light" have been thrown on it by additional evidence? The historical record was fully explored at trial. At this point the issue is one of the rules of treaty interpretation, not evidence. It thus comes within the rule stated in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19, that "[t]he Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice" (para. 33). Here the Attorney General of Alberta took the factual record as he found it. The issue of treaty infringement has always been central to the case. Alberta's legal argument is not one that should have taken the Mikisew by surprise. In these circumstances it would be intolerable if the courts were precluded from giving effect to a correct legal analysis just because it came later rather than sooner and from an intervener rather than a party. To close our eyes to the argument would be to "risk an injustice".[17]

[24] The ICC respectfully submits that the portions of the ICC factum impugned by the Appellants fall within the scope of permissible intervener argument as articulated by this Court in *Mikisew*. The legal argument presented by the ICC does not require any additional evidence beyond that present in the existing record, and no "further light" could have been thrown upon the issue by additional evidence before the IPC. The ICC argues in its factum that the Ministry failed to exercise its discretion as required by law: according to the alternative arguments presented by the ICC, either the Ministry had to apply a *Dagenais/Mentuck* style balancing (if *Charter* rights were engaged), or had to consider relevant factors including the public interest, *Charter* values and constitutional principles (if no *Charter* right was engaged). In either case, the ICC's argument reduces to the assertion that in exercising its discretion under *FIPPA*, the Ministry was legally required to consider relevant factors including the public interest.

[25] The question of whether public interest considerations apply has always been central to this case. In this regard, the ICC's argument should not have taken the Ministry by surprise. Indeed, the ICC submissions now impugned by the Appellants – the analysis of the exercise of discretion by the Ministry – were in fact discussed by the courts below.[18] The ICC's argument

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17 *Mikisew, supra* at ¶41.

18 Notably, see ¶115 of the judgment of the Divisional Court: "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 sections 14 and 19 - <u>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</u>

does not widen or add to the points in issue,[19] but rather suggests an alternative legal framework for the analysis of the existing public interest issue.

[26] At most, the analysis proffered in the ICC factum locates the public interest issue differently from the CLA: the ICC argues that the public interest must be considered by the Ministry in deciding whether to invoke a discretionary exemption, whereas the CLA has argued all along that the IPC must be able to consider the public interest within the s. 23 review of the Ministry's claim of the s. 14 and 19 discretionary exemptions. For the purposes of the within motion, however, the distinction is immaterial: if the legal argument had been similarly formulated before the IPC, it is evident that no "further light" could have been thrown upon it. The Appellants have not pointed to any evidence that they would have brought before the IPC at first instance, if the ICC's arguments had been raised at that point. Their assertion that the ICC's arguments constitute impermissible "new issues" on appeal must therefore fail.[20]

[27] Because the Respondent CLA raised the applicability of *FIPPA* s. 23 (the public interest override) from the start, the Ministry was given a full opportunity before the IPC to articulate its position concerning the public interest. The IPC's Order PO-1779 concluded that the Ministry's position on the public interest amounted to a refusal to acknowledge the existence of any public interest.[21] The Ministry provided its views on this issue in its submissions to the IPC dated September 7, 1999, which submissions were included in the Record of Proceedings before the Divisional Court and the Court of Appeal.[22] In these submissions, the Ministry asserted that there

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<u>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.</u> 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 section 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 section 2(b) violation and a failure to comply with the principle of democracy." [emphasis added]. See also the dissent in the Court of Appeal at ¶162.

[19] In this regard, the ICC's arguments can be distinguished from those of the interveners in *R. v. Morgentaler*, [1993] 1 S.C.R. 462 and *Reference Re Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445 at ¶72-76.

[20] *Mikisew*, *supra* at ¶41; *Performance Industries Ltd. v. Sylvan Lake Gold & Tennis Club Ltd.*, [2002] 1 S.C.R. 678 at ¶32-34; *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 3 at ¶5.

[21] See IPC Order PO-1779 (May 5, 2000) at p. 16, *Record of the Appellants*, Tab 2, p. 19, particularly the IPC's statement "[that the interest is not public] is the Ministry's <u>only</u> submission regarding the question of whether the nature of the interest in these records is 'public'. The Ministry does not comment on whether the public interest, if it exists, would be "compelling"." [emphasis added].

[22] Affidavit of Simone Poirier, sworn November 6, 2008. The ICC has filed a copy of Ministry's submissions to the IPC dated September 7, 1999 as part of its response to the within motion: see Exhibit A to the Affidavit of Simone Poirier, sworn November 5, 2008. The Ministry's submissions are filed for use in the within motion only, for the purpose of demonstrating (1) that the Ministry was provided with notice that the public interest issue was a live

were no public interest considerations at stake in this case. Given the Ministry's complete denial to the IPC of the existence of public interest considerations in this case, it is evident that had the ICC's legal argument been expressly raised before the IPC, the Ministry would not have been able to provide any further evidence material to this question. Accordingly, the evidence in the existing record must be considered complete on this point.

[28] In asserting that the ICC has impermissibly raised "new issues", the Appellants implicitly suggest that this Court is restricted to resolving this appeal on the grounds expressly raised by the CLA before the IPC. This is manifestly incorrect: when unrestricted leave is granted in a civil case, a respondent may advance any argument which would support the judgment below, subject only to the restriction on arguments that would have required additional evidence at first instance.[23] In any event, the issues raised in the ICC factum ought to have been considered by the IPC regardless of whether the CLA so requested, if necessary on the IPC's own motion: the IPC is obliged to apply the burden as set by *FIPPA*, according to which the Ministry must demonstrate the lawfulness of a refusal,[24] and in these circumstances the Ministry's failure to exercise its discretion lawfully by considering the public interest results in a loss of jurisdiction.[25]

PART IV & V – COSTS AND ORDERS SOUGHT

[29] The ICC seeks no costs on this motion.

[30] With respect to the relief sought in relation to the ICC, the ICC respectfully requests that this Honourable Court dismiss the Appellants' motion, decline to expunge the paragraphs of the ICC factum impugned by the Appellant, and decline to limit the content of the oral argument that the ICC is permitted to present at the hearing of the within appeal.

ALL OF WHICH is respectfully submitted, this 6th day of November, 2008.

Daniel Brunet
Marlys Edwardh
Solicitors for the Information Commissioner of Canada

one in this case, (2) that the Ministry had an opportunity to make submissions on this question and did so, and (3) the existing record before this Court is conclusive on the Ministry's position on this issue.

23 *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 at ¶20.

24 *FIPPA* s. 53.

25 *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at ¶16-18 (*per* Cory J. for the majority).

PART VI – TABLE OF AUTHORITIES

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File Number 32172

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

BETWEEN:

THE MINISTRY OF PUBLIC SAFETY AND SECURITY
(Formerly the Solicitor General)
AND THE ATTORNEY GENERAL OF ONTARIO

Appellants
(Respondents)

and

THE CRIMINAL LAWYERS' ASSOCIATION

Respondent
(Appellant)

and

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

Intervener
(Respondent)

and

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF BRITISH COLUMBIA, THE ATTORNEY GENERAL OF MANITOBA, THE ATTORNEY GENERAL OF NEW BRUNSWICK, THE ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR, THE ATTORNEY GENERAL OF NOVA SCOTIA, THE ATTORNEY GENERAL OF QUEBEC, THE INFORMATION COMMISSIONER OF CANADA, CANADIAN BAR ASSOCIATION, FEDERATION OF LAW SOCIETIES OF CANADA, CANADIAN NEWSPAPER ASSOCIATION and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

MOTION RECORD BY THE INTERVENER, THE INFORMATION COMMISSIONER OF CANADA, IN RESPONSE TO THE APPELLANTS' MOTION

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