Federal Court of Appeal | Cour d'appel fédérale

Date: 20230727

Docket: A-225-21

Citation: 2023 FCA 167

CORAM: **PELLETIER J.A.**
WEBB J.A.
RIVOALEN J.A.

BETWEEN:

KAREN FRASER, JENNIFER SWEET, NICOLE SWEET, KIM SWEET, JOHN SWEET, J. ROBERT SWEET, CHARLES SWEET, PATRICIA CORCORAN, ANN PARKER, TORONTO POLICE ASSOCIATION, DOUG FRENCH, DONNA FRENCH and DEBORAH MAHAFFY

Appellants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, ATTORNEY GENERAL OF CANADA, CORRECTIONAL SERVICE CANADA, PAROLE BOARD OF CANADA, CRAIG MUNRO, and PAUL BERNARDO

Respondents

Heard at Toronto, Ontario, on January 23 and 24, 2023.

Judgment delivered at Ottawa, Ontario, on July 27, 2023.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: WEBB J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] This is an appeal from a decision of the Federal Court (per Justice McVeigh) reported as 2021 FC 821. In that decision, the Federal Court dealt with five applications under section 41 of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the *AIA*) having to do with the refusals of Correctional Service Canada (Corrections Canada) and the Parole Board of Canada (the Board) to disclose records relating to certain offenders to the families of the victims of those offenders. The Federal Court also had before it an application by the Canadian Broadcasting Corporation (CBC) for copies of the audio recordings of certain Board hearings pursuant to the open court principle. While these applications were separate applications, they were heard together and disposed of in one set of reasons. These reasons deal with the applications brought by the families of the victims. The CBC's appeal is dealt with in separate reasons released concurrently with these.

[2] In substance, the appellants rested their case largely on their view that the offenders' incarceration and parole records stood to be disclosed on the same basis as the records produced at their trials because they were part of the offenders' sentencing. Underlying this argument was the conviction that the offenders had lost their privacy rights in these records because of their violent and highly publicized offences.

[3] In addition, there was an application for leave to file new evidence relating to the treatment of an application dealing with another violent offender. That application will be dealt with later in these reasons.

[4] For the reasons that follow, I would dismiss the appeal.

II. Facts

[5] The appellants Karen Fraser, Jennifer Sweet, Nicole Sweet, Kim Sweet, John Sweet, J. Robert Sweet, Charles Sweet, Patricia Corcoran, Ann Parker, and Toronto Police Association applied for the review of the decisions of Corrections Canada and the Board denying disclosure of the "personal [Corrections Canada] and Parole Board files on Mr. Munro and the disclosure of recordings of Mr. Munro's parole hearings": Decision at para. 5. Mr. Munro shot Constable Michael Sweet in the course of a botched robbery and allowed him to bleed to death while holding him hostage. The case drew significant media attention. While the Toronto Police Association is not a member of the Sweet family, its interests are the same so that this group of appellants will be referred to as the "Sweet appellants".

[6] The respondents in the Sweet appellants' application were the Minister of Public Safety and Emergency Preparedness, the Attorney General of Canada, Correctional Service Canada, the Parole Board of Canada and Craig Munro. The respondents other than Craig Munro – who did not appear – were represented by the Attorney General.

[7] The Sweet appellants sought the review of a number of decisions refusing disclosure of records in relation to a number of Board decisions and two Corrections Canada decisions on the basis of section 19 of the *AIA* and subsections 8(1) and 8(2) of the *Privacy Act*, R.S.C. 1985, c. P-21.

[8] The appellants Doug French, Donna French, and Deborah Mahaffy applied for review of the Board's decision to refuse disclosure of Paul Bernardo's complete Board file as well as all materials and information that were before and/or available to the Board at its October 17, 2018 hearing. These appellants also requested complete copies of the audio/video recordings and a transcript of Paul Bernardo's parole hearing held on October 17, 2018: Appeal Book (AB) at p. 225.

[9] I will refer to these appellants as the "French/Mahaffy appellants".

[10] The respondents in the French/Mahaffy application were the Minister of Public Safety and Emergency Preparedness, the Attorney General of Canada, the Parole Board of Canada and Paul Bernardo. These respondents, other than Paul Bernardo, who did not appear, were represented by the Attorney General.

[11] Given that the Sweet appellants and the French/Mahaffy appellants were represented by the same counsel who made the same arguments in relation to the refusal to disclose the records requested by each of the families, I will refer to them collectively as the "Families".

[12] Mr. Bernardo and Mr. Munro will be referred to collectively as the "Offenders".

[13] The Families made their requests to Corrections Canada and the Board under the *AIA*. When their requests were refused, they referred them to the Information Commissioner pursuant to section 30 of the *AIA*. The Commissioner investigated their complaints and in all cases upheld

the refusal to disclose the records. The Families then applied for a review of each refusal by the Federal Court pursuant to section 41 of the *AIA* which is reproduced below:

41 (1) A person who makes a complaint described in any of paragraphs 30(1)(a) to (e) and who receives a report under subsection 37(2) in respect of the complaint may, within 30 business days after the day on which the head of the government institution receives the report, apply to the Court for a review of the matter that is the subject of the complaint.	41 (1) Le plaignant dont la plainte est visée à l'un des alinéas 30(1)a) à e) et qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les trente jours ouvrables suivant la réception par le responsable de l'institution fédérale du compte rendu, exercer devant la Cour un recours en révision des questions qui font l'objet de sa plainte.

III. The decision under appeal

[14] To avoid repetition, I will deal briefly with the Federal Court's conclusions on the issues that were before it, leaving the details of the Court's reasoning for discussion in the analysis, which follows.

A. *Standard of review*

[15] At paragraph 43 of its decision, the Federal Court held that the question of whether "the Withheld Information falls within the statutory exemption at s. 19(1) of [*AIA*]" was reviewable on the correctness standard while "the discretionary decision not to disclose information under s. 19(2) of the [*AIA*] subject to a *Doré* framework" was reviewable on the reasonableness standard. The Withheld Information is the records whose disclosure was refused, a descriptor that will be used in the balance of these reasons.

B. *Section 2(b) of the Charter and Notice of Constitutional Question*

[16] The Federal Court noted at paragraphs 7 and 8 of its decision that the French/Mahaffy appellants submitted a Notice of Constitutional Question.

[17] The questions raised in the Notice were reproduced in the Court's reasons as follows:

> the constitutional validity and/or applicability and effect of sections 3.1, 4(a), (b), (c) and (e), 26(1), 27(1) and (2), 100.1, 101(a) and (b), 102, 132, 140(4), 140(5), 140(13), 140(14), 140.2(1), (2) and (3), 142(1)(b), 143(1) and 144(4) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("CCRA"); sections 2(1), 4(1), (2.1), 19(1), (2)(b) and (c) and 20(6) of the *Access to Information Act*, R.S.C., 1985, c. A-1; sections 7, 8(1), 8(2)(a), 8(2)(m)(i), 12 and 26 of the *Privacy Act*, R.S.C., 1985, c. P-21.

[18] The Federal Court undertook to deal with these questions but, in the end, it disposed of them on the basis that the open court principle did not apply to the Board:

> Given that the jurisprudence does not characterize the Parole Board as either a judicial or a quasi-judicial body, and that no jurisprudence has demonstrated that the [open court principle] or s. 2(b) require the disclosure of the Withheld Information, I am of the view that the Applicants' constitutional challenge to the disclosure framework does not succeed. CBC and the Families have failed to demonstrate that the statutory disclosure framework infringes their *Charter* rights.
>
> Decision at para. 92

[19] The Court then addressed the test set out in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 [*Criminal Lawyers' Association*]. That case speaks of when section 2(*b*) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter] entitles a party to access documents in the government's hands. The Court

concluded that access to the Withheld Information was not necessary for meaningful discussion and criticism on matters of public interest given the attendance of the public and the media at Board hearings.

[20] This led the Court to restate its disposition of the constitutional question succinctly in paragraph 97 of its Decision:

> There is consequently no constitutional right of access to records, and s. 2(b) of the *Charter* has not be [*sic*] violated. Due to this finding, I answer the constitutional question that the sections noted are not in violation of the *Charter*.

[21] In the alternative, the Federal Court found that, if it was wrong about the quasi-judicial nature of Board hearings, the open court principle was rebutted following the Supreme Court's decision in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361 [*Sherman Estate*]. Specifically, the Federal Court found that: (1) the highly sensitive nature of the information requested went to the dignity of the Offenders, an important public interest; (2) there was no control over the dissemination of the records once released; and (3) the release of the information would have no impact on the parole status of the Offenders.

C. *Reasonableness of the Board and Corrections Canada Decisions*

[22] The Federal Court found, at paragraph 114 of its decision, that "the record in each instance [of refusal to disclose] discloses sufficient reasons and evidence to understand the decisions and to assess whether they were reasonable".

[23] The Federal Court also found that, notwithstanding the use of boiler-plate language, the refusal decisions were justified, transparent and intelligible: Decision at para. 115.

[24] In response to the allegations that Corrections Canada erred in its selection of the factors it considered, the Federal Court found that:

> It is apparent on reviewing the decisions that the Parole Board and [Corrections Canada] considered the requirements of s. 19(2)(c) of the *ATIA* and s. 8(2)(m)(i) of the *Privacy Act*, assessed the nature of the sought-after evidence through the prism of the public interest in disclosure and the intrusion upon the Inmates' privacy interests, and arrived at a decision grounded in their assessment of the evidence.
>
> Decision at para. 118

[25] As for the Offenders' privacy rights, the Federal Court noted that the institutional decision-makers rejected the suggestion that Offenders have no privacy rights in relation to their sentence administration. Offenders expected that their personal information would remain protected from public disclosure: Decision at para. 124.

[26] The Court agreed with the respondents that the records whose disclosure was refused contained personal information and therefore fell within the exemption prohibiting disclosure at subsection 19(1) of the *AIA*. The Federal Court also agreed with the respondents that the information contained in the Withheld Information was not publicly available and that its release had not been consented to by the Offenders. Finally, the Federal Court agreed that the disclosure of the information was not necessary to enable a public discussion: Decision at paras. 135–36, 145.

[27] As for the potential infringement of Charter rights, the Federal Court reviewed the analytic framework established in the Supreme Court's decisions in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 [*Doré*] and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 [*Loyola*] which, taken together, set out the *Doré/Loyola* framework. In the end, it decided that the decisions in issue considered the relevant factors in a *Doré/Loyola* analysis: "The decision contemplates the effects of disclosure with the effectiveness of the legislative scheme, the potential for public safety and harming reintegration": Decision at para. 151.

[28] Taking all of these factors into account, the Federal Court concluded that the decision refusing disclosure of the records in issue was reasonable.

IV. Statement of Issues

[29] The Families served and filed their Amended Notice of Constitutional Question in this Court. It is identical to that filed in the Federal Court. The core of the Families' argument is found in the following paragraph:

> To the extent that the impugned legislative regime (the *Corrections and Conditional Release Act*, the *Access to Information Act* and the *Privacy Act*), prevents disclosure and production of the materials and information requested by the applicants, it violates the open Court principle and free speech rights of the applicants embedded in s. 2(b) of the *Charter*.

[30] The Notice of Constitutional Question challenges 36 statutory provisions contained in three statutes. None of the parties or the Federal Court dealt with the Notice of Constitutional Question in a systematic way. No attempt was made to lay out the evidence and the arguments as

to the invalidity of each of these provisions, though there was some discussion of the impact of the open court principle on some of them. Significantly, the Attorney General did not lead evidence or argument justifying the impugned provisions under section 1 of the Charter.

[31] It is not for the Court to do for the parties what they have not done for themselves. As a result, there will not be a systematic examination of the allegations made in the Notice of Constitutional Question, though some constitutional questions will be addressed as they arise.

[32] While the Families raise a series of policy questions relating to the Offenders' privacy rights, in the end this appeal is about the application of subsections 19(1) and 19(2) of the *AIA*, subparagraph 8(2)(*m*)(i) of the *Privacy Act*, and section 2(*b*) of the Charter to the disclosure of documents containing personal information about the Offenders. In the result, the issues are:

A. What is the standard of review?
B. Should the Court receive the new evidence on appeal tendered by the Families?
C. Did the Federal Court fall into palpable and overriding error when it found that the Withheld Information contained personal information?
D. If the Withheld Information does contain personal information, did the Federal Court fall into palpable and overriding error in not disclosing those documents pursuant to the open court principle?
E. If the Withheld Information does contain personal information, did the Federal Court fall into palpable and overriding error in not disclosing that information pursuant to subparagraph 8(2)(*m*)(i) of the *Privacy Act* and section 2(*b*) of the Charter?

V. Analysis

A. *What is the standard of review?*

[33] This case has a novel element which calls for particular attention to the standard of review. That element is subsection 44.1 of the *AIA* which is reproduced below:

44.1 For greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding.	44.1 Il est entendu que les recours prévus aux articles 41 et 44 sont entendus et jugés comme une nouvelle affaire.

[34] The fact that an application for review should be "heard and determined as a new proceeding" means that the Federal Court is not reviewing the Information Commissioner's or the department head's refusal to disclose the requested information but is instead conducting a *de novo* hearing.

[35] In *Canada (Health) v. Elanco Canada Limited*, 2021 FCA 191, 337 A.C.W.S. (3d) 153 [*Elanco*], this Court dealt with the issue of the standard of review to be applied by this Court to the Federal Court's review of a refusal to disclose certain information in light of section 44.1 of the *AIA*. In that case, the information was third-party information, which is exempted from disclosure by section 20 of the *AIA*. This Court noted that the Federal Court judge who heard the application was not reviewing the Minister's refusal but was rather making their own determination as to whether the exemption from disclosure as set out in section 20 of the *AIA* was applicable: *Elanco* at para. 23. As a result, the reviewing judge was in the same position as a trial judge who makes findings of fact and applies the law to those facts.

[36] The Court then reviewed the debate in the jurisprudence, prior to the passage of section 44.1, as to whether the appropriate standard of review on appeals from a section 41 or 44 review was the administrative law standard (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559) or the appellate standard (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]). After concluding its review of the jurisprudence, this Court found that:

> In my view, to the extent that there was any dispute with respect to the applicable standard of review to be applied on an appeal from a decision of the Federal Court on an application under section 44 of the Act, the addition of section 44.1 to the Act ends any such debate. The principles as set out in *Housen* are applicable in this appeal.
>
> *Elanco* at para. 32

[37] As a result, the Federal Court's determinations of questions of law are reviewable on the correctness standard while its determinations of questions of fact or questions of mixed fact and law are reviewable on the standard of palpable and overriding error: *Elanco* at para. 33. While this Court's analysis in *Elanco* did not deal with extricable questions of law, there is no reason to doubt that the *Housen* standard of correctness would apply to those questions.

[38] It should be noted that because the case was argued as an application for judicial review, the Federal Court did not approach the issues on the basis of a *de novo* hearing. For the purposes of this appeal, the conclusions to which the Court came will be treated as its conclusion, notwithstanding the fact that it may have applied a deferential standard to the administrative decision-maker's decision.

[39] Given the direction in section 45 of the *AIA* that applications are to be heard and determined in a summary way, the Families were correct to proceed by way of application but the relief available to them was not judicial review but a *de novo* hearing.

B. *Should the Court receive the new evidence on appeal tendered by the Families?*

[40] In the course of the hearing of this appeal, the Families argued that this Court should receive as new evidence the *AIA* request made by the Baylis/Leone families and the Toronto Police Association for Clinton Gayle's Corrections Canada and Parole Board records. The center-piece of that evidence is described in paragraph 14 of the Families' notice of motion:

> The strongest example of this is the evidence that was before Justice Nordheimer at Clinton Gayle's early release hearing pursuant to s. 745.61 of the *Criminal Code*. Significant evidence from Gayle's institutional records containing so-called "highly sensitive" materials were part of the public record on that application and therefore not impressed with any privacy interest. When the Baylis/Leone families requested the same materials as part of their ATIP request, these same public documents became impressed with the offender's privacy interest, an interest that [Parole Board] and the [Office of the Information Commissioner] held outweighed the public interest.

[41] The "new" evidence was included in the Appeal Book but the Federal Court ruled that it would not consider it, relying on the principle that on judicial review, the Court will only consider the material that was before the decision-maker, subject to certain exceptions. The Families argued that the evidence fell within the exception for information that provided context for the decision under review, by illustrating the context within which their requests for the Withheld Information had been decided.

[42] Ground 20 of the Families' notice of appeal provides that:

> The learned applications court judge erred in disregarding the evidentiary record concerning Clinton Gayle, when this evidence was highly relevant to the constitutional issues, statutory interpretation and contextual considerations.

[43] As a result, the Families seek to have this Court accept as new evidence, material that is already in the Appeal Book and that the Federal Court refused to consider. Since the issue is raised in the notice of appeal, the notice of motion seeking to introduce this material as new evidence is redundant. The material is already in the record and has been ruled on by the Federal Court. In effect, the Families are arguing that the Federal Court erred in law in refusing to consider this evidence.

[44] In fact, the Federal Court erred by applying the wrong test to the reception of this material since its role, as provided by section 44.1 of the *AIA*, was to conduct a *de novo* review. Given that the issue in that review was the refusal to disclose the Withheld Information, the fate of a different application was simply irrelevant to the Federal Court's task. Whether the Withheld Information contained personal information and whether their disclosure was justified or not has nothing to do with the disclosure of other documents in other files. As a result, the Families' motion to introduce new evidence should be dismissed and ground 20 of the notice of appeal should also be dismissed.

C. *Did the Federal Court fall into palpable and overriding error when it found that the Withheld Information contained personal information?*

[45] The records maintained by Corrections Canada were set out in paragraph 3 of the Federal Court's decision as follows:

- admission and discharge records (i.e. personal effects, valuables);
- case management reports (i.e. police reports, offender applications);
- discipline and disassociation reports (i.e. disciplinary measures, segregation records);
- education and training (i.e. employment records);
- health care (i.e. medical and surgical, dental and psychiatric assessments);
- preventative security (i.e. incident reports, modus operandi);
- psychology (i.e. psychological assessments, treatment records);
- sentence administration (i.e. victim information, community contact information); and
- visits and correspondence (i.e. list of visitors, declarations of common law unions).

[46] It is apparent that the contents of those records will contain practically only personal information. The Court can take notice that offenders, in their relations with Corrections Canada, have very little expectation of privacy. They are under constant supervision and assessment, for security purposes and for program purposes. As a result, the records maintained by Corrections Canada, taken together, contain an exceptional amount of personal information compared to other government institutions, with the possible exception of the police.

[47] The Families' memorandum of fact and law argues that the Offenders have lost any privacy rights they might otherwise have had relating to their crimes and their sentences. A few examples follow:

> By virtue of seeking a public remedy, at a public parole hearing, arising from a public crime, following a public trial, public sentencing and public appeals, there can be no reasonable expectation of privacy and certainly no greater expectation of privacy than that which they experienced heretofore. If these offenders enjoyed any privacy right during the prosecution stage related to the offence, they were waived or must give way to the public interest when seeking release from the full consequences of their life sentences. There is nothing private about parole.
>
> Para. 3
>
> If the privacy rights of Canada's most dangerous offenders who have committed the most serious of criminal offences, with a complete disregard for human life

and the dignity of their victims trump the public interest when these offenders seek a public remedy, then facts do not matter and the public interest is rendered meaningless.

Para. 5

The overwhelming public nature of the types of crimes sought to be caught by the ATIP requests herein has been reaffirmed repeatedly by some of the most distinguished and experienced judges in Canada. … there is nothing private about these crimes. These judges made it clear in their respective decisions that the crimes these offenders had committed were very public crimes against society and humanity itself.

Para. 6

Everything about these murders were public – from the investigations, arrests, trials, convictions, to the sentencing and the appeals. The parole hearings for Munro, Bernardo and Gayle were also public. In the case of Paul Bernardo, there was a massive media presence at his parole hearing. To somehow impress these cases with an offender's privacy interest for the purpose of parole hearings and to keep secret, facts highly relevant to the issue of public safety which could never have been kept secret at trial and on sentencing, simply strains the boundaries of credulity.

Para. 64

Justice McVeigh did not give any weight to these factors in reviewing how [Corrections Canada]/[the Parole Board] balanced the interests of those who committed the act of murder, with the public interest, as aligned with the families, whose loved ones had their privacy rights ripped apart by unspeakable acts of violence committed by the very people who assert that their privacy rights must prevail.

Para. 65

When the herein offenders ask for a benefit by seeking parole, they are instituting a legal proceeding, whilst asserting a privacy interest in the very materials they rely upon for the purpose of obtaining parole, including the recording and/or transcript of the public hearing itself. In these circumstances, any privacy rights are necessarily waived. The offender cannot have it both ways.

Para. 82

The notion that protecting the "human dignity" of offenders convicted of first-degree murder who are seeking parole after committing unspeakable public crimes, rising to the level of "public importance" to displace the open justice

> principle, is untenable. The purported "private" information is not private at all, as it is vitally important in determining whether parole should be granted or not.
>
> Para. 83
>
> (emphasis in original)

[48] These passages vividly demonstrate how strongly the Families feel about the Offenders' privacy rights. But the law is not on their side on this issue. Paragraph 4(*d*) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the *Corrections Act*) provides that:

4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:	4 Le Service est guidé, dans l'exécution du mandat visé à l'article 3, par les principes suivants :
…	…
(d) offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted;	d) le délinquant continue à jouir des droits reconnus à tout citoyen, sauf de ceux dont la suppression ou la restriction légitime est une conséquence nécessaire de la peine qui lui est infligée;

[49] The Offenders' privacy rights are protected by section 3 of the *AIA*, which is incorporated by reference into the *Privacy Act*, as well as by sections 19 of the *AIA* and 8 of the *Privacy Act*:

"personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,	« renseignements personnels » Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :
…	…
(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial	b) les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des

transactions in which the individual has been involved,	opérations financières auxquelles il a participé;
…	…
(g) the views or opinions of another individual about the individual,	(g) les idées ou opinions d'autrui sur lui;
19 (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Part that contains personal information.	19 (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements personnels.
(2) The head of a government institution may disclose any record requested under this Part that contains personal information if	(2) Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :
(a) the individual to whom it relates consents to the disclosure;	a) l'individu qu'ils concernent y consent;
(b) the information is publicly available; or	b) le public y a accès;
(c) the disclosure is in accordance with section 8 of the *Privacy Act*.	c) la communication est conforme à l'article 8 de la *Loi sur la protection des renseignements personnels*.
8 (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.	8 (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.
(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :
…	…

(m) for any purpose where, in the opinion of the head of the institution,	m) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :
(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or	(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,
...	…

[50] The Families seek to avoid the application of the relevant statutory provisions to this information by arguing that there is no distinction between the trial and sentencing of these Offenders and the administration of their period of incarceration. Nothing in the *Criminal Code*, R.S.C. 1985, c. C-46 or the *Corrections Act* compels that conclusion. The Offenders' trial and sentencing took place in open court and were covered by the open court principle. The Offenders' incarceration is administered by Corrections Canada and the Parole Board, neither of whom, as we shall see, is covered by the open court principle and both of whom are subject to the *AIA* and the *Privacy Act*.

[51] The Families' insistence upon the fact that applicants for parole are seeking a public remedy that is inconsistent with privacy rights is not conclusive. It is true that parole hearings are open to the public, subject to the screening criteria set out in paragraphs 140(4)(*a*) to (*d*) of the *Corrections Act*, but the information disclosed in those proceedings is deemed not to be publicly available by subsection 140(14) of that Act:

140 (14) If an observer has been present during a hearing or a victim or a person has exercised their right under subsection (13), any information or documents discussed or referred to during the hearing shall	140 (14) Si un observateur est présent lors d'une audience ou si la victime ou la personne visée au paragraphe 142(3) a exercé ses droits au titre du paragraphe (13), les renseignements et documents qui y sont étudiés ou

not for that reason alone be considered to be publicly available for purposes of the *Access to Information Act* or the *Privacy Act*.	communiqués ne sont pas réputés être des documents accessibles au public aux fins de la *Loi sur la protection des renseignements personnels* et de la *Loi sur l'accès à l'information.*

[52] The Families shake their heads at the inanity of declaring that something disclosed in a public forum is not publicly available. But this inanity is irrelevant to their classification of parole as a "public" remedy, by which they suggest that there are no privacy issues associated with parole. Privacy issues arise because paragraph 4(*d*) of the *Corrections Act* preserves offenders' rights to privacy and their sentences and parole applications are administered by agencies who are subject to the *AIA* and the *Privacy Act*.

[53] It follows from this that, until the contrary is shown, offenders have the same privacy rights as all members of society except insofar as they are necessarily and lawfully removed or restricted. The Federal Court and the heads of Corrections Canada and the Parole Board did not fall into error in concluding that the information that the Families sought was personal information and protected by the *AIA* and the *Privacy Act*.

D. *If the Withheld Information does contain personal information, did the Federal Court fall into palpable and overriding error in not disclosing those documents pursuant to the open court principle?*

[54] The Families argued that the material in the Parole Board's hands, including audio recordings and the documents that the Board considered in dealing with Mr. Munro's and Mr. Bernardo's applications for parole, should have been released pursuant to the open court principle.

[55] The open court principle does not apply to Corrections Canada as it is a government institution listed in Schedule 1 to the *AIA*. Its mission is to operate correctional institutions for offenders with a view to returning them to society as law-abiding citizens. In the course of that mandate, it collects information and creates records about the persons in its charge for the purpose of managing their experience so as to achieve its ultimate mission. As the list of the records it creates and maintains set out in paragraph 45 above indicates, most if not all of that information is personal information. It is not a tribunal, let alone an adjudicative tribunal, and is therefore not subject to the open court principle.

[56] This Court dealt with the application of the open court principle to the Parole Board in *Canadian Broadcasting Corporation v. Parole Board of Canada*, 2023 FCA 166, [*CBC*] released contemporaneously with these reasons. In that decision, the Court examined the jurisprudence underlying the application of the open court principle to administrative tribunals. The Court found that the application of that principle to a tribunal based on whether it was quasi-judicial was no longer relevant. It decided instead that a better indicator of whether the open court principle applied was whether the tribunal in question was an adjudicative tribunal, that is, a tribunal that presided over adversarial proceedings in which questions of rights and obligations were decided.

[57] The Federal Court agreed with the Parole Board when it said that it was not subject to the open court principle because the proceedings before it were not adversarial but inquisitorial. The fact that the state's interest was not represented before the Board was indicative of the absence of

adversarial proceedings. In addition, the Board argued that it did not adjudicate rights but rather assessed risk.

[58] In their memorandum of fact and law, the Families write at length about the open court principle, but their submissions are unpersuasive. For example, they argue that the open court principle has equal application to all administrative tribunals, including the Parole Board, as the legitimacy of their proceedings can be effectively monitored only if their proceedings are open to the public, citing *Southam Inc. v. Canada Minister of Employment and Immigration*, [1987] 3 F.C. 329, 13 F.T.R. 138 (T.D.) [*Southam*]. Of course, Board hearings are open to the public. As for *Southam*, it dealt with the application of the open court principle to quasi-judicial tribunals. The Families go on to rely on Justice Morgan's learned decision in *Toronto Star Newspapers Ltd. v. Ontario (Attorney General)*, 2018 ONSC 2586, 142 O.R. (3d) 266, but that case concerned 13 adjudicative tribunals, all of which are designated as "institutions" in the Schedule to the *Freedom of Information and Protection of Privacy Act*, a designation which created the conflict between those tribunals and the freedom of information legislation.

[59] Other cases which the Families relied on all dealt with the application of the open court principle to courts of law: *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 (application in the Ontario Court of Justice), *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (application in the Federal Court of Canada), *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18, 5 C.R. (6th) 189 (C.A.) (application in the Ontario Superior Court of Justice),

Edmonton Journal v. Alberta (Attorney General), 1989 CanLII 20, [1989] 2 S.C.R 1326, (*Alberta Judicature Act*), *Sherman Estate* (application in the Ontario Superior Court of Justice).

[60] In addition, none of those cases holds that privacy interests must always be subordinated to the open court principle. The *Sherman Estate* case says the opposite:

> … Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). …
>
> … In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. …
>
> *Sherman Estate* at paras. 52–53

[61] In the result, the Families have not shown that the open court principle applies to the Parole Board or to Corrections Canada. In *CBC*, this Court found that the CBC was not entitled to copies of audio recordings of Parole Board hearings pursuant to the open court principle.

[62] In light of the conclusion that the Parole Board is not an adjudicative tribunal, the question of the production of adjudicative records does not arise. As a result, the Families are not entitled to what they seek from the Parole Board pursuant to the open court principle.

E. *If the Withheld Information does contain personal information, did the Federal Court fall into palpable and overriding error in not disclosing that information pursuant to subparagraph 8(2)(m)(i) of the Privacy Act and section 2(b) of the Charter?*

[63] In order to answer this question, it is necessary to get a sense of the records requested by the Families. In their notices of application, the Families sought to have reviewed the refusal to provide the following information:

1. File No. T-1358-12: full disclosure and production of Federal inmate Craig Munro's complete Parole Board and Corrections Canada file, and in particular, access to all information and materials that were before and/or available to the Parole Board for its consideration at Craig Munro's parole hearings held on February 26, 2009, March 16, 2010 and March 30, 2011;

2. File No. T-101-18: disclosure and production of federal inmate Craig Munro's complete Corrections Canada file, inclusive of all medical records and the full details of the breaches and offences leading to the cancellation of Mr. Munro's temporary unescorted absences (UTAs) in 2012 and the cancellation of his 2012 parole hearing, the full details of the breaches and offences that led to Mr. Munro's transfer from Kwikwexelhp Institution to Motsqui Institution and any previous institutional breaches; and the full circumstances and facts leading to Mr. Munro's February 2016 withdrawal of his application for UTAs. This request was directed to Corrections Canada;

3. File No. T-102-18: disclosure and production of federal inmate Craig Munro's complete Parole Board file, and in particular, access to all information and materials that were before and/or available to the Parole Board for its consideration at all of Craig Munro's parole hearings as well as the audio/visual recordings and transcripts of those parole hearings held on February 26, 2009, March 16, 2010, March 30, 2011 and July 29, 2015;

4. File No. T-103-18: disclosure and production of federal inmate Craig Munro's Corrections Canada file and, in particular, all subsequent documents not included in Exhibits "I" and "J" of the Affidavit of Ginette Pilon, sworn March 21, 2014 and filed in companion Federal Court of Canada action T-1358-12; and

5. File No. T-465-20: disclosure and production of federal inmate, Paul Bernardo's complete Parole Board file and, in particular, access to all materials and information that were before and/or available to the Parole Board for its consideration at Paul Bernardo's parole hearing, as well as for the complete copies of audio/visual recordings and transcripts of his parole hearing held on October 17, 2018.

[64] In general terms, all of the requests described above were refused on the basis of either or both of sections 19 of the *AIA* and subparagraph 8(2)(*m*)(i) of the *Privacy Act*. The refusals by Corrections Canada that were based on section 19 were not supported by any rationale beyond the fact that the records contained personal information: see, for example, AB at pp. 327, 331. However, in a letter dated October 21, 2019, a representative of the Parole Board did offer a justification for refusing to produce Mr. Bernardo's complete file as well as the audio recording of Mr. Bernardo's October 17, 2018 parole hearing: see AB at pp. 338–41. In their material parts, the explanations offered are reproduced below.

[65] After discussing subsection 19(1) and 19(2) of the *AIA*, the Board noted that they did not assist the Families because the Offenders had not consented to the release of their personal information and because the information was not publicly available. The Board then set out its rationale for its decision under subparagraph 8(2)(*m*)(i) in the following paragraphs:

> Under this section [s. 8(2)], there is a presumption in favour of non-disclosure unless there are compelling arguments to the contrary.
>
> …
>
> In determining whether personal information should be disclosed in the public interest, the head of the institution is required to balance the public interest in disclosure against the threat to an individual's privacy. This is based on an invasion-of-privacy test, which requires weighing the expectations of the individual, the nature and sensitivity of the personal information involved and the probability of injury that could be caused to the individual by disclosure. Examples of situations in which public interest may outweigh the potential invasion of privacy disclosure include emergencies, accidents, natural disasters, hostile or terrorist acts, and the enforcement of a court order i.e. enforcement of a custody order. The public interest to be balanced against the possible invasion of privacy can be evaluated on the basis of whether it is specific, current and probable.
>
> In reviewing and weighing the factors in this case, the probability of injury has been considered, as the Board must take into account under the law the harm to the offender's rehabilitation as a law-abiding citizen, and the harm to anyone

> whose information is held by the PBC, as required by the ATIA and *Privacy Act*. In this instance, the information requested is of a highly sensitive nature, inherently personal, and confidential. I was unable to identify a distinct group of individuals who would have a genuine stake in this information, or who would clearly benefit and how they would benefit by having access to the information. More specifically, I am not satisfied that the public interest in disclosing the information would outweigh the privacy interests of the individual. There is no immediate need or imminent danger – the individual was and is under the care and control of the Correctional Service of Canada, in accordance with the [Corrections Act], and there is, as a result, no risk to public safety. I do not find that there is a substantial concern because the information affects the welfare of citizens. Conversely, the invasion of privacy is clear. I have therefore determined that the public interest has not been demonstrated.
>
> It is also not possible to overlook the consequences that would likely result from a discretionary release of personal information if public interest were to have been demonstrated in this case. Where there is a possible invasion of privacy balanced against a public interest, consideration may be given to who would be receiving the information and whether any controls can be placed on further use or release. In the informed opinion of the Board, any offender in such a circumstance would be at very real risk of having his reintegration potential as a law-abiding citizen compromised or derailed by the high degree of media and/or public scrutiny that could reasonably be anticipated and predicted to follow him everywhere.
>
> AB at pp. 339–40

[66] The Federal Court dealt with all the access requests collectively and dismissed the Families' applications on the basis that: (1) the Parole Board was not a quasi-judicial body so as to be subject to the open court principle; (2) the reasons given by the Parole Board and Corrections Canada were sufficient; (3) subparagraph 8(2)(*m*)(i) of the *Privacy Act* did not justify releasing the requested records; and (4) the *Doré/Loyola* test was satisfied.

[67] The issue of the application of the open court principle to the Parole Board was discussed earlier in these reasons and need not be repeated here. The sufficiency of the Board's reasons and the discussion of the Parole Board's decision under subparagraph 8(2)(*m*)(i) go hand in hand and

can be discussed together. The *Doré/Loyola* principle does not arise on these facts and needs no further discussion.

[68] The Families have a series of criticism of the responses they received from the Parole Board. Insofar as Corrections Canada is concerned, they say the responses were non-communicative. It is notable that Corrections Canada did not address the application of the discretionary release provision in subparagraph 8(2)(*m*)(i). One would have thought that an institution could address this provision on its own motion without being asked to do so: see the Parole Board's letter to the CBC at pp. 351–55.

[69] The Federal Court set out the Families' complaints about the adequacy of the reasons provided by the two federal agencies. They claimed (correctly) that the letters contained boiler-plate language and that they were devoid "of any reasons or analysis". They also reproached the agencies for not providing any evidence that granting their requests would "subvert the ends of justice" or "result in a serious danger of an injustice". In the end, the Families felt that the Parole Board and Corrections Canada had not justified that the public interest was not engaged.

[70] The Federal Court's response to these submissions is found at paragraph 114 of the Decision, reproduced below:

> On that basis, and on a review of the six Parole Board/[Corrections Canada] decisions, the correspondence between the Parole Board /[Corrections Canada] and the [Office of the Information Commissioner], and the [Office of the Information Commissioner] investigative reports, I am of the view that the record in each instance discloses sufficient reasons and evidence to understand the decisions and to assess whether they were reasonable. The Families are correct in stating that the letters communicating the outcome of the decisions in PBC-1 and CSC-1 are devoid of analysis. However, those letters are supported in the record

> by letters from Parole Board and [Corrections Canada], respectively, which outline the rationale for those decisions. As for the remaining decisions, PBC-2, CSC-2, PBC-3, and the letter from the Parole Board to CBC, they all contain analysis justifying the decision to withhold information. These materials identify the basis on which the decision-makers weighed the Inmates' privacy interests against the public interest in disclosure, identify the variety of factors under consideration by the decision makers, and provide an overall basis to understand how the decision-makers arrived at their decisions.

[71] The Federal Court's comment that the decisions "provide an overall basis to understand how the decision-makers arrived at their decisions" is correct to the extent that the decisions identify issues that have been referred to but it is mistaken when it says that the analysis is sufficient.

[72] Taking the passages from the Parole Board's letter quoted at paragraph 65 above as typical of the Parole Board's approach to the Families' access requests, several observations impose themselves.

[73] It is apparent that the Parole Board and, by extension, Corrections Canada did not seriously entertain these requests. In practically all of the cases in which section 19 was given as the reason for non-disclosure, there was no indication that the discretionary power of disclosure was considered. In the cases in which it was, the analysis did not in any way consider the circumstances of the particular offenders involved. As can be seen from the response quoted above, the analysis was very abstract and theoretical. This is illustrated by the affirmation that, in the Board's opinion, any offender whose personal information had been disclosed to any degree "would be at very real risk of having his reintegration potential as a law-abiding citizen compromised or derailed by the high degree of media and/or public scrutiny that could

reasonably be anticipated and predicted to follow him everywhere": see paragraph 65 above, last full paragraph quoted.

[74] One presumes that these comments are specific to the Offenders and are not intended to apply to every incarcerated person. If they do, they are vastly overbroad. It is impossible to believe that every offender released from custody will be the subject of sufficient public attention that it would prevent them from being a law-abiding citizen. It seems unlikely, to say the least, that the recidivism rate among offenders will be increased to a significant degree by some disclosure of their personal information at some point prior to their release.

[75] With respect to these Offenders, their notoriety will ensure that they are in the public's eye for a time should they be granted parole which, having received a life sentence, is the only form of release available to them. If the degree to which the release of their personal information will affect their reintegration as law-abiding citizens is known (as opposed to assumed), the Parole Board has not disclosed it. More importantly though is the fact that these Offenders, by reason of their crimes and their personalities, are not likely to be released on parole any time soon: see, for example, the Parole Board decision following Mr. Bernardo's October 17, 2018 parole hearing, AB at pp. 5384–92.

[76] If some of the Offenders' personal information were to be released today, how long would it have an effect on their reintegration: 6 months, 1 year, 5 years? Without suggesting that there is a precise answer to the question, it is unlikely that whatever personal information is released about the Offenders will pose a danger to their reintegration for the rest of their lives. As

a result, when assessing the risk of harm, the Board should deal with the time frame within which it sees parole as a reasonable prospect for these Offenders. This is in line with the Board's own observation that the evaluation of the relative weights of the invasion of privacy and the public interest "can be evaluated on the basis of whether it is specific, current and probable".

[77] The Board's consideration of the public interest in disclosure is similarly limited, as can be seen by the examples it chose as the foundation for public interest: "emergencies, accidents, natural disasters, hostile or terrorist acts, and the enforcement of a court order". This is a remarkably narrow sampling of public interest and, frankly, one which is unlikely to apply to correctional settings to any extent other than perhaps notifying the Offenders' families of their condition should one of these calamities occur. Given that the Board and Corrections Canada are institutions who are often in the news, the agencies should be easily persuaded that the information is sought in the interests of enabling the requesters to exercise their freedom of expression, which is constitutionally protected.

[78] In any event, it is difficult to see how the issue of "a distinct group of individuals who would have a genuine stake in this information, or who would clearly benefit and how they would benefit by having access to the information" arises in this case. The requesters are the Families of those who have been injured by the acts of the Offenders.

[79] The Board indicated that it worries about "who would be receiving the information and whether any controls can be placed on further use or release". The thing about providing information is that the information does no good if it cannot be used. The Board or Corrections

Canada should expect that there would be some further dissemination of the information. Given the nature of the Offenders' crimes, there may be reasonable limitations that can be imposed. But given that the Families invoke their right of freedom of expression, any such conditions would have to be crafted with their constitutional rights in mind. On its face, this is not an insurmountable problem.

[80] It can be seen from this discussion that the reasons given for the refusal to disclose the records sought by the Families are not adequate. But since this is an appeal from a *de novo* review of the refusal to disclose the Withheld Information, this Court can make the decision which the Federal Court could have made: see *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 52(*b*). I would therefore make the same order as did the Federal Court with respect to the documentary records for the following reasons.

[81] As can be seen from the Families' notice of applications, they requested, in each of their access requests, the production of every scrap of paper in the files maintained by Corrections Canada and the Parole Board in relation to Mr. Munro and Mr. Bernardo. As time progressed, their requests were updated to ensure that documents created after earlier requests were included in subsequent requests. It is apparent that, in the Families' view, there was no zone of Mr. Bernardo's and Mr. Munro's institutional experience that was sheltered from disclosure.

[82] This is a total invasion of Mr. Munro's and Mr. Bernardo's privacy interests while they were in the custody of Corrections Canada or had applications before the Parole Board. This differs from many if not most applications for access to personal information which a

government institution may receive with respect to an individual; those requests generally deal only with the individual's personal information gathered for use in a narrow (compared to Corrections Canada) program which the institution administers. In this case, Corrections Canada's mandate is such that it has close custody of offenders for a period of time, often a lengthy period, in the course of which practically all of their activities are tracked and recorded. The information ranges from the trivial to the intensely personal, such as medical and psychiatric reports.

[83] What is the public interest in this level of personal information over this period of time? As indicated earlier in these reasons, the Families do not accept that the Offenders have any right to privacy at all, a proposition which cannot be accepted. Nor can the comparison frequently drawn by the Families between the trial and sentencing of the Offenders and parole hearings be sustained. The open court principle applies to the former and not to the latter. In any event, the public disclosure in a trial will never be as full as the disclosure that the Families seek here. It is simply not true that respecting the Offenders' privacy interests is done for the purpose of keeping secret "facts highly relevant to the issue of public safety which could never have been kept secret at trial and on sentencing": appellants' memorandum of fact and law at para. 64.

[84] There are passages in the Families' memorandum of fact and law that suggest the public interest for which they stand. At paragraph 64 of their memorandum of fact and law, the following appears:

> To somehow impress these cases with an offender's privacy interest for the purpose of parole hearings and to keep secret, facts highly relevant to the issue of public safety which could never have been kept secret at trial and on sentencing, simply strains the boundaries of credulity.

[85] Later, in paragraph 71 of their memorandum of fact and law, they write:

> In the cases-at-bar, this has consistently resulted in an absurd outcome where the privacy rights of offenders convicted of the most unspeakable acts of cold, calculated, first-degree murder consistently defeat the public interest on the issue of public safety.

[86] In paragraph 81 of their memorandum of fact and law, the Families pursue this theme further:

> The sought-after information herein could never be an affront to dignity as contemplated in Sherman, because it is the very information that is vitally important to the threshold issue at the parole hearing – public safety.
>
> (emphasis in original)

[87] It is apparent that the Families seek the Withheld Information so that it can be used for the purpose of enhancing public safety. But it is not apparent how having the information would aid them in doing so. To the extent that the Offenders remain incarcerated, the threat to public safety is contained. It is the possibility of their release on parole that raises the issue of public safety. This suggests that the Families seek the Withheld Information for the purpose of opposing the Offenders' applications for parole. There is a difference between commenting on the Parole Board's discharge of its mandate and building a case against an offender's parole. The public's interest in the care and custody of the Offenders is expressed in section 3 of the *Corrections Act*, as follows:

3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by	3 Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés

dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.

(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

[88] There may be room for scepticism as to whether the goal of rehabilitation and reintegration can be achieved with these Offenders, but neither Corrections Canada nor the Parole Board can, given their mission, write these Offenders off for the rest of their lives. Nor should they. That being the case, it is not in the public interest that the Offenders' personal information be disclosed for purposes at odds with Corrections Canada's or the Parole Board's mandate.

[89] There is no public interest in the total disclosure of all information in Corrections Canada's or the Parole Board's hands. The identification in all the applications of some particular transaction or event of interest does not detract from the fact that in each case the request is for the disclosure of the complete files maintained on the Offenders.

[90] It is not for the Court to define when public interest in the Offenders' personal information would justify disclosure to a lesser degree, but it is obvious that categories of the

kind identified in the Parole Board's letter, such as emergencies and natural disaster, are much too narrow. Subparagraph 8(2)(*m*)(i) is one of the few, if not the only, provisions in the *Privacy Act* in which the requesters' motives are relevant. To the extent that the requesters can identify an interest beyond their own personal interest, the government institution must give respectful attention to the stated motive, but given the ease of aggrandizing one's personal interests, the institution is not bound by the stated interest. But, notwithstanding scepticism as to the stated motive, the government institution must be sensitive to the requesters' interest in expressing their views about the institution's exercise of its mandate and its delegated discretion. In this case, despite the Families' stated interest in public safety, the maintenance of the *status quo* gives rise to no plausible public interest in all of the Offenders' personal information.

[91] The Families based their appeal of the refusal to disclose the Withheld Information on constitutional grounds, that is, section 2(*b*) of the Charter. Since the documents have been withheld pursuant to the *AIA* and the *Privacy Act*, the Families argued that the relevant provisions of those Acts infringed the section 2(*b*) rights and should therefore be set aside. When the operation of section 19 of the *AIA* and section 8 of the *Privacy Act* is examined, it is not apparent that there has been an infringement of the Families' section 2(*b*) rights.

[92] It is true that when the operation of subsection 19(2) of the *AIA* and subparagraph 8(2)(*m*)(i) of the *Privacy Act* is examined, it is apparent that there are limitations on the records which the Families can receive pursuant to those provisions. But, as noted in *Sherman Estate*, even in the context of the open court principle, which is not the case here, limitations on access to personal information are not necessarily unconstitutional.

[93] The weighing exercise prescribed by subparagraph 8(2)(*m*)(i) of the *Privacy Act* can accommodate the consideration of the Families' section 2(*b*) rights. When the extent of the disclosure of personal information sought by the Families is compared to the public interest in disclosure as required by subparagraph 8(2)(*m*)(i) of the *Privacy Act*, no public interest of sufficient weight emerges. Given the Families' access to the Board hearings themselves, to the audio recordings of those hearings, and to the Board's decisions, it is clear that the Families have not been denied the opportunity under section 2(*b*) of the Charter to express their views on the operation of the Parole Board, notwithstanding the refusal to disclose the entirety of the Offenders' personal information in the hands of the government institutions in question. As a result, the Federal Court did not err in dismissing the Families' applications for a review of Corrections Canada's and the Parole Board's refusal to disclose the Withheld Information.

[94] The foregoing discussion deals with the request for production of documentary records, but the Families also sought production of copies of audio recordings of parole hearings. The CBC made a similar request, which was dealt with in the reasons for decision in the *CBC* case released contemporaneously with these reasons. In that case, this Court returned the Parole Board's refusal to disclose the audio recordings to the Board, to be reconsidered in light of the considerations set out in paragraphs 77 to 84 of that decision.

[95] One would have thought that the Families would be entitled to the same consideration but, unfortunately, subsection 140(13) of the *Corrections Act*, reproduced below, stands in their way:

140 (13) Subject to any conditions specified by the Board, a victim, or a	140 (13) La victime ou la personne visée au paragraphe 142(3) a le droit,

person referred to in subsection 142(3), is entitled, on request, after a hearing in respect of a review referred to in paragraph (1)(a) or (b), to listen to an audio recording of the hearing, other than portions of the hearing that the Board considers	sur demande et sous réserve des conditions imposées par la Commission, une fois l'audience relative à l'examen visé aux alinéas (1)a) ou b) terminée, d'écouter l'enregistrement sonore de celle-ci, à l'exception de toute partie de l'enregistrement qui, de l'avis de la Commission :
(a) could reasonably be expected to jeopardize the safety of any person or reveal a source of information obtained in confidence; or	a) risquerait vraisemblablement de mettre en danger la sécurité d'une personne ou de permettre de remonter à une source de renseignements obtenus de façon confidentielle;
(b) should not be heard by the victim or a person referred to in subsection 142(3) because the privacy interests of any person clearly outweighs the interest of the victim or person referred to in that subsection.	b) ne devrait pas être entendue par la victime ou la personne visée au paragraphe 142(3) parce que l'intérêt de la victime ou de la personne ne justifierait nettement pas une éventuelle violation de la vie privée d'une personne.

[96] This provision imposes an explicit limit on victims' access to audio recordings, a limitation which applies to the Families who are undoubtedly victims, a limitation which the Parole Board conceded did not preclude providing the CBC with copies of those recordings. Presumably, this was based upon a literal interpretation of the provision.

[97] The interpretation of subsection 140(13) calls for consideration of the maxim *inclusio unius, exclusion alterius est* which suggests that where a statute specifically includes something, it implicitly excludes everything else. Thus, authorizing victims to listen to audio recordings implies that the public is excluded from listening to them, and from being given copies of them. It also implies that the victims themselves have no wider access to the audio recordings than that which the provision grants them.

[98] It would be anomalous if subsection 140(13) were interpreted to give the public access to copies of audio recordings when the provision limits the rights of the Families to those recordings. Such an interpretation would render subsection 140(13) nugatory, an unlikely result when one considers that Parliament is presumed not to speak in vain: *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51, 464 D.L.R. (4th) 244 at para. 64.

[99] Given the Board's literal interpretation of subsection 140(13), the analysis called for by subparagraph 8(2)(*m*)(i) of the *Privacy Act* was not carried out in relation to the Families. Had it been, it would have had a different cast than it did with respect to documentary production. The requests for copies of audio recordings are limited requests that do not engage the whole of the Offenders' personal information in the hands of the Parole Board. As noted in *CBC*, the information has already been disclosed in the course of the parole hearing and, while subsection 140(14) of the *Corrections Act* stipulates that it is not publicly available, the media's reporting may have made it so. In any event, the risks associated with disclosure have already been incurred. But these considerations are not sufficient to invalidate subsection 140(13) on constitutional grounds.

[100] As in the case of the documentary records sought by the Families, the refusal to provide copies of the audio recordings has not impaired the Families' ability to engage in "meaningful discussion on a matter of public importance" (*Criminal Lawyers' Association* at para. 31), given the other sources of information to which they have access.

[101] That said, as this matter evolves, the Families may find themselves with fewer rights to the audio recordings they requested than the CBC has to the same, or similar, recordings. That would be an unfortunate result, which would call for a legislative amendment. The preoccupation that the Board has with the misuse of the audio recordings is easily managed in the case of the Families, perhaps by simple expedient of releasing the audio recordings to their counsel and imposing the necessary conditions upon him. But, unfortunately, nothing more can be done for them at the moment.

VI. Conclusion

[102] For the reasons set out above, the appeal should be dismissed. The Families ask that costs not be awarded against them in this Court and that they be relieved of the costs order made against them in the Federal Court. They argue that the principles for which they argue are matters of public interest and that they should be treated as public interest litigants. For reasons set out in paragraphs 84 to 88 of these reasons, the Families cannot be considered public interest litigants.

[103] The respondents in this appeal have not asked for costs and so none should be awarded. As for the costs in the Federal Court, the dismissal of this appeal would not permit this Court to deal with the costs in the Federal Court.

"J.D. Denis Pelletier"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 23 AND 24, 2023
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	WEBB J.A. RIVOALEN J.A.
DATED:	JULY 27, 2023

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