Court File No: 32172

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

B E T W E E N:

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

Appellants
(Respondents)

-and-

THE CRIMINAL LAWYERS' ASSOCIATION

Respondent
(Appellant)

-and-

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

Intervener
(Respondent)

-and-

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

Interveners

APPELLANTS' REPLY FACTUM ON THE MOTION
THE MINISTRY OF PUBLIC SAFETY AND SECURITY (formerly the SOLICITOR GENERAL) AND THE ATTORNEY GENERAL OF ONTARIO

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PART I – OVERVIEW

1. In this reply, the Appellants respond to issues raised by the Information Privacy Commissioner of Ontario ("IPC"), the Information Commissioner of Canada ("ICC") and the Criminal Lawyers Association ("CLA") in their responding factums on the Appellants' motion.

PART II – ARGUMENT

1. The Appellants' motion that the IPC should be denied standing to make "detailed and elaborate submissions" on the merits of its own initial decision regarding the constitutional validity of *FIPPA*

2. The Appellants ask for an Order denying the IPC standing to make the argument on the merits of the constitutional issues that it makes in its factum on the appeal, and requests that the IPC's oral argument be limited to "explaining the record before the court and on issues of jurisdiction". Despite IPC and CLA assertions to the contrary, the IPC factum on the appeal runs contrary to this Court's jurisprudence regarding the proper role of tribunals on appeals of their decisions.[1] The IPC's submissions are clearly directed at the merits of the CLA's position that *FIPPA* unjustifiably infringes s. 2(b). Indeed, this is evidenced by paragraph 10 of the CLA factum on the motion, in which the CLA argues that the IPC's appeal factum "must be kept before the Court...so as not to prejudice the CLA's argument" on the constitutional questions.

3. The Appellants are not aware of any case in which a tribunal has been granted standing to argue that its original decision on the constitutional validity of a statute was incorrect. In its response, the IPC has not provided any case law to the contrary. Here, the IPC gave a final judgment on the validity of *FIPPA*. Following the jurisprudence and general practice of this Court, it should be denied standing to address on appeal the merits (or lack thereof) of the constitutional validity of *FIPPA*. Contrary to the arguments of the IPC, the issues it addresses in its factum on appeal are not issues of jurisdiction, and are not unique.[2]

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[1] In its factum at para. 9, the CLA, in support of the IPC, argues that the IPC should be granted standing because, *inter alia*, if the IPC had not made the original decision at issue in this appeal it could intervene and make the submissions it makes in its factum on appeal. If the IPC had not made the original decision at issue in this appeal, this case would not exist. The fact that the IPC is the original decision-maker is exactly why the IPC should not be granted standing and why Ontario's motion should be granted.

[2] The importance of maintaining tribunal impartiality also dictates refusal of granting the IPC expanded standing. The IPC concedes in their motion materials that the Commissioner made remarks to the media advocating for Ontario not to appeal the Court of Appeal Decision – see Tab 3, Affidavit of Kenneth Anderson at para. 9. As of Nov. 14, 2009 these remarks were posted on the IPC website at http://www.ipc.on.ca/images/Resources/up-12007_05_29_ar.pdf (see page 5-6 of Appendix A).

A) The issue of whether *FIPPA* infringes the *Charter* is not an issue of "jurisdiction"

4. The IPC argues in its motion factum that Ontario's motion should be denied because the "constitutional questions in the instant appeal affect the IPC's jurisdiction", relying on *inter alia Martin*, *Cuddy Chicks* and *Northern Telecom.*[3] However, the IPC overlooks the fact that the issue in those cases was the constitutional authority to apply the *Charter* or, under the *Constitution Act, 1867*, of a tribunal to decide a case.[4] The tribunals at issue in those cases appropriately made submissions on these issues.

5. However, the issue in the instant appeal is very different. There is no live question as to the jurisdiction of the IPC to apply the *Charter* – rather, what is at issue here is the correctness of the IPC's decision regarding the validity of its enabling statute.[5] If the IPC is granted standing here on the basis that a decision on the validity of its enabling statute is one of "jurisdiction" (in the sense that term is used in *C.A.I.M.A. W*), then every administrative tribunal would be able to rely on this decision when seeking standing to make submissions on the merits of original decisions on constitutional issues. This would be clearly inconsistent with this Court's jurisprudence.

B) The IPC has little to add to the issue of the constitutional validity of *FIPPA*

6. At paragraph 25 of its factum, the IPC lists six arguments that they allege are unique and that they should be granted standing to advance. The Appellants agree that the IPC should be able to make submissions on three of the six topics listed (without conceding that they are unique), namely:

> (ii) "to make comprehensive submissions on the legislative history of Ontario's freedom of information statutes, as set out in the Williams Report, detailing the historical and constitutional imperatives for the enactment of freedom of information laws in Ontario and elsewhere as a mechanism for ensuring the continued viability of parliamentary democracy";

[3] *Northern Telecom v. Communications Workers of Canada*, [1983] 1 S.C.R. 733; *Ontario Hydro v. O.L.R.B.*, [1993] 3 S.C.R. 327; *Cuddy Chicks v. O.L.R.B.*, [1991] 2 S.C.R. 5

[4] The issue of whether the IPC has jurisdiction to apply the *Charter* was actually decided by the IPC <u>in this case</u> (see Tribunal decision at paras 115-209). Since Ontario did not cross-appeal that decision, the issue of the IPC's *Charter* jurisdiction is not at issue in this appeal. Ontario agrees that if this issue were live on appeal, the IPC would be entitled to make submissions on its ability to apply the *Charter*.

[5] See for example the recent decision in *Chief Commissioner of the Human Rights and Citizenship Comm. v. Janice Brewer*, [2008] A.J. No. 460 (C.A.) especially at paras. 28-39, leave to S.C.C. denied 10/30/2008 ([2008], S.C.C.A. No. 290 (*per* McLachlin C.J. and Fish and Rothstein JJ.)).

(iii) "to address the legislative history and statutory developments in access to information in the context of then concurrent judicial developments recognizing the need for greater openness and accountability in government"; and

(iv) "to relate the independent reviewing mechanism in the statute to judicial recognition of the "fundamental precept" of independent oversight for decisions on government secrecy".

7. Ontario submits for the reasons expressed in its motion factum that the IPC should be denied standing to make submissions on the other three topics identified in para. 25 - (i) (the expressive activity at issue is "the attempt to gather information for public scrutiny purposes"), (v) (*FIPPA* fails the minimal impairment test) and (vi) (appropriate remedy) as well as the "positive-rights" argument it sets out in paragraph 23.[6] If the IPC is denied standing to make these submissions, there will still be a full adjudication of the issue. As the IPC itself points out, the ICC is advancing issue (i), and the CLA, the British Columbia Civil Liberties Association ("BCCLA") and the Media Interveners have all made submissions on issues (v) and (vi). Further, the BCCLA and the CLA are advancing the "positive rights issue". The decision on the extent to which the CLA decided to detail their argument on this issue in its factum was a tactical decision of the CLA. In addition, the CLA may make full oral argument on the positive rights issue if it so chooses. Tactical decisions of the CLA cannot support expanded standing for the IPC.

2. The Information Commissioner of Canada does not have standing to raise issues relating to the exercise of discretion

8. Ontario's position is that the ICC does not have standing to raise the issue of whether the Minister failed to properly exercise his discretion when he refused to disclose the government documents at issue. In its response, the ICC argues that this issue is not new and that Ontario consented to it when Ontario consented to the ICC's motion for leave to intervene[7]. Neither of these arguments bears scrutiny.

A) Ontario did not consent to the impugned arguments of the ICC

9. Contrary to the submissions of the ICC (and CLA), the ICC did not set out the substance of their position in their leave materials. Nowhere in its application for leave to intervene does the ICC state that if granted leave, it will be making the argument

[6] The IPC factum on appeal is primarily directed at these latter points.

[7] At paragraphs 11-13 of its motion factum, the CLA also baldly asserts that Ontario consented to the arguments now advanced in the ICC factum on appeal.

a) that the constitutional issues stated by the Court should not be decided;[8]
b) that Ontario failed to appropriately exercise its discretion in this case.[9]

B) Issues related to the exercise of discretion have never been raised in this appeal

10. Contrary to the argument of the ICC (and the CLA), at no time in the long history of this case did the CLA ever raise the issue of whether Ontario properly exercised its discretion in this case.[10] Thus, this Court is left without the considered analysis of the tribunal, the Divisional Court or the Court of Appeal on this issue. This fact supports Ontario's position that the general rule - that new issues raised for the first time on appeal should not be heard - should be applied here.

11. Furthermore, because the issues related to the exercise of discretion were never raised, contrary to the ICC's submissions, there is not even a record before this Court on which this Court could review the Minister's exercise of discretion. For example, if this issue had ever been raised by the CLA, it would have been open to Ontario to provide affidavit evidence from the decision-maker setting out the considerations taken into account when deciding how to exercise the discretion. Thus, Ontario is prejudiced in its ability to file a reply on the question of whether discretion was properly exercised in this case since the record is inadequate for this inquiry. The ICC's attempt to make submissions on this issue runs counter to the general rule that intervenors are limited to legal submissions.

12. In a confusing submission, the ICC baldly asserts that Ontario's <u>legal submissions</u> to the IPC on whether the application of s. 23 in the context of s. 21(3)(b) would require disclosure "is conclusive of the Ministry's position on this issue [i.e. the issue of the exercise of discretion pursuant to s. 14(2)(a)]". <u>Legal submissions</u> on the <u>s. 21(3)(b) / s. 23</u> issue are not and were

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[8] It is true that this Court need not always answer the Constitutional Questions it has stated (e.g. where they are moot). However, this does not mean that intervenors have standing to raise new legal questions unrelated to the constitutional questions and argue that the appeal should be resolved by answering the new questions. With respect, it is likely the ICC would not have been granted leave to intervene if it had stated in its application for leave to intervene its position that the constitutional questions here need not be answered.

[9] Further, nowhere in the ICC leave materials does it state that if granted leave, it would argue that this Court should find, for the first time, that a version of the *Dagenais/Mentuck* test that was developed in the context of publication bans should apply to discretionary decisions regarding information disclosure or that a discretionary decision must consider "*Charter* values".

[10] Paragraph 25 and footnote 18 of the ICC motion factum are plainly incorrect. When para. 115 of the Divisional Court decision is read in the context of paras. 110-116, it is clear that what the Divisional Court was addressing was whether *Charter* values should influence the <u>interpretation</u> of s. 23 of *FIPPA* and not how *Charter* values applied to the Minister's exercise of <u>discretion on whether to disclose</u>. Contrary to para. 13 of the CLA's motion factum para. 40 of its Divisional Court factum (appended here as Appendix B) did not advance this argument.

never intended to serve as a substitute for evidence on the question of whether the Minister appropriately exercised his discretion to refuse to disclose the document under s. 14(2)(a). If the ICC were correct that the Minister has no viable position on s. 14(2)(a) / s. 23 in light of his legal submissions on the s. 21(3)(b) / s. 23 issue, there would have been no need for the majority of the Court of Appeal to, as they did, send the s. 14(2)(a) / s. 23 matter back to the IPC for determination.

13. While Ontario could, as suggested by the ICC, file a reply factum on the framework for review of the exercise of Ministerial discretion, it is submitted that intervenors should not be granted standing to raise new issues that deflect attention from the *lis* between the parties. That allowing the ICC to raise this new issue would deflect from the heart of the appeal is further evidenced from the CLA's request to file a reply to the ICC factum since it is "not in full agreement" with the ICC on the principles applicable to the proper exercise of discretion under *FIPPA*.[11] Thus, the appropriate outcome of this motion is to strike the impugned paragraphs of the ICC factum.

3. Ontario's request to file a reply factum

14. The CLA's consent supports Ontario's motion to file a reply factum responding to the Media Intervener's international and foreign law argument.

4. Time for Oral Argument

15. Two intervenors – the IPC and the Media Interveners – each have requested 10 minutes of additional time for oral argument. The Appellants take no position on these requests but assert that if any additional time is granted to these intervenors, the Appellants should be granted additional time equal to the sum granted to these intervenors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATE: NOVEMBER 14, 2008

Daniel Guttman

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[11] See CLA motion record, tab 3 at p. 3 (last bullet).

PART III – TABLE OF AUTHORITIES

Cases Cited

PART IV – LEGISLATION

No legislation cited

Remarks for news conference May 29, 2007 on the release of the Commissioner's 2006 Annual Report

Good afternoon ladies and gentlemen. Thank you for joining me here today.

It is a pleasure to meet with you again to share the highlights of my Annual Report. With me here this afternoon are Ken Anderson, my Assistant Commissioner for Privacy, and Brian Beamish, my Assistant Commissioner for Access. With so much happening in the fields of access and privacy, and the increasing demands on my office, I am extremely thankful to have such talented and dedicated colleagues.

I'm going to begin by reviewing a few of the positive developments of the past year – the accomplishments of the Ontario government. This may come as a surprise to you, given the tone of my press release, but I will explain that shortly.

On the privacy front, the government has eliminated the use of SINs within government, when their use is not specifically required by law. We have been asking for this for many years, and are very pleased to see its use rolled back.

A new enterprise-wide approach to the secure destruction of records has been adopted, applicable to both paper and electronic media. This is highly commendable, especially on the heels of my first order under the *Personal Health Information Protection Act* in 2005, involving the need for secure destruction.

A Chief Information and Privacy Officer has now been appointed, again in response to a recommendation we made in our 2003 Annual Report.

We are all delighted with the appointment of Mark Vale, who has already started developing a number of new programs and initiatives.

The 30-day provincial compliance rate for responding to freedom of information requests has been steadily improving for much of this decade; it dropped to 73.5 per cent in 2006, down from 80.1 per cent in 2005. But the drop in the compliance rate is not what troubles me.

It's the fact that the 30-day compliance rate to FOI requests has been viewed as being enough – as having satisfied the government's responsibilities under the *Acts*. This is a mistake. As we say in our report – it's only part of the story. Meeting legislated compliance rates is only where you begin – it shows that the government is providing responses to FOI requests within the legislated time frame of 30 days. But it says nothing about the quality of those responses – the decisions made regarding whether or not to disclose the information requested.

I now want to shift from looking at a quantitative measure – whether a decision was issued within 30 days of receiving an FOI request – to the quality of those decisions. And the quality of those decisions needs to improve. The decisions made need to reflect more openness and transparency. They need to let more information out the door.

What troubles me is that, as a government, the bureaucracy needs to do a much better job at following the spirit of the *Acts*. Premier McGuinty identified this point himself in his seminal memorandum of 2004, in which he noted that information requested of government "should be made public unless there is a clear and compelling reason not to do so." This just isn't happening!

The examples I am about to give you will clearly demonstrate that this is still not happening! And I am now referring to the fact that Ontario is a mature jurisdiction. The FOI laws in Ontario have been around for nearly 20 years – the *FIPPA* Act was passed in 1987 – 20 years, ladies and gentlemen. That's a long time – well past the learning stage – surely long enough for the bureaucracy to have gotten acclimatized to the principles of openness and transparency – that information should be released to the public, unless, in the words of the Premier, there is a "clear and compelling reason not to do so," – because it is essentially, the public's information. Let's not forget that. Surely, the time for secrecy and withholding information should have come to an end. Well, I'm sorry to say that, after almost 20 years, it has not. Let me explain.

I know that I have used some strong language in this annual report. I firmly believe that such language is necessary to encourage all elements of the provincial government to be **fully** open and transparent.

Open and Transparent Government

My position is very clear: Saying that you want an open and transparent government isn't enough. You have to do it – take the steps necessary to make it happen, to make it real. *Too many government officials are* not *living up to the memorandum that Premier McGuinty issued to his ministers and deputies, three years ago.*

I applauded the Premier at the time for issuing his communiqué and for taking such a strong position in favour of openness and transparency. But it hasn't filtered down the ranks to those making the actual decisions relating to freedom of information. That's the reality that we are facing.

My concern stems from a number of the appeals that my office has received. In some cases, provincial organizations have rejected FOI requests for information that were virtually identical to information in previous appeals that we had ordered released. So let me be clear – we order some information to be released – that sets the benchmark. Virtually the **same** information is requested from another ministry, but it is **not** released. Where is the sense in that? One area where this has occurred is with government contracts. Contracts for services provided should be **routinely** disclosed. But, despite the Premier's words, access to this basic information continues to be denied. Why? Why waste everyone's time and resources?

This office has repeatedly encouraged government institutions **not** to deny access to a record simply because it is **possible** that an exemption may be claimed. There are still too many cases where government institutions are resisting the disclosure of information that should be in the public domain, through the unnecessary application of such exemptions. – This, despite the Premier's words.

Another example is a refusal by a number of ministries to disclose **bottom-line** information – and here I'm talking about a single figure – the total – related to legal costs expended, despite orders by this office that have found that bottom-line aggregated total is not privileged information. By bottom-line, I mean a single, total figure – the **sum** of the legal fees involved – nothing more. We strongly respect solicitor-client privilege, but we don't feel that disclosing the total amount the government has spent in one area should be concealed.

In addition, some institutions continue to give an overly broad interpretation to sections of the *Acts* that relate to employment and labour relations matters. Remember Bill 7? These provisions are often misapplied to deny access to basic information that should be routinely disclosed.

So, what can be done, besides the Premier issuing another memorandum? I have one idea relating to government tenders – a proposal for the government.

I am urging the Ontario government to post the winning bid for every contract awarded by a provincial government organization on a website, accessible to the public. And – to ensure that the entire process is transparent – I am also recommending that details of the unsuccessful bids, be posted alongside the successful bid. While this may come as a shock to those who are used to the veil of secrecy involved in the old model of public procurement, Ontarians deserve better – they deserve transparency and accountability.

In order to do this, the government would need to adopt a policy *requiring* the disclosure of the **bottom**-line of *all* successful contracts and *all* unsuccessful bids. This policy would be noted in all RFP/tender packages, so all bidders would know up-front, that the details of their bids would be posted publicly. Proprietary trade secrets and business secrets would, of course, continue to be protected. I await the Premier's response to my proposal.

Ensuring the integrity and effectiveness of the procurement process by publicly posting this information to a website would go a long way to increasing government accountability.

And, this would mirror the government's decision announced just yesterday, that information on daycare inspections will be posted on a government website. This was in response to the Toronto Star's lengthy investigation on thousands of daycare incidents. Only after two years of repeated FOI requests, was the Star finally able to obtain the requested records on Ontario's 4,400 licensed daycares, and even then, large parts of the records were blacked out. To quote the Star, "Such secrecy is unconscionable." Two years ... it seems like a long time to get this information out – information that will now be routinely posted to a website – as it should be.

Now, let me turn to privacy.

Culture of Privacy

In my Annual Report, I refer to a truly regrettable situation that occurred at an Ontario hospital. I want to drive home the point that having a privacy policy, in and of itself, is not enough: A culture of privacy must be developed so that everyone handling personal information understands what may or may not be done with that information.

A patient admitted to the Ottawa Hospital made a specific request to ensure that her estranged husband, who worked at that hospital, and his girlfriend, who happened to be a nurse at the hospital, did not become aware of her hospitalization, and that steps be taken to protect her privacy. Much to her dismay, she learned later that this had not occurred – the nurse/girlfriend had repeatedly gained access to her personal information.

Despite having clearly alerted the hospital to the possibility of harm, the harm occurred nonetheless. I'm sure you are wondering, how could this happen? More easily than you think.

Unless privacy policies are interwoven into the fabric of an organization's day-to-day operations, they won't work; full stop. Hospitals – and every other health care provider and government organization – **must** ensure that they not only educate their staff about privacy, but also that privacy becomes embedded into their institutional culture – we call this developing a culture of privacy.

Upholding compliance with Ontario privacy laws is not simply a matter of following the provisions of enacted legislation, but ensuring that the use and disclosure of sensitive personal information is strongly monitored, and access controlled to those who truly need it in the performance of their duties.

Identity

Let me turn to another theme that I explore in my annual report – Identity. There is every reason to believe that identity-related issues will be **the** dominant privacy issue in the coming years. In all sectors of government, in health care and in educational settings, all are undergoing, large-scale IT-enabled transformations in their operations that depend critically on the view of identity adopted and the use of personal identifiers. These institutions are also evaluating how to identify citizens, their stakeholders and their clients. The private sector is facing similar issues.

Personally-identifiable information is a special category of sensitive data that, more than ever, must be treated as both an asset and a liability, and managed in a verifiable manner. The risk of a privacy and security breach looms high when identifiable data are collected and retained in databases, in plain view.

We may not be able to put the information genie back in the bottle, but we can set limits on permissible levels of collection, use and disclosure of personal information, and hold those organizations accountable for actions that impact negatively on the privacy of individuals and the security of our freedoms.

I released our first major paper on this fundamental issue last fall – *The 7 Laws of Identity: The Case for Privacy-Embedded Laws of Identity in the Digital Age* – and the response was very positive. We will continue to monitor this issue very carefully.

AVOIDING ABANDONED RECORDS

I realize that you may not have had time to read every single word in my annual report yet. Please correct me if I'm wrong. But if you made it to the section on *High Profile Privacy Incidents*, you will have read about a health order I issued late in 2006 (HO-003) which dealt with personal health records that had been left behind – abandoned – when a Toronto clinic had closed its doors.

Today, I am following up on that order by releasing new guidelines to avert future records from being abandoned: *How to Avoid Abandoned Records: Guidelines on the Treatment of Personal Health Information in the Event of a Change in Practice* – which may include retirement, selling your business, bankruptcy, or death. Let me stress something here: It is unacceptable – totally unacceptable – for a health information custodian, when closing business premises, to leave behind records containing personal health information. You can't do that – leave your patients' records behind.

These *Guidelines,* which address privacy safeguards and the continuity of records management, outline the responsibilities of health information custodians under the *Personal Health Information Protection Act* and provide best practices to ensure that health records are never abandoned. We have copies available at the table by the entrance for those who do not already have a copy of the *Guidelines.*

COURT OF APPEAL RULING

Before concluding my remarks, I want to briefly comment on a very important ruling that came down this Friday from the Ontario Court of Appeal. The ruling, which rewrites the current law, means that my office will now be able to determine whether the interests of the public outweigh the purpose of the exemption in matters involving law enforcement and solicitor-client privilege. This is called the "public interest override," S.23, and may only be invoked in cases where there is a "compelling public interest," that clearly outweighs the purpose of the exemption. This sets a very high bar to meet.

<u>However</u>, and this is a big however, the public interest override does not apply to all exemptions, meaning that my office cannot even consider invoking it when handling certain types of appeals. But now, we will be able to, especially in the very important area of <u>law enforcement</u>.

As I said, The standard for invoking the public interest override is extremely high – we have used it, on average, less than once a year over the past two decades – under 1% - under half a percent - 0.3% to be exact, that's in only 16 cases out of some 4,800 orders we've issued to date. But it is very important that the determination as to whether the public interest does override an exemption, is made by an independent office, such as ours.

Now, the government could still seek leave from the Supreme Court of Canada, to appeal this decision, a decision made by Ontario's highest court. This, ladies and gentlemen, will be the acid test – and it will reveal how serious the government actually is about openness and transparency.

If the government truly wants the public to be made aware of matters where there is a "compelling public interest," surely they would not object to my office's ability to make such determinations, on behalf of the public – decisions that we have made very guardedly in the past since the test for a matter to be considered a "compelling public interest, that outweighs the purpose of the exemption involved," is indeed very high. Which is why our use of S.23 has been rare – under 1% - 0.3% to under 0.5% to be exact. Accordingly, we urge you to see the wisdom in the Court of Appeal's decision, and respectfully ask the government not to appeal this decision.

We await your response, Mr. Premier!

Let me end by returning to the main themes of my Annual Report. With respect to openness and transparency, the government's performance is just not good enough. After 20 years, the learning curve has been exhausted. With respect to privacy, their performance is better, no question, but there's still room for improvement. In the words of California's Governor, who is visiting our fair city today, I would like the government to "Super-size" privacy. I think that after 20 years, it's time.

Appendix "B"

Court File No.: 730/00

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

IN THE MATTER OF the *Judicial Review Procedure Act*, R.S.O. 1990, 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

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

BETWEEN:

THE CRIMINAL LAWYERS' ASSOCIATION

Applicant

-and-

THE MINISTRY OF THE SOLICITOR GENERAL and TOM MITCHINSON, ASSISTANT COMMISSIONER, OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

Respondents

FACTUM OF THE APPLICANT, THE CRIMINAL LAWYERS' ASSOCIATION

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(f) Remedy

37. The CLA submits that s. 23 would be consistent with ss. 2(b) and the principle of democracy if ss. 14 and 19 were added to the exemptions set out in s. 23 (or "read into" s. 23). This would make the public interest override in that section available in the case of ss. 14 and 19 exemptions.

38. Reading in is a remedy that is adopted when it is consistent with legislative intent. In this case, it must be asked whether the legislature would prefer that s. 23 be struck and there be no public interest override or whether ss. 14 and 19 should be read into s. 23. As the former would likely be unconstitutional for the reasons developed in this case, the only option available to the legislature would be the latter.

> *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

39. In the alternative, the CLA submits that the appropriate remedy would be to declare s. 23 unconstitutional to the extent that it fails to permit a public interest override in cases of ss. 14 and 19 exemptions and to give the government a period of 6 months to enact legislation permitting a public interest override for those exemptions.

> The Supreme Court granted this remedy in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, a s. 2(d) Charter case where legislation excluded certain workers from the ambit of the *Labour Relations Act*.

(g) The alternative submission: the Assistant Commissioner failed to take into account the CLA's rights and the constitutional principle of democracy in interpreting and applying the exemptions to disclosure

40. The exemptions under s. 14 (law enforcement) and s. 19 (solicitor client privilege) of the Act must be interpreted and applied in a manner consistent with the Constitution. The Assistant Commissioner's interpretations and applications of these sections did not take into account the the CLA's constitutional freedom of expression or the constitutional principle of democracy and what these, taken together, require: there must be some assessment of the public interests involved. Constitutional considerations such as these are relevant considerations which the

Assistant Commissioner must take into account in his interpretation and application of the sections.

R.W.D.S.U. v. Dolphin Delivery, [1986] 2 S.C.R. 573.

Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513 at 558.

41. Sections 14 and 19 are constitutionally valid, but the jurisprudence under those sections and the tests applied by the Assistant Commissioner are not consistent with the requirement (under s. 2(b) of the Charter and the constitutional principle of democracy, taken together) that there must be some assessment of the public interest in disclosure:

(a) In the case of the s. 19 exemption (solicitor client privilege), the Assistant Commissioner specifically rejected the submission that solicitor client privilege can be set aside where there is a compelling public interest.

Order PO-1779 (May 5, 2000), (Ministry of the Solicitor General, Information and Privacy Commissioner/Ontario) at 12, Public Record of Proceedings, Volume 4, Tab 71-A at 927.

(b) In the case of the s. 14 exemption (law enforcement), not one word was said about the public interest in disclosure. The test for the law enforcement exemption in s. 14 must be modified in order to accord with the constitutional requirement that there must be some assessment of the public interest in disclosure.

Order PO-1779 (May 5, 2000), (Ministry of the Solicitor General, Information and Privacy Commissioner/Ontario) at 6-8, Public Record of Proceedings, Volume 4, Tab 71-A at 921-923.

As the Assistant Commissioner failed to consider the public interest under ss. 14 and 19, his decision (Order PO-1779) must be quashed. (The failure to consider and implement constitutional values is reviewable on a standard of correctness but even on a standard of reasonableness, Order PO-1779 must be quashed: see paragraph 8, above.) The matter must be remitted back to him for reconsideration.

Order PO-1779 (May 5, 2000), (Ministry of the Solicitor General, Information and Privacy Commissioner/Ontario) at 12 (s. 19) and 6-8 (s. 14), Public Record of Proceedings, Volume 4, Tab 71-A at 927 and 921-923.