

**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**

Intervenors

**APPELLANTS' RESPONDING FACTUM TO THE RESPONDENT'S MOTION
THE MINISTRY OF PUBLIC SAFETY AND SECURITY (formerly the
SOLICITOR GENERAL) AND THE ATTORNEY GENERAL OF ONTARIO**

ATTORNEY GENERAL OF ONTARIO

720 Bay Street, 4th Floor
Toronto, Ontario
M5G 2K1

Dan Guttman

Tel: 416-212-4111
Email: Daniel.Guttman@ontario.ca

Sophie Nunnelley

Tel: 416-326-6287
Email: Sophie.Nunnelley@ontario.ca

Fax: 416-326-4015

Counsel for the Appellants

BURKE-ROBERTSON

70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Robert E. Houston, Q.C

Tel: (613) 236-9665
Fax: (613) 235-4430

Agent for the Appellants

TO:

THE CRIMINAL LAWYERS' ASSOCIATION

Heenan Blaikie LLP

P.O. Box 185, Suite 2600
200 Bay Street
Toronto, Ontario
M5J 2J4

David Stratas

Tel: (416) 360-6336
Fax: (416) 360-8425

Counsel for the Respondents

Heenan Blaikie LLP

55 Metcalfe street,
Suite 300
Ottawa, Ontario
K1P 6L5

Judith Parisien

Tel: (613) 236-4673
Fax: (613) 236-9632
Email: jparisien@heenan.ca

Agent for the Respondents

INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

**Information And Privacy
Commissioner/Ontario**

2 Bloor Street East
Suite 1400
Toronto, Ontario
M4W 1A8

William S. Challis

Tel: (416) 326-3921
Fax: (416) 325-9186
Email: bill.challis@ipc.on.ca

Counsel for the Intervener Tom Mitchinson
Assistant Commissioner, Office of the
Information and Privacy Commissioner of
Ontario

Borden Ladner Gervais LLP

World Exchange Plaza
100 Queen Street, suite 1100
Ottawa, Ontario
K1P 1J9

Carole Brown

Tel: (613) 237-5160
Fax: (613) 230-8842

Agent for the Intervener, Tom
Mitchinson, Assistant Commissioner,
Office of the Information and Privacy
Commissioner of Ontario

ATTORNEY GENERAL OF CANADA

Attorney General Of Canada
Bank of Canada Building - East Tower
234 Wellington Street, Room 1212
Ottawa, Ontario
K1A 0H8

Christopher M. Rupar
Tel: (613) 941-2351
Fax: (613) 954-1920
Email: Christopher.Rupar@justice.gc.ca

Agent for the Intervener, Attorney
General of Canada

**ATTORNEY GENERAL OF NEW
BRUNSWICK**

Gowling Lafleur Henderson LLP
2600 - 160 Elgin St
Box 466 Station D
Ottawa, Ontario
K1P 1C3

&

**ATTORNEY GENERAL OF
MANITOBA**

Brian A. Crane, Q.C.
Tel: (613) 786-0107
Fax: (613) 788-3500
Email: Brian.Crane@gowlings.com

Agent for the Interveners, Attorney
General of New Brunswick and Attorney
General of Manitoba

**ATTORNEY GENERAL OF BRITISH
COLUMBIA**

Burke-Robertson
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

&

**ATTORNEY GENERAL OF
NEWFOUNDLAND AND LABRADOR**

Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 235-4430

Agent for the Interveners, Attorney
General of British Columbia and Attorney
General of Newfoundland and Labrador

**ATTORNEY GENERAL OF
NOVA SCOTIA**

Gowling Lafleur Henderson LLP
2600 - 160 Elgin St
P.O. Box 466, Stn "D"
Ottawa, Ontario
K1P 1C3

Henry S. Brown, Q.C.
Tel: (613) 233-1781
Fax: (613) 563-9869
E-mail: henry.brown@gowlings.com

Agent for the Intervener, Attorney
General of Nova Scotia

ATTORNEY GENERAL OF QUEBEC

Noël & Associés
111, rue Champlain
Gatineau, Quebec
J8X 3R1

Pierre Landry
Tel: (819) 771-7393
Fax: (819) 771-5397
E-mail: p.landry@noelassocies.com

Agent for the Intervener, Attorney
General of Quebec

CANADIAN BAR ASSOCIATION

Osler, Hoskin & Harcourt LLP
340 Albert Street
Suite 1900
Ottawa, Ontario
K1R 7Y6

Patricia J. Wilson
Tel: (613) 787-1009
Fax: (613) 235-2867
E-mail: pwilson@osler.com

Agent for the Intervener, Canadian Bar
Association

**INFORMATION COMMISSIONER
OF CANADA**

Information Commissioner of Canada
Place de Ville - Tower B
112 Kent Street, 22nd Floor
Ottawa, Ontario
K1A 1H3

Daniel Brunet
Tel: (613) 943-2411
Fax: (613) 947-5252

Counsel for the Intervener, Information
Commissioner of Canada

**FEDERATION OF LAW SOCIETIES
OF CANADA**

Borden Ladner Gervais LLP
100 - 1100 Queen Street
Ottawa, Ontario
K1P 1J9

Guy J. Pratte
Tel: (613) 237-5160
Fax: (613) 230-8842
E-mail: gpratte@blgcanada.com

Counsel for the Intervener, Federation of
Law Societies of Canada

**CANADIAN NEWSPAPER
ASSOCIATION, AD
IDEM/CANADIAN MEDIA
LAWYERS' ASSOCIATION AND
CANADIAN ASSOCIATION OF
JOURNALISTS**

Blake, Cassels & Graydon LLP
World Exchange Plaza
20th Floor, 45 O'Connor
Ottawa, Ontario
K1P 1A4

Gordon K. Cameron
Tel: (613) 788-2222
Fax: (613) 788-2247
E-mail: gord.cameron@blakes.com

Agent for the Intervener, Canadian
Newspaper Association, Ad
Idem/Canadian Media Lawyers'
Association and Canadian Association
of Journalists

**BRITISH COLUMBIA CIVIL
LIBERTIES ASSOCIATION**

Blake, Cassels & Graydon LLP
45 O'Connor St.
20th Floor
Ottawa, Ontario
K1P 1A4

Nancy K. Brooks
Tel: (613) 788-2200
Fax: (613) 788-2247

Agent for the Intervener, British
Columbia Civil Liberties Association

INDEX

	PAGE
PART I – OVERVIEW	1
PART II – ISSUES	1
PART III – ARGUMENT	1
1. The CLA’s request for a reply factum	1
2. Time for Oral Argument	2
3. The Respondent’s request to file a document	2
PART IV – SUBMISSION ON COSTS	2
PART V – TABLE OF AUTHORITIES	3
PART VI – LEGISLATION	4

PART I – OVERVIEW

1. This is the Appellants' response to the Respondent's request for an order allowing it to file a 15 page reply to various interveners and for 15 minutes of additional oral argument.

PART II – ISSUES

2. Should the Respondent ("CLA") be granted the right to file a reply factum and/or additional time for oral argument?

PART III – ARGUMENT

1. The CLA's request for a reply factum

3. Although the CLA has not filed in its motion materials a draft reply factum, the Appellants do not oppose the CLA's request to file a short reply on the first two topics it identifies in paragraph 7, which relate to solicitor-client privilege and to the case of *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* 2008 SCC 44 (released after the Respondent filed its factum). In addition, subject to the outcome of the Appellants' motion to strike certain paragraphs of the Information Commissioner of Canada ("ICC") factum, the Appellants do not oppose the CLA's request to file a reply to the ICC's new argument, as long as the Appellants are also granted permission to file a reply on this issue. If the Appellants' motion to strike portions of the ICC factum is granted, there is no need for either the Appellants or Respondent to reply to the ICC factum.

4. The Appellants oppose the CLA's request to file a reply on the topics listed in the other 6 bullet points in paragraph 7 on the ground that it is not the practice of the Court to permit wide-ranging replies¹ – a substantial concern here that is heightened by both the fact that the CLA asks for 15 pages of reply and the fact the CLA's motion is not accompanied by a draft factum. If the Appellants' motion to strike the ICC factum is denied, the CLA will have already supplemented its 40-page factum on appeal by adopting the IPC's 20-page appeal factum. Finally, the fact that the intervenors filed their factums after the Respondent does not entitle the Respondent to a reply

¹ The CLA also propose replying on *inter alia*: the scope of the democracy principle, the alleged convention of secrecy in Canada, s.1 of the *Charter*, s. 2(b) of the *Charter*, "the alleged lack of rights by the public to review documents relevant to police or prosecutorial discretion", common law access to government information, and "attitudes evident in all interveners' memoranda about the purpose of access to information, its scope, and the alleged need for government secrecy". See para. 7 of the Respondent's factum for the full list of proposed topics.

factum – just as the Appellants have not received a right to file a reply to the Respondent's factum (despite the fact that it was filed after the Appellants' factum).

2. Time for Oral Argument

5. The CLA has requested 15 minutes of additional time for oral argument. The Appellants take no position on this request but assert that, following the practice of this Court, if any additional time is granted to the CLA, the Appellants should be granted equal time. It is true that there are more interveners on the side of the Appellants – however, to the knowledge of the Appellants, this has never been a cause for giving one party more time than the opposing party. In provincial courts of appeal, appellants are given significantly more time than respondents in recognition of the fact that they must spend some time setting the stage for the appeal.² While the Appellants are not asking for more time than the Respondent, the Appellants should not be given less time.

3. The Respondent's request to file a document

6. The Respondent seeks leave to file a document from the Public Record before the Divisional Court. While this document is entirely irrelevant if the Appellants' motion to strike certain parts of the ICC factum is granted, the Appellants consent to the filing of this document.

PART IV – SUBMISSION ON COSTS

7. The respondent submits that there should be no costs on this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATE: NOVEMBER 14, 2008



for Daniel Guttman



Sophie Nunnolley

² The CLA was the Appellant in the Ontario Court of Appeal.

PART V – TABLE OF AUTHORITIES

Cases Cited

- | | at para. |
|---|----------|
| 1. <i>Canada (Privacy Commissioner) v. Blood Tribe Department of Health</i> , 2008 SCC 44 | 3 |

PART VI – LEGISLATION

at para.

1. *Canadian Charter of Rights and Freedoms* s. 1 and 2(b)

4