Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1779

Appeals PA-980338-1, PA-990137-1 & PA-990218-1

Ministry of the Solicitor General

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BACKGROUND

Two men were prosecuted for the 1983 murder of Domenic Racco, an individual alleged to have been involved in organized crime. The accused men were originally convicted, but in 1995 the Ontario Court of Appeal ordered a new trial on the basis of missing evidence that had not been produced at the original trial. This evidence was never found.

In 1997, the charges against the two men were stayed by the Ontario Court (General Division) (now the Superior Court of Justice) in a decision reported as R. v. Court and Monoghan (1997), 36 O.R. (3d) 263. The trial judge, Mr. Justice Glithero, stayed the proceedings because he concluded that the rights of the accused men under sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms (the Charter) had been violated as a result of "abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, [and] negligent breach of the duty to maintain original evidence ..." (p. 300). He also found that the accused men's right to be tried within a reasonable time under section 11(b) of the Charter had been violated. The remedy of a stay of proceedings was granted under section 24(1) of the Charter.

Shortly thereafter, the two police forces that were involved in the murder investigation asked the Ontario Provincial Police (the OPP) to investigate allegations of misconduct by police officers and the Crown Attorney stemming from the findings of the trial Judge. Following the investigation, the OPP issued a brief news release stating that they had "found no evidence that the officers attempted to obstruct justice by destroying or withholding a vital piece of evidence," and also "found no evidence that information withheld from the defence was done deliberately and with the intent to obstruct justice."

NATURE OF THE APPEAL

Three requests relating to the OPP investigation were made to the Ministry of the Solicitor General (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The requesters sought access to records relating to the OPP investigation into the disappearance of an audiotape and the conduct of police officers and the Crown Attorney. The requesters are, respectively, the Ontario Criminal Lawyers Association (the CLA) (PA-980338-1), a member of the media (PA-990137-1) and an individual who is identified in the records (PA-990218-1).

The records identified by the Ministry as responsive to all three requests consist of a 318-page police brief (Record 1), a March 24, 1998 letter (Record 2) and a March 12, 1998 memorandum (Record 3). Pages 1 to 24 of Record 1 contain the history, investigation and summary of the investigation into the missing tape; pages 25 to 46 consist of the "Disclosure Final Report" including the seventeen disclosure issues and a summary of responses by certain individuals; and pages 47 to 318 contain the interviews conducted with eleven identified individuals.

With respect to the request in Appeal PA-980338-1, the Ministry identified four further boxes of responsive records. These are the subject of a separate appeal.

The Ministry denied access to the three records pursuant to sections 14(1)(c), (d), (e), (g) and (l), 14(2)(a) 19, 20 and 21(1) of the Act. In its decision regarding section 21, the Ministry relied on the "presumed unjustified invasion of personal privacy" in sections 21(3)(b) and (d) and the factors listed in sections 21(2)(e), (f) and (h).

The requesters (now the appellants) appealed the Ministry's decision. The appellants in Appeals PA-980338-1 and PA-990218-1 also claimed that there was a compelling public interest in disclosure of the records pursuant to 23 of the Act.

A Notice of Inquiry was sent to the Ministry and the appellants. Sections 49(a) and (b) of the Act were relevant to the circumstances of Appeal PA-990218-1 and, therefore, were added to the scope of this inquiry.

Representations were received from the Ministry, the appellant in PA-990218−1 and the CLA (the appellant in PA-980338-1).

In its representations, the Ministry states that it relies on sections 14(2)(a), 19 and 21 of the Act and its representations address only the application of these exemptions. Accordingly, sections 14(1)(c), (d), (e), (g) and (l), and 20 are no longer at issue in these appeals.

The appellant in Appeal PA-990218-1 raised the constitutional validity and/or constitutional applicability of section 14 of the Act under sections 7, 11(b) and 11(d) of the Charter. I notified the appellant of the requirements of section 109 of the Courts of Justices Act, and asked him to comply with the notice requirements of this section, or satisfy me that these requirements are not applicable in the circumstances of these appeals. Section 109, which applies to proceedings before tribunals as well as to courts, requires a person who seeks a ruling that a legislative provision is constitutionally invalid, to serve a Notice of Constitutional Question (a NCQ) on the Attorney General of Canada, the Attorney General of Ontario and any other parties. This appellant did not serve a NCQ on the Attorneys General of Canada and Ontario, pursuant to sections 109(1) and (2) of the Courts of Justice Act, and, therefore, I am unable to consider these particular Charter claims.

The CLA also raised the constitutional validity and/or constitutional applicability of sections 10, 14, 19 and 23 of the Act under section 2(b) of the Charter. The CLA followed the requirements of section 109 of the Courts of Justices Act, and served a NCQ on the Attorney General of Canada, the Attorney General of Ontario (the AG) and this office.

Because the constitutional issues raised by the CLA were not included in the original Notice of Inquiry, I issued a Supplementary Notice to the CLA, the Ministry, the Attorney General of Canada and the AG in

order to provide them with an opportunity to submit representations on the specific constitutional issues raised in the NCQ. Supplementary representations were received from the CLA and the AG.

Subsequently, the CLA and the AG agreed to share their representations on the constitutional issues. I provided each party's representations to the other, and invited them to respond. Reply submissions were received from both. As the result of a further exchange, additional reply submissions were received from both parties. The submissions cover two main topics, namely, the Commissioner's jurisdiction to consider Charter issues, and the merits of the CLA's Charter claims.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

The records were prepared in connection with an investigation by the OPP into whether Crown counsel and/or police officers had committed offences under the Criminal Code stemming from their conduct in the criminal proceedings. The records consist of the details of the investigation regarding these individuals, including statements of the subject officers and the Crown as well as other witnesses, and also describe the history of the original criminal investigation, including the identities of the victim, the accused and other involved parties. The records also include the home addresses and personal telephone numbers of some of the individuals who were interviewed during the investigation as well as their current employment status.

Several previous orders have found that information generated in the course of investigations of improper conduct or disciplinary proceedings qualifies as personal information (See, for example, Orders 165, 170, P-256, P-326, P-447, P-448, R-980015, M-120, M-121 and M-122). In addition, the home addresses, personal telephone numbers, and current employment status also qualifies as personal information.

On this basis, I find that Records 2 and 3 contain the personal information of the subject police officers and Crown counsel only; and Record 1, with the exception of pages 9 and 11 in their entirety and page 10 in part, contains the personal information of these individuals, as well as the appellant in PA-990218-1 and the witnesses, the victim, the accused and other involved parties.

With respect to pages 9-11 of Record 1, the information contained in these pages identifies the fact that an investigation was undertaken, lists the identities of the OPP investigating officers, and sets out the parameters of and the process respecting the conduct of the investigation. With the exception of two names associated with the original murder investigation on page 10, which are personal information, none of the information in these pages identifies any of the parties who were the subject of, witnesses to or otherwise involved in the investigation.

The investigating OPP officers were performing in their professional capacity as police officers in conducting the investigation. Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" (See Orders P-257, P-427, P-1412 and P-1621). For example, information associated with the names of individuals contained in records relating to them only in their capacities as officials with the organizations which employ them, is not personal in nature but is more appropriately described as being related to the employment or professional responsibilities of the individuals (See Order R-980015). On this basis, I find that the identities of the investigating officers do not qualify as personal information.

Therefore, I find that pages 9 and 11 in their entirety, and page 10, with the exception of the names of the two individuals associated with the original murder investigation appearing on that page, do not contain personal information. Consequently, sections 21(1) and 49(b) cannot apply to this information.

INVASION OF PRIVACY

Under section 49(b) of the Act, where a record contains the personal information of both the requester and other individuals (Appeal PA-990218-1) and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information. However, where a record contains only the personal information of individuals other than the requester (Appeals PA-980338-1 and PA-990137-1), and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 21(1) of the Act prohibits the Ministry from releasing this information.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. One of these circumstances is found in section 21(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

In both of these situations, sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

The Ministry has relied on the "presumed unjustified invasion of personal privacy" in section 21(3)(b) which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The Ministry submits that the information contained in the records was compiled during the course of a law enforcement investigation. The Ministry submits:

> The OPP was requested to conduct an independent criminal investigation to determine if any offences contrary to the [Criminal Code] were committed. As a result of this investigation personal information was gathered in order to determine if any violation of the law occurred.

The Ministry further submits, and I agree, that the fact that no criminal proceedings were commenced by the OPP does not negate the applicability of section 21(3)(b). This section only requires that there be an investigation into a possible violation of law (See Orders M-198, P-223, P-237 and MO-1256).

Having reviewed the information contained in the records, I find that the presumption in section 21(3)(b) clearly applies to the personal information.

None of the personal information contained in the records falls under section 21(4) and, applying the direction of the Divisional Court in John Doe, one or a combination of factors set out in section 21(2) cannot rebut the section 21(3)(b) presumption.

Accordingly, I find that, except for the information I have already indicated does not qualify as personal information, the records are exempt from disclosure under section 21 of the Act (Appeals PA-980338-1 and PA-990137-1) and section 49(b) (Appeal PA-990218-1) because disclosure would constitute an unjustified invasion of personal privacy.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

The Ministry claims that sections 14(2)(a) and 19 apply to the records. In Appeals PA-980338-1 and PA-990137-1, I will consider whether these exemptions apply.

The situation is slightly different for Appeal PA-990218-1 because the records contain the requester's own personal information. Under section 49(a) of the Act, the Ministry has the discretion to deny access to an individual's own personal information in instances where section 14 or 19 (and several other exemptions which are not at issue) would apply to the disclosure of that personal information. In Appeal PA-990218-1, therefore, I will consider whether section 49(a) applies.

LAW ENFORCEMENT

Law Enforcement Report

The Ministry claims that Record 1 (the 318-page brief) qualifies for exemption pursuant to section 14(2)(a) of the Act.

Section 14(2)(a) reads as follows:

> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

Only a report is eligible for exemption under this section. The word "report" is not defined in the Act. For a record to be a report, it must consist of a formal statement or account of the results of the collation and consideration of information (Order P-200). Generally speaking, results would not include mere observations or recordings of fact (Order M-1048).

In order for a record to qualify for exemption under section 14(2)(a) of the Act, the Ministry must satisfy each part of the following three part test:

1. the record must be a report; **and**

2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders 200 and P-324]

A "report" must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, reports would not include mere observations or recordings of fact (Order 200).

The Ministry states that the Police Services Act provides the primary statutory base for the existence of the OPP, its authority, jurisdiction, discipline and other pertinent matters in the provision of police services to the parts of this province that do not have municipal police forces.

The Ministry submits that:

- this report was the official formal accounting of facts regarding the investigation which was conducted. This report provided information and/or opinions gathered as a result of interviews with the subjects of the investigation. The information was assessed, evaluated and were then submitted as a report with a final disposition.

- this report was prepared by Major Cases Criminal investigation Branch of the OPP, an agency which has the function of enforcing and regulating compliance with a law.

- the information was gathered and prepared during a law enforcement matter and/or investigation. The matter at hand specifically relates to the request for an independent investigation of individuals from a complaint that there had been a breach of the Criminal Code.

The CLA submits:

> It has been held that records prepared in the course of an internal review into a person's conduct as an officer of the court, as opposed to investigations which carry the possibility of a "law enforcement" proceeding, are not covered by s. 14(2)(a). The CLA submits that there is no difference in substance between an internal review and a review conducted by a different agency, such as the OPP. Further, this review was a review of various officers of the court, including Crown counsel. It is for the Commissioner to determine whether the law enforcement purpose is met based on the review of the records.

The appellant in PA-990218-1 did not address this issue in his representations.

Record 1 comprises the final report of the investigation of the OPP, which lasted over a period of approximately seven months, into the disappearance of an audiotape and the conduct of police officers and the Crown Attorney in relation to disclosure of information provided to the defence in specified criminal proceedings, to determine whether there had been a breach of the Criminal Code.

For this reason, I do not agree with the CLA's submission. The investigation was not an internal or professional review, but was, in fact, conducted in order to determine whether criminal charges could or should be laid.

I am satisfied that the record consists of a formal statement or account of the results of the collation and consideration of the information gathered during the investigation, and includes findings, summaries, analyses and recommendations. Accordingly, I find it qualifies as a "report" within the meaning of section 14(2)(a).

As I have stated, the report was prepared by the OPP in connection with an investigation into whether Crown counsel and/or police officers had committed offences under the Criminal Code. Therefore I find that the report was prepared in the course of law enforcement.

Finally, I am satisfied that the OPP is an agency which has the function of enforcing and regulating compliance with the law, in this case the Criminal Code. Accordingly, all three parts of the section 14(2)(a) test have been met.

Therefore, I find that the 318-page brief qualifies for exemption under section 14(2)(a) of the Act, as well as section 49(a) in Appeal PA-990218-1.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that Records 2 and 3 qualify for exemption pursuant to section 19 of the Act.

Section 19 of the Act states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining

> legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.
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> (Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.))

Solicitor-Client Communication Privilege

Solicitor-client communication privilege, which is an aspect of solicitor-client privilege at common law (Branch 1), protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation. (see Order P-1551).

In order to qualify for this type of privilege, it must be established that:

(a) there is a written or oral communication, **and**

(b) the communication must be of a confidential nature, **and**

(c) the communication must be between a client (or his agent) and a legal advisor, **and**

(d) the communication must be directly related to seeking, formulating or giving legal advice. (Order 49)

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...
>
> (Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-409)

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a

> specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
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> (Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409)

Record 2 is a letter from the Regional Director of Crown Attorneys to a senior ranking member of the OPP. Record 3, which was an enclosure to Record 2, is an internal memorandum from a Crown Attorney to the Regional Director of Crown Attorneys. Both records directly relate to legal advice regarding the laying of criminal charges following the OPP investigation.

The Ministry submits, with respect to Records 2 and 3:

> [Records 2 and 3] document the meetings between Crown counsel and the OPP investigators and a review of the records at issue which were provided to Crown counsel related to the investigation. [Record 2] responds to the consultation and speaks to the issue of criminal charges arising from the police investigation in the matter. As clearly indicated in the wording of the letter, the communication was given for the purpose of giving legal advice in contemplation of litigation, that being, the laying of criminal charges.

The CLA submits:

> The rationale for solicitor-client privilege is that a client may confide in his or her lawyer on a legal matter without reservation. That rationale has no application here. The "private" thoughts, opinions and findings of all persons involved in the OPP's review were subject to being disclosed if wrongdoing were later found and charges brought. In the case of police investigations, all of the evidence gathered and all of the "private" thoughts, opinions and findings of the police officers are disclosed. No court has found that the "officer's notebook" containing the officer's notes during an investigation is covered by solicitor-client privilege.

The records under consideration here are quite different from those described in the preceding quotation from the CLA's representations. In my view, Records 2 and 3 comprise a legal opinion. While the opinion expressed in Record 3 is only stated by implication, it is enclosed as a supporting document with Record 2, which gives this advice explicitly (and also explicitly states this interpretation of Record 3). Thus, in my view, the two records taken together quite clearly comprise a legal opinion and represent confidential solicitor/client communications. On this basis, they meet the requirements for solicitor-client communications privilege.

However, there is one further aspect to consider before concluding that solicitor-client communications privilege is established. In Order P-613, section 19 was not applied on the basis that there is no solicitor-client relationship between Crown counsel and the OPP. However, in my view, this interpretation is no longer supportable as a result of the recent Supreme Court of Canada decision in R. v. Campbell, [1999] 1 S.C.R. 565. In that case, the Court concluded that a solicitor-client relationship did exist between counsel with the federal Department of Justice and the R.C.M.P. The decision sees the R.C.M.P. as a "client department" of the Department of Justice and, therefore, it is difficult to see how the same conclusion could not apply vis à vis the Ministry of the Attorney General and the OPP. In my view, a solicitor-client relationship exists between the OPP and Crown counsel.

Privilege, once established, can of course be lost if it is waived by the client. The appellant in PA-990218-1 makes a general submission that waiver has occurred with respect to any document to which privilege might otherwise apply. No factual basis is advanced in support of this argument. The CLA submits that there may have been a waiver of privilege in connection with discovery of documents in the lawsuit initiated by one of the accused individuals against the Crown for malicious prosecution, and that the documents may have been circulated in such a way as to constitute waiver. In my view, these submissions do not provide a sufficient basis for me to conclude that waiver has occurred.

The CLA also submits that:

> ... solicitor-client privilege cannot be held to exist where the public interest in the administration of justice (e.g. ensuring that the innocent are not convicted, which is one of the purposes of full and timely disclosure) or other compelling public interest grounds exist.

In support of this proposition, the CLA cites Jones v. Smith (1999), 169 D.L.R. (4th) 385 (S.C.C.). That case applies the public safety exception to privilege. Counsel in that case had referred his client (who was charged with aggravated sexual assault) to a psychiatrist for a forensic assessment. The client described a detailed set of plans for rape and murder and told the psychiatrist that the offence which was the subject of the charge had been a "trial run." Depending on how he felt about it, the client said he would seek out similar victims in future. In his discussion of an exception to privilege to protect the public interest, Cory J., author of the majority reasons, states (at pp. 407-8):

> The foregoing review makes it clear that even the fundamentally important right to confidentiality is not absolute in doctor-patient relationships, and it cannot be absolute in

> solicitor-client relationships: *Solosky, supra*. When the interest in the protection of the innocent accused and the safety of members of the public is engaged, the privilege will have to be balanced against these other compelling public needs. In rare circumstances, these public interests may be so compelling that the privilege must be displaced. Yet the right to privacy in a solicitor-client relationship is so fundamentally important that only a compelling public interest may justify setting aside solicitor-client privilege.

In the appeals before me, there are no criminal charges outstanding and therefore the protection of the innocent from wrongful conviction is not a relevant factor. Nor is there any suggestion that the public safety exception has any relevance to the present appeals.

In the passage just quoted, Jones refers to Solosky v. The Queen (1979), 105 D.L.R. (3d) 745 (S.C.C.), which deals with the need to protect public safety in the context of the security of a penal institution. In my view, neither Jones nor Solosky provides support for a generalized "public interest" ground for setting privilege aside. Moreover, in my view, the interests protected by the exceptions that **are** mentioned in these cases (protection against wrongful conviction and public safety) represent a higher public interest than the desire to know what went wrong in a criminal prosecution where charges were, in fact, stayed to protect the accused from alleged abuses. I am not satisfied that the exceptions discussed in Jones and Solosky have been established.

Therefore, I find that Records 2 and 3 qualify for exemption under the section 19 solicitor-client communication privilege, and in the case of Appeal PA-990218-1 they also qualify for exemption under section 49(a) of the Act.

Solicitor-client communication privilege is not time sensitive and since I have found that Records 2 and 3 qualify for exemption under this part of section 19 it is not necessary for me to consider whether litigation privilege applies or whether the litigation privilege which may have been enjoyed by the Ministry has been lost through termination of litigation or the absence of reasonably contemplated litigation.

COMPELLING PUBLIC INTEREST

As noted earlier, the CLA and the appellant in PA-990218-1 claim that the "public interest override" in section 23 of the Act applies in this case. This section states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (emphasis added)

Section 23 does not provide an override for information that is exempt under section 14 or 19. The CLA argues that these sections should, in effect, be "read in" to section 23, on the basis of arguments relating to the Charter. I will address this issue later in my order. Of the exemptions at issue, only section 21 is mentioned in section 23, and I will confine my discussion in this part of the order to the question of whether section 23 would override the section 21 exemption.

In Order P-241, former Commissioner Tom Wright made the following comments, which I agree with, on the burden of establishing the application of section 23:

> The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

In Order P-1398 (upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner) (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)), former Adjudicator John Higgins stated as follows concerning the potential application of section 23:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption. If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply.
>
> Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.
> ...
>
> Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention." I agree that this is an appropriate definition for this word in the context of section 23.

The Divisional Court provided guidance on the question of whether an established "compelling public interest" outweighs the purpose of an exemption in Ontario Hydro v. Mitchinson, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), in which the Court indicated the need to "take into account" the public interest protected by the exemption in question.

Submissions of the Parties

The CLA states:

> Very little is publicly known about what happened in this case and, as will be seen, there seems to be conflicting information about what happened. In any event, we do know that the murder charges were stayed and will never be determined because the state failed in this case to fulfil two fundamental obligations imposed on it when it lays charges against people. Those obligations are as follows:
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> - Accused persons must be tried within a reasonable time. This is an obligation imposed on the state by the Constitution.
>
> - In any criminal prosecution, there must be full and timely disclosure of all evidence and information that may be relevant to the case, whether it is helpful or detrimental to the prosecution or the defence. Owing to its importance, this obligation is enshrined in four places: government policy, mandatory written ethical rules for prosecutors, our common law and our constitutional law.
>
> The Ontario Superior Court of Justice [in R. v. Court and Monaghan, supra] concluded that neither of these fundamental obligations were met in this case ....
>
> This was an important and serious matter affecting the public interest. The Court's decision was front page news and there were significant follow-up stories on the next two days. More importantly, immediately after the court's ruling, Halton Regional Police Chief Peter Campbell and Hamilton-Wentworth Regional Police Chief Robert Midlaugh asked the OPP to look into the conduct of police officers and Crown counsel involved.
>
> Nine months later, in a terse press release the OPP reported that it had found "no misconduct" on the part of the police and Crown attorneys involved in this case. It reported that it "found no evidence that the officers attempted to obstruct justice by destroying or withholding a vital piece of evidence." It also "found no evidence that information withheld from defence was done deliberately and with the intent to obstruct justice." These findings of "no misconduct" and "no evidence" seem diametrically opposed to the Court's conclusions. The public is left searching for answers: what happened, why did the justice system fail in this case and what can be done to prevent similar failures in the future?

The CLA further argues:

> The public interest in favour of disclosure of the requested information is extremely high. It is demonstrated by: (a) the public interest in this high-profile, notorious case; (b) the importance to the criminal justice system of the obligations at issue in this case; (c) the importance of the criminal justice system in our society; (d) the importance of public access

> to information about the performance of the criminal justice system; (f) [sic] the importance of this particular case; and (g) what potential use the CLA intends to make of this information.

The CLA also states that it intends to use any information disclosed as a result of this request for the purpose of engaging in public discussion of these issues.

The CLA further submits that full and fair discussion of public institutions, including commenting on and criticizing them, is "vital to any democracy," and that the criminal justice system is not just "a public institution" but one that is "essential and fundamental in a free and democratic society." In support of this assertion, the CLA submits that the importance of the criminal justice system is underlined by the eight sections of the Charter that relate to it (i.e. sections 7 through 14).

The CLA relies on the well-known case of Stinchcombe v. the Queen, [1991] 3 S.C.R. 326, in support of its submissions with respect to the public importance of disclosure obligations in criminal proceedings. In Order P-1064, former Adjudicator Higgins considered the impact of Stinchcombe on the application of various exemptions provided by the Act, and concluded that it did not have any bearing on their application. In my view, however, because of the fundamental importance of the criminal justice system in a democracy, the question of whether public authorities met the disclosure obligations summarized in Stinchcombe is relevant in assessing whether there is a compelling public interest in disclosure under section 23.

The appellant in PA-990218-1 argues that this case has generated considerable media and public attention. The appellant states:

> The public is interested in and has a right to be informed about police and prosecutorial misconduct and the basis upon which the OPP concluded that the police and prosecutorial conduct did not justify criminal prosecution.
> ...
>
> Society has granted police forces and public prosecutors within the criminal justice system certain powers and authority affecting citizens' liberty and security. Other public institutions are not afforded this special position. The corollary to these powers and authority is responsibility and perhaps more importantly accountability.
>
> The hallmark of accountability in a democratic system is transparency. The public is entitled to be made aware of how members of police forces and officers of the court execute their professional responsibilities. This knowledge is needed to guarantee the public that the integrity of police investigations and public prosecutions remain intact, since an encounter with these institutions can have enormous ramifications on a citizen's liberty and security of the person...

> The appellant submits generally that any invasion of privacy in the conduct of professional duties is outweighed by the compelling public interest requiring disclosure in this situation...
>
> In his judgement in [in R. v. Court and Monaghan, supra], Justice Glithero established that the case amounted to "deliberate non-disclosure or suppression, of virtually every piece of evidence that was of probable assistance to the defence...." He described the case as one "of continued and systematic non-disclosure of useful information." However, in a terse press release, the OPP concluded that there were no wrongdoings on the part of the police officers or the Crown Attorney.
>
> The appellant submits that the judicial findings of Justice Glithero and the three-paragraph news release by the OPP are so diametrically opposed to one another, that the public interest requires production of the reasons behind the OPP news release.

In its representations for Appeal PA-980338-1, the Ministry submits "... that the request for the record, which contains sensitive personal information, that the interest is not public, but rather, as evidenced in the request itself, only for the purposes of the association to which the requester is part of." I do not accept this position. In my view, the Ministry's submission is contradicted by the stated intention of the CLA to use the information for public discussion purposes, as mentioned above. Moreover, the veracity of the CLA's statement that it will use the information for this purpose is supported by the public statements it has already made, as reported in the media (e.g. "Lawyers challenge province to release trial probe details," Hamilton Spectator, October 30, 1999; "Ontario focus of suit by lawyers' group." Globe and Mail, October 27, 1999).

This is the Ministry's only submission regarding the question of whether the nature of the interest in these records is "public." The Ministry does not comment on whether the public interest, if it exists, would be "compelling."

The Ministry submits that withholding the information is consistent with the purpose of the exemption at section 21, and quotes with approval the following passage from Order P-568:

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

The Ministry emphasizes that the exemption is mandatory without explaining how this is important in the balancing exercise, and notes that section 21(4) takes certain information out of the scope of the exemption, again without explaining the relevance of this fact.

The Ministry further submits, without elaboration, that there is "... no public interest to be served that would clearly outweigh such a purpose." The Ministry mentions that the results of the OPP investigation were

announced in a press release, presumably to advance the view that this limited disclosure was all that the public interest would require.

Compelling Public Interest in Disclosure

In considering the issue of whether there is a public interest in disclosure of the information at issue in these appeals, important context is provided by the judgment of Mr. Justice Glithero of the Ontario Court (General Division) (now the Superior Court of Justice) in R. v. Court and Monaghan, supra. In lengthy and detailed reasons, he relates numerous instances of lost or improperly withheld evidence, and finds many infringements of the section 7 and 11(d) Charter rights of the accused. [Section 7 pertains to the right not to be deprived of liberty except in accordance with the principles of fundamental justice, while section 11(d) enshrines the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal.] The description of these infringements occupies some eighteen pages of the judgment (at pages 278-296). Both police officers and Crown counsel appear to have been involved. At page 297, the Court states:

> Deliberate state action designed to or aimed at removing relevant evidence is unacceptable. In this case, I have found deliberate non-disclosure or suppression, of virtually every piece of evidence that was of probable assistance to the defence. Coupled with that deliberate non-disclosure is the fact that much of the original evidence relating to those issues has been lost, as a result of an unacceptable degree of negligent conduct. On several important evidentiary issues, much of what still remains is in a form much less useful to the defence than would have been the original material. The loss of so many audiotapes, videotapes, notes and reports can only be categorized as involving an unacceptable degree of negligent conduct and indifference on the part of the state representatives charged with the responsibility of maintaining such evidence. In respect of the November 29, 1989 tape, the failure to admit its loss in the face of pointed requests before trial, during the pre-trial motions, and even well into the appeal, is abusive.

Later in its analysis, the Court makes the following observations (at pp. 299-301):

> The right to make full answer and defence, and to a fair trial, does not entitle an accused to a trial conducted in the most favourable manner imaginable by him. In my opinion, however, it does guarantee to him the right to be tried in circumstances where he is able to put forward that evidence favourable to his position. That is not possible in this case. This is not a case of an inadvertent loss of some piece of evidence, through happenstance or made understandable owing to the passage of time. Rather it is a case of continued and systematic non-disclosure of useful information, coupled with the loss of much original information necessary to enable the defence to marshall witnesses useful to the defence, but not disposed towards their position.
>
> As previously indicated, I have found many instances of abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, negligent breach

of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial. That prejudice is completed. The improper cross-examinations and jury address would not be repeated at a new trial and the completed prejudice with respect to those issues would not therefore be perpetuated in a new trial. The effects or prejudice caused by the abusive conduct in systematic non-disclosure, deliberate revision of materials so as to exclude useful information to the defence, and the unexplained loss, or breach of the duty to preserve, of so much original evidence would be perpetuated through a future trial in that the defence cannot be put back into the position they would originally have been, and which in my view they were entitled to maintain throughout the trial process. That evidence is gone, either entirely or to the extent of severely diminishing the utility of the evidence, and the prejudice thereby occasioned has only been exaggerated by the passage of time since the 1991 trial and prior to the belated disclosure of this information in 1996.

To further adjourn these applications for determination as the trial unfolds would in the circumstances of this case perpetuate the unfairness. The defence would be required to pursue two inconsistent courses of action, in that to lead evidence supportive of prejudice would impair their case in the eyes of the jury, and to forgo the elicitation of evidence relevant to prejudice involves abdication of the pursuit of Charter rights to which these men are entitled.

As to the appeal, one of the issues leading to the granting of a new trial was the lost November 29, 1989 audiotape. It is presumptuous of me to speculate on what the Court of Appeal would have done if all of the non-disclosure had been made known to it. Had it been known, the applicants could have applied for a stay of proceedings from the Court of Appeal. Because the non-disclosure and loss of material was not revealed, the issue could not be raised in that court and falls upon me to determine. It is clear to me that the case as presented to the Court of Appeal differs significantly from the case that is now before me. Presumptuous or not, my best estimation is that even the appellants' appeal, albeit successful, was less fair than it might have been had the true nature of this case been then revealed. The conduct and intention of the Crown are amongst the most relevant considerations, even though flagrant and intentional misconduct is not a precondition to the granting of a stay. While I will be considering the trial within reasonable time considerations in the next section of this ruling, nevertheless according to O'Connor a factor in respect of ss. 7 and 11(d) applications for a stay is the number of adjournments or additional hearings necessitated by Crown conduct. The proceedings in this case have been materially prolonged as a result of the earlier failure to make proper disclosure. Lastly I am to consider, in determining whether prejudice to the integrity of the judicial system is remediable, that effect be given to societal interests in a determination on the merits, which increases commensurately with the seriousness of the charge. These charges are at the most serious end of the spectrum. In my earlier ruling I indicated that "in my assessment, a fair-minded and reasonable member of the community, fully apprised of all the circumstances in this case, would be offended and dismayed by the conduct of this case,

> but would want the case to proceed to trial as long as the trial can be a fair one." I remain of that view, but have now concluded that that fair trial requirement cannot be met.
> ...
>
> In the final result, in my opinion the applicants have demonstrated many breaches of their ss. 7 and 11(d) rights, and that irremediable prejudice has been caused. In my opinion they have further demonstrated, on a balance of probabilities, abusive conduct on the part of state officials which is now complete and was manifested throughout the earlier proceedings. While certain aspects of that conduct can be remedied by preventing a repetition at any future trial, other aspects of the abusive conduct, in terms of its effects and results, would be perpetuated by a further trial. Society's rightful expectation of an adjudication on the merits is no longer possible to fulfill.
>
> For these reasons, pursuant to s. 24(1) of the Charter, I am ordering that the prosecution of these two applicants be stayed.

The Court went on to find that the delay in the case violated the right of the accused men to be tried within a reasonable time under section 11(b) of the Charter, and their section 7 rights as regards their appeal after the original trial, and ordered a stay of proceedings on those other grounds as well.

Following the release of this decision, numerous stories appeared in the media. One of these stories reports the results of the OPP investigation. More recently, comments by the CLA about the importance of public scrutiny of this case have been reported in the media. Moreover, an editorial dated November 1, 1999 in the Globe and Mail about the CLA's access request and the government's response stated, in part, as follows:

> Because no broad public cared about the murder of reputed mobster Domenic Racco 15 years ago, few care about the extraordinary and disturbing legal consequences that have followed it in steady progression. But with every new chapter in the Racco saga, its notoriety increases, and causes for public concern multiply.
>
> What began as a story about a clear failure of justice has escalated into a fundamental debate of the limits of a government's right to suppress knowledge of that failure. The Attorney-General of Ontario has taken the radical position that citizens have no right to see justice being done in the Racco case.
> ...
>
> The [OPP's] brief public report on its investigation, issued in the form of a press release, cited "no misconduct" on the part of state officials and "no evidence" that they systematically suppressed vital evidence in the Racco case. It was peremptory at best. The fact that the police force arrived at conclusions diametrically opposed to those of the court demands explanation.

> But none was offered; nothing but a bland assurance in the absence of any known facts. Now, far worse, a proper explanation is being actively denied.
>
> The denial was issued by the Attorney-General in response to a request from the Criminal Lawyers Association for the release of materials from the OPP investigation. The province refused to make public even the slightest detail of the information that led police to their provocative conclusion.
> ...
>
> The conclusions to be drawn from the fundamental arguments at play – about freedom of speech, about justice being seen to be done – are so obvious they barely need be mentioned. Astonishingly, the Ontario government is even seeking to suppress evidence that has already been entered and debated in open court.

I agree with the CLA's submission that the criminal justice system "... is not just 'a public institution' but one that is 'essential and fundamental in a free and democratic society'." In combination with the findings of Glithero J. which I have just quoted, and the public discussion which has ensued, I am satisfied that there is a public interest in obtaining further information about what went wrong in this case, and how the government responded. Since all three records at issue are relevant to these issues, I believe there is a public interest in their disclosure.

I now turn to the question of whether this public interest is "compelling." In his dissenting judgment in the Divisional Court's ruling on Order P-1398 (Ministry of Finance v. John Higgins, Inquiry Officer and John Doe, Requester (February 6, 1998) Toronto Doc. 451/97), mentioned with approval by the Court of Appeal (reported at (1999), 118 O.A.C. 108), MacDougall J. indicated at page 32 that "... one would be hard-pressed to come up with a subject of greater public interest" than the possible economic impact of Quebec independence or a "yes" vote in a referendum on that subject. In my view, given the importance of the criminal justice system in Canadian society, the prominence of the criminal courts among Canadian public institutions, and the preoccupation of the public and media alike with issues relating to criminal justice and the balancing of rights between accused persons and the victims of crime, a similar statement could be made about the public interest in disclosure of information about a prosecution in which the Ontario Court (General Division) "... found deliberate non-disclosure or suppression, of virtually every piece of evidence that was of probable assistance to the defence" as well as "an unacceptable degree of negligent conduct" by the state. Such issues generally rouse strong interest or attention and this case is no exception, as evidenced by the media coverage it has generated.

It is also significant that, as pointed out by two of the appellants, the OPP's conclusions as a result of the investigation seem to be "diametrically opposed" to the Court's view that serious improprieties in the administration of the criminal justice system had occurred, which were at the heart of the decision to stay the charges. I am of course not in a position to comment on the conclusions reached by the OPP, and I am constrained from revealing the contents of the records at issue in these appeals. However, from the public's

perspective, the juxtaposition of the Court's reasons and the OPP's terse press release would appear to demand a more informative explanation.

A recent judgment of the United States District Court for the District of Columbia under the Freedom of Information Act (National Association of Criminal Defense Lawyers, et al. v. United States Department of Justice, Civil Action No. 97-372 (GK) per Kessler J.) provides assistance in assessing the nature of the public interest in disclosure of records dealing with the criminal justice system. It dealt with an appeal from an access decision to withhold the names of two FBI employees in documents relating to "... allegations that one employee failed to advise the FBI Office of Professional Responsibility of possible misappropriation of government property, and that another employee intentionally misrepresented facts while testifying under oath." The Court considered the public interest in this information, stating as follows (at page 7 of its reasons):

> The public interest in this case is extraordinarily significant, namely the need to ensure the integrity of our criminal justice system. Moreover, the public interest in disclosing the names of the two individuals mentioned in the e-mail at issue cannot be considered in isolation or out of context.

With respect to "context," the Court went on to express concerns about "the serious possibility of tainted convictions, and the need to shed light on the workings of the FBI," and stated that this is "especially so at a time when the credibility of the FBI as a law enforcement institution is being called into question more seriously than at any other time in its history."

The government subsequently requested a reconsideration of the Court's order to disclose the names, and an opportunity for reconsideration was granted by Kessler J. on the basis of fresh evidence provided in camera. However, the principles expressed by Kessler J. in relation to the public interest in the administration of criminal justice are not impacted by the reconsideration, which had to do with the evidence. In my view, it is fair to conclude that the public interest in ensuring the integrity of the criminal justice system is just as important in Canadian society as it is in the United States.

Moreover, the U. S. Court's statements about context have resonance here in Ontario, because the findings of Glithero J. in R. v. Court and Monaghan are not without parallel. For example, the recent decision of the Ontario Superior Court of Justice (per Cosgrove J.) in R. v. Elliott, [1999] O.J. No. 3265 (under appeal to the Ontario Court of Appeal, File C32813) involved a stay of proceedings in a murder prosecution as a result of deliberate non-disclosure to the defence and other misconduct by the Crown and by the OPP The findings of Mr. Justice Cosgrove in Elliott bear a striking similarity to those in R. v. Court and Monaghan. The Court found numerous instances of Charter violations by Crown counsel and police. The R.C.M.P. was called in to investigate but the investigation was called off before it was completed, apparently on the basis of legal advice provided by Ontario's Ministry of the Attorney General.

The parallel between the two cases is illustrated by the following excerpts from Elliott:

I find that the loss or unexplained destruction by Sgt. Chris McCruley of his notes and related material ... is a breach of the applicant's Charter rights. (para. 148)

...

I have concluded that the R.C.M.P. investigation as it relates to this trial was co-opted by the OPP officers and Crown prosecutors and that it lacks the basic characteristics of an "independent" investigation - free from any influence by the Crown and OPP. The so-called independence of the investigators was undermined by the following:

(a) reliance by the R.C.M.P. investigators upon legal advice and opinions sought by them and provided to them by the aforementioned Crown Attorneys in the Ontario Ministry of the Attorney General, including legal advice from Regional Senior Crown Pelletier which led to the decision of R.C.M.P. investigators to suspend their investigation in late October 1998 after only two weeks; ... (para. 297)

...

Of the more than one hundred and fifty breaches found by me, the majority of these were related to Crown counsel and the majority of those breaches arose after the trial started. The breaches attributed to the police, comprising approximately two-thirds of the number by Crown counsel, were evenly divided into the investigative stage and the trial itself. A review of these breaches by Crown counsel and the police indicate that scant attention was given to the accused's rights guaranteed under the Charter from the time of her arrest on August 25, 1995, and this misconduct has continued to the present time.

An analysis of the nature of the breaches identified by me demonstrates that many are related to the issue of disclosure by the police and Crown counsel .... (paras. 358-359)

...

In considering whether prejudice to the integrity of the judicial system is remediable, I have returned to the comments of Glithero J. in R. v. Court where he observed, "in my assessment, a fair-minded and reasonable member of the community, fully apprised of all the circumstances of this case, would be offended and dismayed by the conduct of the case, but would want the case to proceed to trial as long as the trial can be a fair one."

As a result of my FINDINGS and ANALYSIS herein, I have concluded that a fair-minded and reasonable member of the community, fully apprised of all the circumstances of the case would conclude that a fair trial was not now possible and would not want the case to proceed to trial. (paras. 377-378)

As in R. v. Court and Monaghan, Cosgrove J. concluded in Elliott that a stay was required on the basis of non-disclosure, among other factors, that led to irremediable breaches of the applicant's rights under section 11(d) of the Charter.

Further concerns of a related nature also arise from the wrongful conviction of Guy Paul Morin and the ensuing inquiry.

In my view, these cases add urgency to the public interest in assessing what went wrong in the prosecutions of Mr. Court and Mr. Monaghan.

In view of the public discussion that has already taken place and the fundamental importance of the integrity of the criminal justice system, and because of the apparent inconsistency between the comments of Glithero J. in R. v. Court and Monaghan, supra and the conclusions of the OPP as stated in its press release, I find that there is a compelling public interest in disclosure of the records at issue in these appeals. Although this finding is fully justified by these factors alone, further powerful justification for this conclusion is provided by the Court's findings in Elliott and the concerns arising from wrongful convictions such as occurred in the case of Guy Paul Morin.

Balancing the Compelling Public Interest and the Purpose of the Exemption

I must now determine whether this compelling public interest in disclosure outweighs the purpose of the exemption at section 21 of the Act. I have already reproduced the Ministry's excerpt from Order P-568, which simply refers to the protection of individual privacy. To this I would add that the importance of this exemption, in the context of the Act, is underlined by its inclusion as one of the fundamental purposes of the Act, stated thus in section 1(b):

> The purposes of this Act are,
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions ....

On this basis, I would conclude that the protection of individual privacy represents a very important public policy purpose which is recognized in the exemption at section 21. However, it is important to note that the balancing exercise within section 21(2), the class-based exclusion of information from the reach of section 21 that is set out in section 21(4) and the inclusion of section 21 as an exemption that can be overridden in the public interest in section 23 all indicate that this public policy purpose must, at times, yield to more compelling interests in disclosure identified by the legislature.

In the Defense Lawyers case, supra, the Court considered the balance between the privacy interests of FBI employees accused of wrongdoing within the context of the criminal justice system and the public interest in disclosure of their identities (which was the only information that had been withheld from the records at issue there). The exemption under discussion in this context is section 7(C) of the United States Freedom of Information Act, which exempts "... records or information compiled for law enforcement purposes, but only to the extent that the production of law enforcement records or information .... could reasonably be expected to constitute an unwarranted invasion of personal privacy" (5 U.S.C. §552(b)(7)(C), as stated in

Defense Lawyers at p. 12-13). The Court continues its explanation of the context of this exemption as follows (at p. 13):

> As with Exemption 6, a balancing of the public and private interests must precede any disclosure of information falling within Exemption 7(C). U.S. Dept. of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 883 (1989). In balancing these interests, the FBI "may not withhold records under exemption solely because disclosure would infringe legitimate privacy interests, but must balance privacy interests against the public's interest in learning about the operations of its government."

In commenting on this issue, the Court stated (at pages 10-11 of its reasons):

> Plaintiffs [the requesters], and indeed Defendant itself [U.S. Department of Justice], have presented compelling, and more than sufficient, evidence to suspect that serious misconduct has occurred, very possibly by more persons than simply the accused individual mentioned in the e-mail. Disclosure of that individual's name is necessary to refute or confirm the allegations made in the e-mail, and indeed to confirm or refute whether those investigating the matter did not also engage in serious misconduct ... Consequently, the public interest in disclosure far outweighs the privacy interests of the accused individual, and Defendant was not justified in withholding his or her name under Exemption 7(C).

Although the American statute is different from Ontario's, both require that the public interest be balanced against privacy interests. In my view, the task of the Court in Defense Lawyers is sufficiently analogous to the balancing required under section 23 in this case to indicate that the Court's reasoning is relevant. The decision suggests that, where there is evidence to support allegations of wrongdoing by public officials in a criminal investigation or prosecution, there is a strong public interest in disclosure of information that would cast light on the issue that can and will on occasion outweigh privacy interests. In conducting the balancing exercise under section 23, it is vital to consider the particular circumstances of the case and the purposes of the exemption at section 21 of the Act as discussed previously.

Like the situation in Defense Lawyers, the essence of the compelling public interest in this case is the need to assure the public that the OPP investigation was conducted in a thorough and fair manner, and that despite the strongly worded judgment of Glithero J., criminal charges were not warranted. One important factor in weighing this public interest is whether other available investigative mechanisms exist that might satisfy this interest.

The OPP investigation, whose object was a determination of whether criminal charges should be laid against police officers and/or crown prosecutors, was undertaken at the request of the Chiefs of Police of the Halton Region Police Service and the Hamilton Wentworth Police Service. This appears to have been an ad hoc investigation. It would also appear that the Ontario Civilian Commission on Police Services (OCCPS), which is governed by the Police Services Act, could have been called upon to investigate. While this may have been an available mechanism, the OPP investigation was the route chosen and there is

no reason to expect that an OCCPS investigation will now occur. In my view, under the circumstances, the existence of this possible, unexercised remedy does not diminish the public interest in disclosure of the records.

In a similar vein, one of the accused has launched a malicious prosecution suit. One might argue that this has the potential to satisfy the public interest, but I would not agree with this view. Such a law suit necessarily relates to a **private** interest, and there is in any event no guarantee that it will ever come to trial.

In my view, the reasons of Glithero J. provide evidence of Charter violations with the implication of possible Criminal Code infractions by law enforcement officials, an implication that was powerful enough to have led to the OPP investigation. In all the circumstances, based on the very compelling nature of the public interests that are at stake, and subject to a number of exceptions to protect personal privacy, I am of the view that the compelling public interest in disclosure of the records at issue clearly outweighs the purpose of the section 21 exemption, including the important public policy basis for that exemption relating to the protection of individual privacy.

The exceptions to this finding are contained in Record 1. Pages 20, 21, 105-120 and 293-307 of that record contain information that pertains to two individuals who were not involved in the investigation or prosecution of the original murder charges. It would appear that these individuals were interviewed by the OPP investigators for the purposes of obtaining certain background information, and are peripheral parties, at best. Under these circumstances, it is my view that the protection of their individual privacy is not clearly overridden by the public interest in disclosure. Similarly, personal information relating to home addresses and personal telephone numbers of the interviewees and current employment status of some of these individuals in Record 1 is also not clearly overridden by the public interest in disclosure of this information to the appellants.

Therefore, I find that the application of section 23 would require disclosure of all three records, with the above-noted exceptions in Record 1, if the only exemption at issue were section 21 (or, in the case of Appeal P-990218-1, section 49(b)).

The Canadian Charter of Rights and Freedoms (the Charter)

As noted previously, the CLA has served a Notice of Constitutional Question, in which the legal basis of the constitutional question is stated as follows:

1. the Requester [CLA] wishes, in exercise of its s. 2(b) Charter rights, to engage in informed public discussion concerning the important matter mentioned in paragraph (a) of the Notice of Appeal;

2. in the circumstances, there is a very compelling public interest in this informed discussion taking place;

3. the information requested is necessary for that informed discussion to take place;

4. sections 14 and 19 of the [Act] may provide bases for withholding the information requested; this is a contentious matter which the Information and Privacy Commissioner will determine in this appeal;

5. if the bases for withholding the information requested in ss. 14 and/or 19 are held to apply in these circumstances, s. 23 of the Act does not allow for a public interest override as it does for other bases for withholding information which are set out in other sections of the Act; s. 10 of the Act then operates to deny the Requester access to the information requested;

6. therefore, ss. 23 and 10 of the Act operate so as to impede the Requester's exercise of its s. 2(b) right to engage in informed public discussion on this very important issue;

7. therefore, pursuant to s. 24(1) of the Charter, the Requester requests that a constitutional exemption be granted in the unique circumstances of this particular case, permitting the Requester to receive disclosure of the information requested so that the Requester may engage in informed public discussion concerning the important matter mentioned paragraph (a) of the Notice of Appeal; alternatively, pursuant to s. 24(1) of the Charter, the Requester requests that ss. 14 and 19 be read into s. 23 of the Act;

8. the Requester will also submit, independently of s. 24(1) of the Charter, that the provisions of the Act must be read or interpreted in light of the Requester's s. 2(b) rights; this is only an issue of statutory interpretation, not validity or applicability.

To state the issues more briefly, the CLA argues that its right to freedom of expression guaranteed in section 2(b) of the Charter is infringed by the Ministry's denial of access to the requested information. The requested remedies are:

1. to grant a "constitutional exemption" to permit disclosure despite sections 14 and 19; or

2. "read in" sections 14 and 19 as exemptions that may be subject to the "public interest override" in section 23; or

3. alternatively, that as a matter of statutory interpretation I read the Act in light of the appellant's section 2(b) Charter rights.

Does the Commissioner have the power to decide Charter issues?

The AG submits that, based on Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854, the Commissioner lacks jurisdiction to decide Charter issues, whether or not it might have been found to have such jurisdiction under the previous law as reflected in the so-called "trilogy" of Douglas/Kwantlan Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570, Cuddy Chicks Ltd. v. Ontario (Labour Relations Board),

[1991] 2 S.C.R. 5 and Tétreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22. The AG argues that the Court in Cooper "clarified" or "refined" the positions taken in the trilogy and that as a result of Cooper, narrower criteria are now applicable in assessing whether a tribunal has Charter jurisdiction.

The sections of the Constitution Act, 1982 (which includes the Charter) that potentially confer jurisdiction on tribunals to consider and decide Charter issues are section 24(1) (part of the Charter) and 52(1).

Section 24(1) states:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 52(1) of the Constitution Act, 1982 states:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Schachter v. Canada, [1992] 2 S.C.R. 679 is helpful in discussing the particular remedies available under sections 52(1) and 24(1). Broadly speaking, section 52(1) remedies deal with the law itself, whereas remedies under section 24(1) may also deal with actions whose effect is to contravene the Charter. As stated by the Court:

> It is valuable to summarize the above propositions with respect to the operation of s. 52 of the Constitution Act, 1982 before turning to the question of the independent availability of remedies pursuant to s. 24(1) of the *Charter*. Section 52 is engaged when a law is itself held to be unconstitutional, as opposed to simply a particular action taken under it. Once s. 52 is engaged, three questions must be answered. First, what is the extent of the inconsistency? Second, can that inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the legislation inextricably linked to it? Third, should the declaration of invalidity be temporarily suspended? (p. 717)
>
> ...
>
> Where s. 52 of the *Constitution Act, 1982* is not engaged, a remedy under s. 24(1) of the *Charter* may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's *Charter* rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed (pp. 719-20).

From this analysis, it can be seen that the remedy of "reading in," or alternatively of severing or striking down legislation, are remedies under section 52(1), whereas individually tailored remedies that do not involve striking down or reading in, including a "constitutional exemption," are granted under section 24(1).

Both the trilogy and the Cooper decision deal with tribunal powers under section 52(1), and explicitly state that they are not making pronouncements about section 24(1). Therefore section 52(1) jurisdiction is the primary focus of the AG's submissions on this subject and is also the focus of my analysis. The criteria for jurisdiction under section 24(1) are somewhat different, with a greater focus on whether the tribunal has the power to grant the particular remedy sought, as enunciated by the Supreme Court of Canada in Weber v. Ontario Hydro, [1995] 2 S.C.R. 863 and Mooring v. Canada (National Parole Board), [1996] 1. S.C.R. 75.

The essential position on the ability of tribunals to consider and decide Charter issues under section 52(1) is most succinctly stated in Cuddy Chicks (supra). Cuddy Chicks concerned the exclusion of persons employed in agriculture from the Labour Relations Act in the context of a certification hearing at the Ontario Labour Relations Board (OLRB). The Court found that the OLRB did have the authority to decide Charter issues. The value of the Court's commentary is underlined by the fact that the majority reasons of Mr. Justice LaForest were concurred in by six other judges. In his reasons in Cuddy Chicks Mr. Justice LaForest stated:

> The power of an administrative tribunal to consider *Charter* issues was addressed recently by this Court in *Douglas/Kwantlen Faculty Ass. v. Douglas College*, [1990] 3 S.C.R. 570. That case concerned the jurisdiction of an arbitration board, appointed by the parties under a collective agreement in conjunction with the British Columbia *Labour Code*, to determine the constitutionality of a mandatory retirement provision in the collective agreement. In ruling that the arbitrator did have such jurisdiction, this Court articulated the basic principle that an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid. This conclusion ensues from the principle of supremacy of the Constitution, which is confirmed by s. 52(1) of the *Constitution Act, 1982* ...
>
> Distilled to its basics, the rationale for recognizing jurisdiction in the arbitrator in the *Douglas College* case is that the Constitution, as the supreme law, must be respected by an administrative tribunal called upon to interpret law. In addition, the practical advantages of having constitutional issues decided at first instance by an expert tribunal confirm if not compel this conclusion. Practical considerations were canvassed at length in *Douglas College* and I need not repeat that discussion here. I would simply note the relevance of such considerations to the determination of whether, in the end, it makes sense for an administrative tribunal to decide whether a particular law is invalid because it violates the *Charter*.

> It is essential to appreciate that s. 52(1) does not function as an independent source of an administrative tribunal's jurisdiction to address constitutional issues. Section 52(1) affirms in explicit language the supremacy of the Constitution but is silent on the jurisdictional point *per se*. In other words, s. 52(1) does not specify which bodies may consider and rule on *Charter* questions, and cannot be said to confer jurisdiction on an administrative tribunal. Rather, jurisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, a tribunal prepared to address a *Charter* issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought. ... An administrative tribunal need not meet the definition of a court of competent jurisdiction in s. 24(1) of the *Charter* in order to have the necessary authority to subject its enabling statute to Charter scrutiny. In the present case, the relevant inquiry is not whether the tribunal is a "court" but whether the legislature intended to confer on the tribunal the power to interpret and apply the *Charter*. (pp. 13-15)

For context, it is important to review the Court's remarks about the application of these principles to the case before it at that time:

> It first must be determined whether the Board has jurisdiction over the whole of the matter before it. It is clear that it has jurisdiction over the employer and the union. The issue here centres on its jurisdiction over the subject matter and remedy. The subject matter before the Board cannot be characterized simply as an application for certification, which would certainly fall within the authority of the Board. This is an application which requires the Board to subject s. 2(b) of the [Labour Relations] Act to *Charter* scrutiny in order to determine whether the application for certification is properly before it. Similarly, the remedy of certification requires the Board to refuse to give effect to s. 2(b) of the Act because of inconsistency with the *Charter*. Since the subject matter and remedy in this case are premised on the application of the *Charter*, the authority to apply the *Charter* must be found in the Board's enabling statute. (p. 15)

The Court acknowledged in Tetréault-Gadoury (supra) that this power could also be implicitly conferred. That case concerned the issue of whether a Board of Referees under the Unemployment Insurance Act had the power to decide Charter issues. The Court examined the question in the context of powers expressly conferred on the Umpire, a higher adjudicative body under the same statute, stating:

> In this case, for the first time, the Court is faced with the question whether an administrative tribunal that has not expressly been provided with the power to consider all relevant law may, nonetheless, apply the *Charter*.....
>
> As I have stressed in both *Douglas College* and *Cuddy Chicks*, *supra*, s. 52(1) does not, in itself, confer the power to an administrative tribunal to find a legislative provision to be

inconsistent with the *Charter*. Rather, the inquiry must begin with an examination of the mandate given to the particular tribunal by the legislature.

Whereas in *Cuddy Chicks*, the Ontario Labour Relations Board was expressly empowered under s. 106(1) of the *Labour Relations Act*, R.S.O. 1980, c. 228, "to determine all questions of fact or law that arise in any matter before it . . .," the Board of Referees is given no such explicit authority in this case. The express mandate given to a particular tribunal by the legislature will normally be the most important factor in determining whether the tribunal has the power to find a legislative provision to be inconsistent with the *Charter*. Because an administrative tribunal is a creature of the state, it follows that the state should, unless otherwise prohibited, have power to confer upon a tribunal the authority to consider *Charter* issues and, equally, to restrict the tribunal from considering such issues. Therefore, where the legislature has already spoken definitively on the question, that will normally be the end of the inquiry. Where it has not, it will be necessary to examine other factors as well.

In the instant case, although the *Unemployment Insurance Act, 1971* does not specifically address the issue whether the Board of Referees has jurisdiction to consider all relevant law, such jurisdiction is expressly conferred upon the umpire, to whom an appeal from the Board of Referees may be made. Section 96 of the Act (later s. 81), in relevant part, provides that:

> 96. An umpire may decide any question of law or fact that is necessary for the disposition of any appeal . . . and may dismiss the appeal, give the decision that the board of referees should have given . . . confirm, rescind or vary the decision of the board of referees in whole or in part. [emphasis added by S.C.C.]

Further, as Lacombe J. pointed out, s. 70(4) of the *Unemployment Insurance Regulations*, C.R.C., c. 1576, as am. by SOR/82-1046, which dates from November 26, 1982, specifically contemplates the possibility of an umpire's finding a provision of the Act or regulations unconstitutional: see [1989] 2 F.C. 245, at p. 259. That provision reads:

> 70. . . .(4) Where, in respect of a claim for benefit, an umpire has declared a provision of the Act or these Regulations to be ultra vires and an application is made by the Commission in accordance with the *Federal Court Act* to review the decision of the umpire, benefits are not payable in respect of any claim for benefit made subsequent to the decision of the umpire until the final determination of the claim under review, where the benefit would not otherwise be payable in respect of any such subsequent claim if the provision had not been declared ultra vires.

> Taken together, these two provisions provide a strong indication that the legislature intended that the umpire have power to find provisions of the Act or its accompanying regulations inconsistent with the *Charter*. It is significant that the umpire has been expressly provided with this power, while the Board of Referees has not. (pp. 31-33)

In each of the trilogy decisions, the Court engaged in a discussion of "practical considerations" concerning the subject tribunal in its assessment of whether it had the power to decide Charter issues. The overall effect of these decisions appears to be that "practical considerations" may have a bearing on the question of legislative intention in relation to section 52(1). This is the approach expressly undertaken in Cooper.

Cuddy Chicks elaborates on the theme of practical considerations, in its analysis of the role of the OLRB, as follows (from the reasons of LaForest J., at pp. 16-18):

> The discussion of practical considerations in the *Douglas College* decision entailed an analysis of the institutional characteristics of administrative tribunals, such as their narrow range of expertise and the speed with which they deal with matters, in relation to the fundamental and often complex nature of *Charter* issues. This analysis concerned administrative tribunals in general, and the ultimate conclusion that practical concerns favour the finding of jurisdiction in administrative tribunals holds in the present case. My purpose here is not to rehearse that comprehensive discussion, but simply to identify those considerations which are more pronounced in the particular case of the Board.
>
> The overarching consideration is that labour boards are administrative bodies of a high calibre. The tripartite model which has been adopted almost uniformly across the country combines the values of expertise and broad experience with acceptability and credibility. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at pp. 235-36, Dickson J. (as he then was) characterized the particular competence of labour boards as follows:
>
> > The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.
>
> It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical. Therefore, while Board members need not have formal legal training, it remains that they have a very meaningful role to play in the resolution of constitutional

> issues. The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance. This is evidenced clearly by the weight which the judiciary has given the factual record provided by labour boards in division of powers cases; see, for example, *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733.
> ...
>
> An additional practical consideration which bears mention here is whether the Attorney General of the province will participate in proceedings before an administrative tribunal. Before the courts, a provision to obtain this participation exists. Finlayson J.A. commented that this sort of participation may be inappropriate in the case of tribunals established by government, but at the same time the lack of participation of the Attorney General unfairly places the burden of defending legislation on the parties. However, the Attorney General for Ontario expressed a willingness to intervene and make submissions in appropriate cases, and has in the past done so before the Board on issues of federalism under the *Constitution Act, 1867*. To the extent that the Attorney General will intervene, the relative disadvantage of administrative tribunals versus courts is lessened.
> ...
>
> At the end of the day, the legal process will be better served where the Board makes an initial determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the Board not only has the authority but a duty to ascertain the constitutional validity of s. 2(b) of the *Labour Relations Act*.

Tetréault-Gadoury reaffirms the views taken in the other two cases, stating (at pp. 35-36 of the majority reasons of LaForest J.):

> In *Douglas College* and *Cuddy Chicks*, *supra*, I recognized that there are many advantages, from a practical perspective, associated with allowing administrative tribunals to decide constitutional questions. It is important to note that many of these practical advantages are preserved in the present case, even though jurisdiction to decide *Charter* questions does not rest with the Board. Foremost amongst these considerations is the fact that the *Unemployment Insurance Act, 1971* allows for the possibility of appeal to an umpire who does possess such jurisdiction. This is of considerable importance in that it provides an applicant with the option of pursuing an avenue outside the regular court process. As I indicated in *Douglas College*, *supra*, at p. 604, one of the major advantages in allowing a party to challenge the constitutionality of a statute before an administrative body is the relative accessibility such bodies provide in comparison with the regular court system. As Lacombe J. notes, [in the Federal Court of Appeal judgment on this same case], at p. 258:

> So long as the procedure in such [administrative] tribunals presents no obstacle to their doing so, litigants should be able to assert the rights secured by the Charter in the natural forum to which they can apply.... These are speedy, inexpensive and readily accessible proceedings, which should be within the immediate reach of the persons for whom they were enacted.

In its representations, the AG indicates that several orders of this office (Orders 106, P-254, M-352, M-380 and P-772) comment on Charter issues on the assumption that the Commissioner has jurisdiction to consider them, on the basis of the trilogy. Because the Commissioner has never before concluded that a Charter breach was established, it has not as yet been necessary to make a firm decision on this point.

In its representations, however, the CLA states that the Commissioner "... has found that there is jurisdiction in section 52(1) to deal with Charter claims." In fact, both Orders M-380 and P-772 assert this authority. Order M-380 does so by reference to Order P-254, which as the AG correctly points out in its submissions, only "assumed" that the Commissioner has this power. Order P-772 does this by reference to previous orders without specifying exactly where this occurred.

Order P-1706 also contains a detailed Charter analysis. Adjudicator Laurel Cropley accepted the proposition that sections 21(1)(f) and 49(b) of the Act must be interpreted consistently with the Charter. This appears to be a reference to the viewpoint expressed in Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513, to the effect that where there is ambiguity with respect to the scope of a statutory provision, it should be interpreted in a manner consistent with the Charter and its underlying values.

To summarize, it is clear that past orders of this office have operated under the assumption that the Commissioner has the power to decide Charter issues in matters properly before it, but the point has not been finally decided.

The AG submits that:

> [w]hether these cases did in fact support the Commissioner's assumption of jurisdiction or not, the issue of a tribunal's jurisdiction pursuant to s. 52(1) has been clarified in the more recent case of *Cooper v. Canada (Human Rights Commission)* [reported at [1996] 3 S.C.R. 854]. In *Cooper*, the Canadian Human Rights Commission and the tribunal were found *not* to have s. 52(1) jurisdiction. The Attorney General submits that, following *Cooper*, the [Commissioner] does not have jurisdiction to consider the constitutional validity of legislation pursuant to s. 52(1) of the *Constitution Act, 1982*.

Cooper concerns an allegation by two airline pilots, who objected to their forced retirement at age 60, that section 15(c) of the Canadian Human Rights Act offends the equality rights enshrined in section 15(1) of the Charter. Section 15(c) states that retirement at the "normal age of retirement" for employees in "similar positions" was not a discriminatory practice.

The Canadian Human Rights Commission (the CHRC) performs a "gatekeeper" function, in that it is not itself an adjudicative body and if a matter is to be adjudicated it must be referred to the president of the Human Rights Tribunal for the appointment of a tribunal. The CHRC did not do so in Cooper, and the complainants brought a judicial review application.

It was an important factor in Cooper that, if the CHRC had referred the matter notwithstanding section 15(c), it would, in fact, have been ruling that the section was of no force and effect as a result of section 15(1) of the Charter - thus a non-adjudicative body would have been applying the Charter to strike down what was, in effect, a jurisdiction-limiting section of its enabling legislation. This point is emphasized in the majority reasons (at p. 893):

> The role of the [CHR] Commission as an administrative and screening body, with no appreciable and adjudicative role, is a clear indication that Parliament did not intend the Commission to have the power to consider questions of law. There is simply nothing in the Act indicating that the Commission has the mandate which the appellants and the Commission would wish it to have. This point was succinctly and directly addressed by Marceau J.A. in his reasons. He stated, at p. D/95:
>
> > It is clear to me that the terms used in the Canadian Human Rights Act contain nothing that could even remotely suggest an intention on the part of Parliament of allowing the Human Rights Commission, whose role is purely administrative, . . . to dispute the constitutional validity of legislative provisions governing their activity.

In my view, borne out by subsequent interpretations of Cooper, the non-adjudicative nature of the CHRC and the fact that a limiting provision was involved were of primary importance in the Court's decision to deny the CHRC the power to apply the Charter. Unlike the CHRC, the Information and Privacy Commissioner and her delegated adjudicators constitute a full-fledged adjudicative body.

The AG's representations also assert that the Court in Cooper found that "the tribunal" under the Canadian Human Rights Act was found "*not* to have s. 52(1) jurisdiction." If this were true, it could have significant ramifications for the present appeals since the role of the Information and Privacy Commissioner is more similar to the tribunal than to the CHRC. However, the underlying basis for the Court's decision in Cooper is important in assessing its applicability to other tribunals, and the scope of the finding itself is more limited than the AG's submission indicates.

In my view, the finding in Cooper regarding the tribunal's powers arose in large part from the fact that, in order to refer the matter to a tribunal, the CHRC would have had to find that a jurisdiction-limiting provision of the Canadian Human Rights Act was in violation of the Charter. The Court had already decided that the CHRC did not have this power, and therefore the tribunal would never be in a position to exercise Charter jurisdiction in that regard. The Court commented that "it would be something of a paradox for Parliament to

grant tribunals under the Act a jurisdiction that could never be exercised" (p. 896). More significantly, the Court's conclusion only extends to a finding that a tribunal under the Canadian Human Rights Act would lack jurisdiction to strike down a **limiting** provision – while expressly conceding that a tribunal might have a general power to decide matters of law and constitutional issues (at pp. 897-8):

> Taking all these factors into consideration, I am of the view that while a tribunal may have jurisdiction to consider general legal and constitutional questions, logic demands that it has no ability to question the constitutional validity of a limiting provision of the Act.

Therefore, in my view, the AG's submission, which indicates that the Court made a general finding denying section 52(1) Charter jurisdiction to tribunals under the Canadian Human Rights Act, is simply inaccurate. It is also significant that the remedies sought by the CLA relate to sections 14, 19 and 23 of the Act, which are not limiting provisions like section 15(c) of the Canadian Human Rights Act, whose effect was to exclude certain complaints from the jurisdiction of the statute.

The importance of the non-adjudicative nature of the CHRC and the jurisdiction-limiting nature of the provision in question as bases for distinguishing Cooper is affirmed in a recent decision, Collins v. Abrams, [1999] B.C.J. No. 2859 (B.C.S.C.). Collins concerned the ability of the British Columbia Human Rights Tribunal to decide Charter issues. Quijano J. distinguishes Cooper as follows (at paragraph 14):

> It was argued on behalf of Mr. Collins that the court in Cooper, supra, held that the administrative body did not have jurisdiction to consider questions of law and that the reasoning in Cooper applies here. I do not agree. **Cooper is distinguishable in its facts as it deals with the question of the ability of a gatekeeper commission, not a tribunal, and furthermore, and more significantly, the court in Cooper was dealing with the question of the ability of the commission to question the constitutional validity of a limiting provision of the Act.** (emphasis added)

In my view, both the non-adjudicative role of the CHRC and the fact that the provision in question was a jurisdiction-limiting one are sufficient to distinguish the Cooper decision from the present appeals. Nevertheless, in order to determine the issue of section 52(1) jurisdiction, it is necessary to apply the criteria developed in the trilogy as further discussed in Cooper. In that regard, it should be noted that, although it offers additional commentary, the majority decision in Cooper does not reverse or change the criteria. As the AG points out, Cooper in fact reiterates the test for jurisdiction over Charter issues enunciated in Cuddy Chicks:

> [J]urisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, a tribunal prepared to address a *Charter* issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought. (quotation from p. 14 of Cuddy Chicks appearing at p. 888 of Cooper)

In its representations, the AG concedes that the Information and Privacy Commissioner has jurisdiction over the parties. The AG combines its discussion of jurisdiction over subject matter and remedies, citing the following passage from Cuddy Chicks:

> It first must be determined whether the Board has jurisdiction over the whole of the matter before it. It is clear that it has jurisdiction over the employer and the union. The issue here centres on its jurisdiction over the subject matter and remedy. . . Since the subject matter and remedy in this case are premised on the application of the *Charter*, the authority to apply the *Charter* must be found in the Board's enabling statute.

The AG goes on to state that "... this description was refined by the Court in *Cooper*," citing the following passage:

> These authorities [i.e. the trilogy] make it clear that no administrative tribunal has an independent source of jurisdiction pursuant to s. 52(1) of the *Constitution Act, 1982*. Rather, the essential question facing a court is one of statutory interpretation -- has the legislature, in this case Parliament, granted the administrative tribunal through its enabling statute the power to determine questions of law? ...
>
> If a tribunal does have the power to consider questions of law, then it follows by the operation of s. 52(1) that it must be able to address constitutional issues, including the constitutional validity of its enabling statute. (pages 886-887)

In my view, this passage simply reiterates the approach taken in the trilogy, and it emphasizes the fundamental aspect of the test, i.e. **the express or implied power to determine questions of law**, which is derived from the wording of section 52(1) of the Constitution Act, 1982 in its description of the Constitution (including the Charter) as "the supreme law of Canada."

It is important to clarify the relationship between the need for jurisdiction over the subject matter and remedy, referenced earlier, and the authority to decide general questions of law. The AG states that "... the Commissioner's jurisdiction pursuant to s. 52(1) of the Constitution Act, 1982 depends on her jurisdiction to decide general questions of law." Given the AG's earlier concession that the Commissioner has jurisdiction over the third required area, i.e. the parties, the AG appears to be of the view that authority to decide general questions of law would confer jurisdiction over subject matter and remedy for purposes of section 52(1) jurisdiction, and if this were established, all necessary elements for such jurisdiction would be present. In my view, this interpretation is consistent with the approach taken in the trilogy and in Cooper.

The Commissioner's Authority to Decide General Questions of Law

The AG relies on Cooper as a basis for including "practical considerations" in the analysis of whether the legislature intended to confer the authority to decide general questions of law on the Commissioner. On this point, the majority reasons in Cooper state as follows (at pp.888-9):

> In considering whether a tribunal has jurisdiction over the parties, the subject matter before it, and the remedy sought by the parties, it is appropriate to take into account various practical matters such as the composition and structure of the tribunal, the procedure before the tribunal, the appeal route from the tribunal, and the expertise of the tribunal. These practical considerations, in so far as they reflect the scheme of the enabling statute, provide an insight into the mandate given to the administrative tribunal by the legislature. At the same time there may be pragmatic and functional policy concerns that argue for or against the tribunal having constitutional competence, **though such concerns can never supplant the intention of the legislature.** (emphasis added)

In my view, this commentary supports the view that the composition and structure of the tribunal, procedure before the tribunal, the route of appeal, and the tribunal's expertise, may provide insight into legislative intention. However, this does not in any way derogate from the fundamental principle established in the trilogy and affirmed in Cooper, that the basic test for authority to apply Charter principles under section 52(1) of the Constitution Act, 1982 is the question of whether the tribunal's empowering statute implicitly or explicitly grants the power to decide general questions of law.

In its representations, the AG submits that no jurisdiction to decide general questions of law "... can be reasonably inferred from the scheme of the Act or consideration of practical matters relating to the Commissioner's office." The AG divides its arguments in support of this submission into several categories, which I will use in considering this issue.

The "Scheme of the Act"

The AG's arguments in this category may be summarized as follows:

- the Act contains no such explicit grant of jurisdiction;
- no such jurisdiction can reasonably be inferred from the Act;
- the Commissioner's jurisdiction is limited by section 54(2), which indicates that the Commissioner's role is to decide whether claimed exemptions apply;
- this may be contrasted to the OLRB in Cuddy Chicks, which could decide questions of contract and tort law, for example.

The Act does not contain a clear statement of the power to determine questions of law similar to the one that appears in section 106(1) of the Labour Relations Act, as identified in Cuddy Chicks. However, sections 54(1) and (3) of the Act state:

> (1) After all of the evidence for an inquiry has been received, **the Commissioner shall make an order disposing of the issues raised by the appeal**.
>
> (3) Subject to this Act **the Commissioner's order may contain any terms and conditions the Commissioner considers appropriate**. (emphasis added)

Similar wording was reviewed by the Supreme Court of the Northwest Territories in Northwest Territories (Workers' Compensation Board v. Nolan (1999), 45 C.C.E.L. (2d) 215 (N.W.T.S.C.). There, the Court confirmed the power of the Workers' Compensation Appeals Tribunal (WCAT) to decide Charter issues under section 52(1) of the Constitution Act, 1982. The Court refers to the tribunal's jurisdiction as described in section 7.3 of the Worker's Compensation Act, stating (at p. 219):

> The Appeals Tribunal is established by s. 7.1 of the Workers' Compensation Act. The Appeals Tribunal's jurisdiction is found in s. 7.3 of the Act:
>
> > 7.3 Subject to section 7.7, the appeals tribunal has exclusive jurisdiction to examine, inquire into, hear and determine all matters arising in respect of an appeal from a decision of a review committee under section 24 or 64, and it may confirm, reverse or vary a decision of the review committee.

Based on the jurisdiction in section 7.3 of the Workers' Compensation Act, the Court in Northwest Territories found (at p. 220) that:

> ...In my view, the jurisdiction granted in s. 7.3 to examine, inquire into, hear and determine all matters arising in respect of an appeal from the review committee's decision must necessarily include matters or questions of law. On its face, s. 7.3 therefore implicitly grants to the Appeals Tribunal the jurisdiction to determine questions of law. It should therefore follow that the Appeals Tribunal must be able to address constitutional issues, including the constitutional validity of its enabling statute. This principle was stated by La Forest J. in *Cooper* (at p. 213):
>
> > If a tribunal does have the power to consider questions of law, then it follows by the operation of s. 52(1) [of the Constitution Act] that it must be able to address constitutional issues, including the constitutional validity of its enabling statute.

In my view, the provisions of sections 54(1) and (3), taken together, do in fact indicate a legislative intention to confer a broad jurisdiction on the Commissioner to consider and decide all matters required for the

resolution of an inquiry, including any questions of law that arise. Based on the analysis in Northwest Territories, I believe this jurisdiction is sufficient, in and of itself, to support section 52(1) Charter jurisdiction in matters properly before the Commissioner. The Commissioner's jurisdiction as regards matters of law is confirmed by the majority reasons in John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 (Div. Ct.), in which the Court states that "the commissioner is called upon ... to find facts and decide questions of law" (p. 782).

I disagree with the AG's interpretation of section 54(2) of the Act. The section states:

> Where the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part.

In my view, this section simply means that where the Commissioner agrees that a claimed exemption applies, the Commissioner may not substitute her discretion for that of the head to disclose the record notwithstanding the applicability of the exemption. It does not stand for the proposition that general questions of law need not be considered in the decision-making process conducted by the Commissioner in an inquiry.

In any event, further consideration of the "scheme of the Act" confirms the legislature's intention to confer a broad jurisdiction to consider "general questions of law" on the Commissioner. The CLA addresses the "scheme of the Act" in its representations, stating that the legislature has implicitly given the power to decide questions of law to the Commissioner. Factors cited by the CLA in support of this view include the Commissioner's need to consider:

- the application of solicitor/client privilege;
- issues of legal privilege in the inquiry (s. 52(9));
- interpretation of the Act;
- public interest privilege.

The CLA also cites the Commissioner's adjudicative role (which, as I have stated, stands in marked contrast to the role of the Canadian Human Rights Commission in Cooper) and mentions the fact that the Notice of Inquiry issued by me to the parties in these appeals is "replete with legal cases."

In my view, the CLA has only scratched the surface in its analysis of the general questions of law which the Commissioner must address. I would expand the list of legal issues raised by the Act, which must be determined from time to time by the Commissioner in order "... to make an order disposing of the issues in an appeal," to include the following:

- the need to assess the implications of agency and property law, as well as the law regulating professionals and their clients in assessing whether externally held records are "under the control" of an institution for the purposes of section 10 of the Act;

- the need to assess the application of external statutes such as the Young Offenders Act and to consider issues of constitutional paramountcy in determining whether records may be excluded from the operation of the Act under that statute and other federal legislation claimed to take precedence over the Act;

- the need to consider and apply extrinsic statutes (e.g. the Criminal Code, the Highway Traffic Act, the Coroners Act and the Fire Prevention and Protection Act, 1997) and the nature of the powers granted therein in the context of the definition of "law enforcement" at section 2, the exemption at section 14 and the presumption at section 21(3)(b) of the Act (and in the context of sections 2, 8 and 14(3)(b) of the Municipal Freedom of Information and Protection of Privacy Act, to make these determinations with regard to municipal by-laws);

- again in the context of the municipal Act, to determine whether a statute authorizes the holding of an in camera meeting for the purposes of the exemption at section 6(2)(b);

- the need to assess the legal implications of contracts and their confidentiality provisions when applying section 17;

- the need to assess the meaning and legislative intent of external statutes in considering whether disclosures are "authorized" or "in compliance" with them under sections 21(1)(d) and 42(e);

- the need to consider whether a request is "frivolous or vexatious" in the context of section 27.1, as that term is defined in section 5.1 of Regulation 460, with reference to the related law of abuse of process and the case law concerning "vexatious proceedings" under section 140 of the Courts of Justice Act;

- the need to consider the relationship between disclosure under the Act and the discovery process in connection with section 64(1) and in the application of the solicitor-client privilege exemption at section 19;

- the need to interpret the definition of "clinical record" under the Mental Health Act for the purposes of section 65(2);

- the complex questions of what constitutes "proceedings" and the issue of an institution's "interest" in "employment-related" or "labour relations" matters in section 65(6);

- the need to interpret other statutes such as the Trustee Act and the Substitute Decisions Act in applying section 66 and in that same context to consider whether individuals qualify as a "personal representative," or whether they hold a valid power of attorney, or have an effective appointment as a person's guardian of property or personal care;

- the need to assess confidentiality provisions in other statutes in connection with the application of section 67.

In its reply submissions, the AG returns to the following passage from Cooper to contradict the CLA's claims about the Commissioner's power to address questions of law (at pp. 891-892):

> Notwithstanding the general scheme of the Act, there are specific provisions, notably ss. 27, 40 and 41, that both the appellants and the [CHR] Commission fastened upon as indicating an intent by Parliament to have the Commission determine questions of law. However, these sections amount to no more than that the Commission has power to interpret and apply its enabling statute. It does not follow that it then has a jurisdiction to address general questions of law. Every administrative body, to one degree or another, must have the power to interpret and apply its own enabling statute.

In my view, this passage is placed in context by what the Court says immediately afterwards, emphasizing the "gatekeeper" mandate of the CHRC (at p. 892):

> If this were not the case, it would be at the mercy of the parties before it and would never be the master of its own proceedings. The power to refuse to accept a complaint, or to turn down an application, or to refuse to do one of the countless duties that administrative bodies are charged with, does not amount to a power to determine questions of law as envisaged in *Douglas/Kwantlen*, *Cuddy Chicks* and *Tétreault-Gadoury*. To decide otherwise would be to accept that all administrative bodies and tribunals are competent to question the constitutional validity of their enabling statutes, a position this Court has consistently rejected.

The AG further states that the Commissioner's authority to interpret the questions of law, as identified by the CLA, amounts to no more than the need to address discrete areas of law necessarily incidental to the interpretation of the enabling statute, and that these areas are a mere "subset" of a "larger body of law."

While the sections of the Canadian Human Rights Act referred to by AG concerning the interpretation of immigration laws and pension rights are in some ways similar to the ones identified by the CLA, I believe

they are much narrower in scope and qualitatively different than the multiple and varied kinds of legal questions the Act requires the Commissioner to consider, as identified in the CLA's submissions and in my more exhaustive review, above. I think it is fair to conclude that, at a certain point, the need to consider a broad range of legal subjects crosses the boundary from the consideration of "discrete" legal topics and becomes a more general requirement and authority. I also note that in Collins, supra, for instance, the B.C. Supreme Court did not apply Cooper in the manner suggested by the AG, and found instead that the B.C. Human Rights Tribunal "has been given the power to decide questions of law," albeit without extensive discussion. The B.C. Human Rights Code does not grant the tribunal express power to consider or decide questions of law, nor does that statute raise anything remotely resembling the broad range of legal subjects the Commissioner is required to consider.

It is also important to bear in mind that every requirement for an administrative body to consider external laws must of necessity arise from its exercise of the mandate conferred in its own statute. Like the Commissioner, the OLRB (whose Charter jurisdiction the Supreme Court confirmed in Cuddy Chicks) considers such matters within the context of certification applications and other matters within its statutory jurisdiction. Despite its broad interpretive powers it does not entertain general lawsuits.

Eventually this argument becomes circular and, taken to its logical conclusion, no administrative tribunal except those expressly granted to power to interpret general questions of law could ever qualify. That would contradict the clear views of the Court as expressed in Tetréault-Gadoury which are also implicit in the whole inquiry undertaken in Cooper.

In my view, the requirements imposed on the Commissioner to decide general questions of law, as summarized above, make an overwhelming case to support an implicit legislative mandate to decide such questions, especially when viewed in light of the provisions of sections 54(1) and (3). Therefore, any further exploration of legislative intention is basically unnecessary since the fundamental test laid down in the trilogy and reiterated in Cooper has been met. As the court has made clear on numerous occasions in these judgments, although practical considerations may be relevant in determining legislative intent, they can never be used to negate a clear intention to give a tribunal the power to decide general questions of law, which of necessity results in Charter jurisdiction under section 52(1) of the Constitution Act, 1982.

Nevertheless, I will address the AG's lengthy arguments on the basis of "practical considerations."

Practical Considerations

Procedure before the Commissioner

The AG submits:

> Procedures mandated by the Act, which are well designed to protect the privacy interests particularly at stake in the context of the Act, are not appropriate to provide a basis for deciding a constitutional issue. Most importantly, pursuant to s. 52(13) parties are not

> "entitled to be present during, or have access to or comment on representations made to the Commissioner by any other person." This means that a party is without the opportunity to directly contest the submissions and factual assertions of other parties. While the Commissioner may at times choose to adopt more open procedures, s. 52(13) indicates a legislative intent with respect to jurisdiction. That the legislature envisaged a closed process with limited disclosure is an indication that it did not intend the Commissioner to address general questions of law involving the constitutionality of legislation.
>
> When conducting an inquiry under s. 52(1) of the Act, the Commissioner is bound by neither the common law rules of evidence, nor, as stated in s. 52(2), by the *Statutory Powers Procedure Act*. Further, like the Human Rights Commission in *Cooper*, the Commissioner's decision is commonly based on a "paper hearing." *Viva voce* evidence is extremely rare. When *viva voce* evidence is presented, the Commissioner proceeds in an inquisitorial manner.

The AG then cites the following passage from Cooper (at p. 894):

> As this Court has previously found, there is no requirement for anything more than a "paper hearing" for the parties before the [CHR] Commission. Although I readily acknowledge that the informal and accessible process of administrative bodies may well be a considerable advantage to a party, as compared to the regular court system, there comes a point where a body such as the Commission simply does not have the mechanism in place to adequately deal with multifaceted constitutional issues. For example, the Commission is not bound by the traditional rules of evidence. This means that it is open to the Commission to receive unsworn evidence, hearsay evidence, and simple opinion evidence. Such an unrestricted flow of information may be well suited to deciding the threshold question facing the Commission, but it is inappropriate when determining the constitutional validity of a legislative provision. In the latter case, suitable evidentiary safeguards are desirable.

In my view, the process before the Commissioner is considerably more flexible than is acknowledged in these submissions of the AG. To begin with, section 52(13) does not, as confirmed in Attorney General for Ontario v. Tom Mitchinson et al., [1998] O.J. No. 5015 (Div. Ct.), preclude an exchange of representations, nor does it forbid a live hearing at which all parties are present. This point is underlined by both past and current practices of the Commissioner (see, for example, Order M-618).

Moreover the AG did not include in its excerpt from the above-quoted passage from Cooper the following, which comes right after the text that was actually quoted, and which concludes that same paragraph (again at p. 894):

> Related to this problem is the concern that one of the aims of the [CHR] Commission, to deal with human rights complaints in an accessible, efficient and timely manner, would be disrupted and interfered with by allowing the parties to raise constitutional issues before the

> Commission. Such issues would of necessity require a more involved and lengthy process than is presently the case. In my view, it was not the intention of Parliament that the Commission's screening function become entangled in this manner.

Again, in my view, the result in Cooper is closely associated with the CHRC's non-adjudicative, screening function. That function is quite unlike the Commissioner's mandate which requires the adjudicator to consider complex legal and policy issues. Such issues are, of necessity, time-consuming.

The AG also submits that the Commissioner's process is "not sufficiently adversarial and will not generate an adequate record with which to address Charter issues or to consider matters of justification under s. 1 of the Charter." Once again, this submission overlooks the flexible procedures available to the Commissioner, and the complaint about the adequacy of the record generated is contradicted, for example, by the process followed in these appeals.

The AG's submissions on process are broadly addressed by the CLA in its reply submissions as follows:

> The Act provides the Commissioner with full power to adequately consider Charter issues. For example, the Act provides the Commissioner with the power to require production of any relevant evidence (s. 52(4)), to summons and examine on oath any person who may have information relating to the inquiry (s. 52(8)) and to receive representations from the government and any affected party (s. 52(13)). Further, to ensure all relevant interests are canvassed, the Act provides for notice of the inquiry to be provided to potentially affected parties (s. 28(1)) [sic - this reference should be to s. 50(3) which requires notice of the appeal to the institution and "any other affected party"] and for all parties to be represented by legal counsel (s. 52(14)). In addition, as evidenced by the proceedings in this appeal, the Commissioner has procedures available to ensure that parties are able to respond to the submissions of other parties.
>
> These powers under the Act enable the Commissioner to adopt appropriate procedures for the consideration of "multifaceted constitutional issues" and the creation of an adequate record for Charter issues. They are very different than those of the non-adjudicative Commission in *Cooper* ...

In support of these submissions, the CLA cites Northwest Territories and quotes the following passage:

> The function of the Appeals Tribunal is an adjudicative one. Although not bound by the traditional rules of evidence, it may make rules respecting its procedure and the conduct of its business, exercise the powers of a board appointed under the *Public Inquiries Act* (for example, the power to summons witnesses, take sworn evidence and require production of documents) and cause depositions of witnesses outside the Northwest Territories to be taken in a manner similar to that set out in the Rules of the Supreme Court of the Northwest Territories (s. 7.5(2) of the *Workers' Compensation Act*). The Appeals Tribunal can

> therefore develop or adopt more formal rules of procedure ... for a case involving constitutional issues. (p. 227)

The nature of the Information and Privacy Commissioner as an adjudicative body, its powers at inquiry and the flexible processes I have outlined are analogous to these aspects of WCAT as summarized by the Court in Northwest Territories.

One of the "practical considerations" in Cooper considered in Northwest Territories relates to the AG's stated concern that the Commissioner is empowered to use looser rules of evidence than those that apply at common law. In this regard, the Court in Northwest Territories states:

> *Lack of evidentiary safeguards* - In *Cooper*, the Court gave as an example of the Human Rights Commission's not having a mechanism in place to adequately deal with multifaceted constitutional issues the fact that the Commission is not bound by the traditional rules of evidence and may therefore receive unsworn, hearsay or opinion evidence. The Court said that suitable evidentiary safeguards must be in place for purposes of determining the constitutional validity of a legislative provision.
>
> Counsel for the Applicant Board urged me to consider that because the Appeals Tribunal is not bound by the traditional rules of evidence, it too lacks the suitable evidentiary safeguards referred to in *Cooper*.
>
> I think it is important to keep in mind the function of the Human Rights Commission. As described in *Cooper*, its function is to screen a complaint to determine whether a tribunal should conduct an inquiry into it. The Commission does not hear evidence and does not adjudicate; it reviews an investigator's report and may hear submissions on that report from the parties concerned ...
>
> The Appeals Tribunal can ... invoke the traditional rules of evidence for a case involving constitutional issues. Certainly one would expect that the Appeals Tribunal as an adjudicative body would be alert to evidentiary requirements in a way that a screening body would not. (pp. 226-7)

The same analysis applies to the Commissioner. In my view, it is reasonable to conclude that the nature of the adjudications conducted by the Commissioner, the powers available to the Commissioner as regards process generally and evidence in particular, the procedures now in general use by the Commissioner, and the fact that specifically tailored approaches have been used, are sufficient to indicate that the process concerns expressed in Cooper do not pertain to the Commissioner. Therefore, I find that such concerns do not impact on the clear legislative requirement for the Commissioner to consider and decide general questions of law.

The Commissioner's General Legal Expertise

The AG submits:

> Like the human rights tribunal discussed in *Cooper*, the [CHR] Commissioner has no general legal expertise to employ in addressing constitutional issues. The legislature does not require the Commissioner to be a judge or to have any special legal training. The Commissioner is an expert in a discrete and particular area. This area of expertise was described by the court in *Re Solicitor General of Ontario et al. and Assistant Information and Privacy Commissioner et al.* [(1993), 102 D.L.R. (4th) 602 at 607 (Div. Ct.)] as, "balancing three competing interests: public access to information; individuals' right to protection of privacy in respect to personal information held by government; and the government's interest in confidentiality of government records."
>
> The expertise described above does not imply any further expertise in constitutional law, or law generally. Further, the expertise of the Commissioner does not have application outside of the Act, unlike the expertise, for instance, of labour tribunals, which, as mentioned above, may be empowered to interpret not just their enabling statute but other statues as well. Because the Commissioner has no general expertise in law, for example, the court in *Ontario (Minister of Finance v. Information and Privacy Commissioner* [(1997), 102 O.A.C. 71 at 75 (Div. Ct.)] ruled that there was no deference due to the Commissioner with respect to solicitor-client privilege, an area in general law which arises with respect to the exemption in s. 19 of the Act.
>
> The Attorney General respectfully submits that the following passage from *Cooper* is apposite [p. 894-895)]:
>
> > A second and more telling problem in the case of the [CHR] Commission is its lack of expertise. In *Tétreault-Gadoury*, supra, I pointed out, at p. 34, that an Umpire under the Unemployment Insurance Act was a Federal Court judge which would ensure that a complainant received "a capable determination of the constitutional issue." Similarly in both *Douglas/Kwantlen* and in *Cuddy Chicks*, supra, the expertise of labour boards and the assistance they could bring to bear on the resolution of constitutional issues was recognized. In contrast this Court has made clear in *Mossop*, supra, at pp. 584-85, and reiterated in *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at pp. 599-600, that a human rights tribunal, unlike a labour arbitrator or labour board, has no special expertise with respect to questions of law.

In my view, the sentence from the judgment that immediately follows, which was not included in the AG's quotation, provides important context for these remarks:

> What is true of a tribunal is even more true of the [CHR] Commission which, as was noted in *Mossop*, is lacking the adjudicative role of a tribunal.

In any event, John Doe, supra, offers a much broader view of the Commissioner's role and expertise. As part of its conclusion that, despite the lack of a privative clause, the Commissioner is entitled to a high degree of curial deference, the majority of the Divisional Court recognized the Commissioner's unique role in managing access to government information in the hands of a wide variety of government bodies. At pages 782-3, the Court states that the Commissioner:

> ... is a specialized agency which administers a comprehensive statute regulating the release and retention of government information. In the administration of that regime, the commissioner is called upon not only to find facts and decide questions of law, but also to exercise an understanding of the body of specialized expertise that is beginning to develop around systems for access to government information and the protection of personal data.

It is also significant that the Supreme Court has recognized labour relations tribunals as bodies with expertise that makes them suitable to decide Charter issues. This significance arises from the striking similarity between the description of the Commissioner in John Doe and the expertise of labour boards as described in Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, at pp. 235-36, quoted with approval in the discussion of "practical considerations" in Cuddy Chicks (at p. 16):

> The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

At page 783 of John Doe, the majority of the Divisional Court explicitly likens the Commissioner's expertise to that of labour relations tribunals:

> Faced with the task of developing and applying the new statutory concept of unjustified invasion of privacy, one of the touchstones of its unique regulatory scheme, the commission is performing the same task begun years ago by labour tribunals in the development of then novel concepts, such as unfair labour practices.

In my view, these passages provide a much more realistic assessment of the Commissioner's expertise and the difficult adjudicative tasks it must perform than the more limited description quoted by the AG from Re Solicitor General of Ontario et al., supra, and the similarity between the expertise of the Commissioner and labour boards provides a strong indication that the Commissioner **is** the sort of administrative body which has Charter jurisdiction.

It is also important to bear in mind the extent to which the Commissioner's adjudicative role relates to basic social and democratic values that do show a significant similarity to Charter values, both in terms of the kind of analysis that is required, and the social consequences that accompany such decisions. This aspect of the Commissioner's adjudicative function, which is especially prominent in the application of section 23, has a significant bearing on the Commissioner's competence in the constitutional field. Section 23, often referred to as the "public interest override," requires the Commissioner to weigh the public interest in disclosure against the policy purposes that underlie many of the exemptions in the Act.

Section 23 was a central issue in the judicial review of Order P-1398 [Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner) (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)], where the Court of Appeal recognized the Commissioner's expertise regarding its application, stating:

> The legislature has entrusted the application of s. 23 to the issue of any particular record first to the head, and the to the inquiry officer [a statutory delegate of the Commissioner]. Both the application of the section and therefore its interpretation are within the expertise of the inquiry officer under the Act whose decision must be accorded deference by the courts. The standard of review is therefore reasonableness.

The task of discerning the public interest, a vital exercise in the formulation of public policy, has thus been found to be within the Commissioner's expertise, and decisions of the Commissioner in this area (Orders P-1398 and P-1190) have been upheld by the Ontario Court of Appeal. In the case of Order P-1398, an application by the Ministry of Finance for leave to appeal to the Supreme Court of Canada was denied.

In my view, this recognized area of expertise is sufficient to put to rest any potential concerns about "a capable determination on the constitutional issue" as far as the Commissioner is concerned. Further in my view, the Commissioner's "expertise," and its ability to make sound Charter decisions, is underlined by the expertise it has been found to possess regarding section 23, which requires a sophisticated understanding of the fundamentals of democracy and a weighing of public interest considerations in a way that closely resembles decision-making under the Charter.

Moreover, since the application of section 23 requires a balancing between the purpose of the exemptions and the public interest in disclosure of information, it demonstrates an ability to analyze "competing policy concerns," an ability described in Cuddy Chicks as "vital" in assessing Charter matters in a regulatory context (at pp. 16-17).

It is also important to note that the AG's attempt to suggest that the Commissioner lacks expertise on legal and constitutional issues, to the extent that this argument is derived from the standard of review applied on judicial review, represents a flawed analogy. The consistent view of the Court has been that **no** tribunal that possesses the authority to decide general questions of law, and hence to decide Charter issues, is entitled to

curial deference as regards those decisions, because of lack of constitutional expertise. The majority in Douglas College states this in the following way:

> I should add that constitutional determinations by arbitrators or other administrative tribunals or agencies should, of course, receive no curial deference; see *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, supra, at p. 31, per Grange J.A. **They are not there acting within the limits of their expertise.** (p. 605; emphasis added)

I also note that, in Collins, the B.C. Supreme Court, which as previously noted discusses the Cooper decision in its reasons, states that all parties acknowledge "... that the [B.C. Human Rights] Tribunal does not have special expertise in determining questions of law and that there will be no curial deference afforded to the decision of the tribunal with respect to the constitutional and jurisdictional questions." Nevertheless, the Court found that the Tribunal had the power to make Charter decisions.

In this same group of submissions, the AG also comments on the fact that "the legislature does not require the Commissioner to be a judge or to have any special legal training." This appears to be a reference to the fact that the Commission in Cooper is contrasted to the Umpire in Tetréault-Gadoury, who is required to be a Federal Court judge, as an example of lack of expertise. Although I believe that the allegations about the Commissioner's lack of expertise are more than adequately addressed by the preceding analysis, I would also point out that other decisions of the Supreme Court of Canada and other superior courts have consistently held that such training is not necessary for Charter jurisdiction. The Supreme Court's comments in Cuddy Chicks provide a good introduction to this line of jurisprudence:

> It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of Charter matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical. Therefore, **while Board members need not have formal legal training, it remains that they have a very meaningful role to play in the resolution of constitutional issues**. (pp. 16-17; emphasis added)

Moreover, in Northwest Territories, the Supreme Court of the Northwest Territories dealt with a similar objection to the Charter jurisdiction of WCAT. It considered the passage from Cooper relied on by the AG in this regard, as quoted above, and after quoting the passage from Cuddy Chicks that I have just reproduced, the Court stated (at p. 225-6):

> There is no question that although members of the Appeals Tribunal may in fact lack legal training and expertise, they have access to legal advice and counsel. Also, although the members or some of them may in fact lack legal training and expertise, there is no bar to an individual with such training and expertise being appointed as a member.
>
> I conclude that lack of legal expertise is not an impediment to a finding that the Appeals Tribunal has the jurisdiction in question.

Earlier in its reasons, the Court also commented (at p. 224) that "although [WCAT's] members may not have legal training, that has not been considered in any of the cases ruled on by the Supreme Court of Canada to be essential."

In the case of the Information and Privacy Commissioner, a majority of her delegated adjudicators, including the Assistant Commissioner, are in fact lawyers, and in any event, like the members of WCAT in the Northwest Territories case, all adjudicators also have access to in-house legal counsel.

In my view, the AG's submissions on legal expertise do not provide a basis for concluding, as a practical matter, that the legislature did not intend the Commissioner to have the power to decide general questions of law, or Charter issues.

Route of Appeal and Efficiency

The AG submits:

> The Commissioner is subject to judicial review. As suggested by the majority in *Cooper*, it would be more efficient for parties seeking a declaration pursuant to s. 52(1) of the *Constitution Act, 1982*, to do so from the Superior Court, rather than form an administrative tribunal such as the Commissioner. A finding by the Commissioner under s. 52(1) would likely be subject to judicial review in any case and the efficiencies normally valued in tribunal proceedings would be impaired were the Commissioner to be burdened with the added complexity, time and cost of hearing constitutional questions. The following passage from *Cooper* [at p. 897, see also 895], while referring to human rights complaints is, the Attorney General submits, equally apposite in this context:
>
> > Finally, and perhaps most decisively, the added complexity, cost, and time that would be involved when a tribunal is to hear a constitutional question would erode to a large degree the primary goal sought in creating the tribunals, i.e., the efficient and timely adjudication of human rights complaints.

As the previous discussion (at p. 895 of Cooper) makes clear, this conclusion is, in my view, closely tied to the Canadian Human Rights Commission's lack of expertise, a characteristic that I have already concluded is not shared by the Information and Privacy Commissioner:

> To my mind the relevant practical considerations do not argue in favour of having the [CHR] Commission consider *Charter* issues. Without question there is on the surface an attraction and efficiency, at least for the complainant, in having the constitutional matter first heard by the Commission. That will always be so, however, and in the present situation I am of the view that the reality would in fact be different. It is likely that in a case such as

> the one presently before us the decision of the Commission on the validity of a provision of the Act under the *Charter* would be the subject of judicial review proceedings in the Federal Court. It would be more efficient, both to the parties and to the system in general, to have a complainant seek a declaration of constitutional invalidity in either the Federal Court or a provincial superior court. In such a setting the question can be debated in the fullness it requires and the proper expertise can be brought to bear on its resolution.

This conclusion is also tied to the CHRC's non-adjudicative, screening role, as the following passage (which appears just before it, at p. 894) makes clear:

> ... one of the aims of the [CHR] Commission, to deal with human right complaints in an accessible, efficient and timely manner, would be disrupted and interfered with by allowing the parties to raise constitutional issues before the Commission. Such issues would of necessity require a more involved and lengthy process than is presently the case. **In my view, it was not the intention of Parliament that the Commission's screening function become entangled in this manner.** (emphasis added)

Moreover, to date, Charter decisions of the Commissioner such as those referenced earlier in this order, have not been the subject of judicial review applications. Thus the objective of efficiency has been served. Moreover, unlike the CHRC in Cooper, the Commissioner is not a screening body and frequently deals with complex legal problems and cases having a significant public policy importance.

If the possibility of judicial review or the fear of adding complexity to administrative proceedings were, in and of themselves, sufficient reason to deny administrative bodies the authority to make Charter rulings, then no such body, including the OLRB would be found to possess it. All such proceedings of tribunals are subject to judicial review, and efficiency was no doubt one of the purposes for the creation of the Information and Privacy Commissioner, the Ontario Labour Relations Board, and all other bodies of this nature.

For all of these reasons, I am not persuaded that route of appeal or efficiency considerations present any kind of practical limitation on the Commissioner power and ability to make Charter decisions. And in any event, as noted previously, "practical considerations" cannot reverse a legislative intent to confer the authority to decide general questions of law, and Charter issues, on a tribunal. In my view, that intention has already been definitively demonstrated to exist with respect to the Commissioner.

Independence

While this "practical" issue was not raised by the parties I would simply note that the Commissioner **does** have an assurance of independence, as reflected in the fundamental principles set out in section 1 of the Act which states:

> The purposes of this Act are,

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) **decisions on the disclosure of government information should be reviewed independently of government**; ... (emphasis added)

Participation of the AG

This issue is also mentioned in Cuddy Chicks as a "practical consideration." The Court, in assessing whether a tribunal process was suitable for deciding Charter issues, states (at p. 18):

> To the extent that the Attorney General will intervene, the relative disadvantage of tribunals versus courts is lessened.

On this point, the AG states in its representations:

> "The Attorney General is not in a position to provide a general statement of "willingness" of engaging in regular interventions before the Commissioner should the Commissioner's *Charter* jurisdiction be affirmed.

In this regard, it is to be noted that the Commissioner's policy regarding Charter issues is that, in keeping with section 109 of the Courts of Justice Act, the Commissioner will not consider or rule on Charter issues unless a Notice of Constitutional Question is served. This notice must be served on, among others, the Attorneys General of Ontario and Canada.

Moreover, where a potentially significant Charter issue is raised (as in the present appeals), the AG is added as a party and provided with the opportunity to participate.

Finally, as with other "practical considerations," this cannot be used to negative a clearly implied statutory authority to consider general questions of law which, as exhaustively stated above, is in my view established as regards the Commissioner.

Conclusions Regarding *Charter* Jurisdiction

To summarize, the following are the essential reasons to conclude that the Commissioner has jurisdiction to consider Charter issues under section 52(1) of the Constitution Act, 1982.

Distinguishing Cooper:

- the Commissioner is an adjudicative body, not a "gatekeeper" with only a screening function as is the Canadian Human Rights Commission in *Cooper*;

- the Commissioner is not being asked to read down jurisdiction-limiting sections, as was the case in Cooper.

Power to Decide General Questions of Law

- section 54(1) of the Act requires the Commissioner to make an order "... disposing of the issues raised by the appeal" and section 54(3) grants the adjudicator the power to include in the order "... any terms and conditions the Commissioner considers appropriate";

- in order to satisfy the requirement imposed by section 54(1), the Commissioner has ruled on non-Charter constitutional issues such as division of powers and paramountcy, as well as external provincial and federal statutes and common-law questions;

- because of the multifaceted legal questions the legislature has clearly called on the Commissioner to decide in the course of exercising its statutory mandate, including a broad variety of statutory and common law questions external to the Act, the only reasonable conclusion is that the legislature has, by implication, conferred the power to decide general questions of law on the Commissioner;

- the majority of the Divisional Court in John Doe recognized that the Commissioner is called on to "find facts and decide questions of law."

Practical Considerations Favouring the Commissioner's Authority to Decide Charter Issues

- the Commissioner's independence as guaranteed by section 1(a)(iii) of the Act;

- the multiplicity of powers granted to the Commissioner under section 52 to procure required evidence and involve all parties that may be necessary to fully consider any relevant issue;

- the ability of the Commissioner, as affirmed by the Courts, to order the sharing of representations to permit comment by other parties, or, in an appropriate case, to hold a live hearing in the presence of all interested parties;

- the ability of the Commissioner, as an adjudicative body, to be alert to evidentiary requirements and impose an appropriately high standard where the evidence relates to a Charter issue;

- the recognition of the Commissioner as an expert tribunal by the Court in John Doe, supra with the concomitant advantages of its expert analysis in its reasons for consideration by the Court in the event of a judicial review;

- the recognition of the Commissioner's expertise with respect to section 23 in Minister of Finance, supra and the close parallel between the required analysis under section 23 of the Act and Charter issues, including the need to analyze competing policy concerns within that area of expertise;

- the fact that the Commissioner's mandate is said to be similar to that of labour tribunals in John Doe, combined with the fact that the Supreme Court of Canada has repeatedly found that such bodies have Charter jurisdiction;

- the legal expertise available to the Commissioner's adjudicators as a result of their own legal training and/or the presence of dedicated legal counsel to give them legal advice whenever required;

- the desirability of speedy and accessible administrative decision-making on Charter issues, particularly in light of the fact that the Commissioner's previous Charter decisions have not been challenged on judicial review.

- the importance of recognizing the Charter, and the constitution generally, as the "supreme law of Canada" as set out in section 52(1) of the Constitution Act, 1982.

In my view, both the Commissioner's authority to decide general questions of law under the Act and the practical considerations I have reviewed provide support for concluding that the Commissioner has the power to consider and decide Charter issues under section 52(1) of the Constitution Act, 1982, and therefore I find that the Commissioner and her delegates do have this power.

The Impact of Section 2(b) of the *Charter*

In its very detailed representations, the CLA submits that disclosure of the records would be justified under the guarantee of freedom of expression found in section 2(b) of the Charter. This section states:

> Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

The CLA submits that sections 14 and 19 of the Act must be interpreted and applied consistently with Charter principles, which entails "a weighing between the s. 2(b) interests in the case and the countervailing interests as each exemption is assessed." As the case law makes clear, "consistent interpretation" is onlyan option where the application of the provision in question is ambiguous and Charter values provide interpretive assistance. The principle arises from a line of cases beginning with Hills v. Canada (Attorney General), supra. The majority reasons of L'Heureux-Dubé J. in Hills state the principle as follows (at par. 93):

> Appellant, while not relying on any specific provision of the Charter, nevertheless urged that preference be given to Charter values in the interpretation of a statute, namely freedom of association. I agree that the values embodied in the Charter must be given preference over an interpretation which would run contrary to them.

In my view, this means that where more than one interpretation of a statutory provision is possible, that provision must be interpreted consistently with the Charter. This view is reinforced by in the reasons of Lamer J.(as he then was) in Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038. Mr. Justice Lamer dissented in part, but his reasons in relation to "the applicability of the Charter to administrative decision-making" were adopted in the majority reasons of Dickson C.J.C. On this point, Mr. Justice Lamer states (at pp. 1077-8):

> The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, **there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect**. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. (emphasis added)

The AG submits that sections 14 and 19 are clear and unambiguous, and not subject to more than one interpretation.

As is clear from my analysis of the application of section 14 (Record 1) and section 19 (Records 2 and 3), there is no ambiguity as to the meaning or application of these sections in the circumstances of these appeals that would allow for a reinterpretation "consistent" with Charter values. Therefore, in this case, I find that "consistent interpretation" is not an available remedy.

The CLA also submits that if the section 2(b) interests have not been taken into account in interpreting and applying section 14 and 19, "... then it is necessary for [these sections] to be read into s. 23 of the Act so that those interests can be taken into account in the assessment of the public interest." This submission is based on Schachter v. Canada, supra. The majority reasons of Lamer C.J. in that case discuss the remedies available under section 52(1) of the Charter. He is of the view that "reading in" is available under that section in addition to the more obviously available remedy of striking down, in whole or in part (which clearly arises from an inconsistent law being "of no force or effect"as mentioned in section 52(1)). He describes the criteria for applying the remedy of "reading in" as follows (p. 698):

> In the case of reading in the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. This has the effect of extending the reach of the statute by way of reading in rather than reading down. (underlined emphases are by the Court)

"Reading in" may arise from or be limited by "respect for the role of the legislature." The majority reasons in Schachter note that limitations of this nature arise in the following way:

> Of course, reading in will not always constitute the lesser intrusion for the same reason that severance sometimes does not. In some cases, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. For example, in a benefits case, it may not be a safe assumption that the legislature would have enacted a benefits scheme if it were impermissible to exclude particular parties from entitlement under that scheme. (p. 700)

As regards the CLA's proposal to read in sections 14 and 19 as exemptions subject to the "public interest override" in section 23, I believe it is helpful to consider the legislative record to determine whether the legislature would have passed the section if it had included sections 14 and 19 as exemptions subject to the override.

The Standing Committee on the Legislative Assembly debated this issue on May 13, 1987. The government proposed that section 23 be added to the Bill to provide a general "public interest override" section for a specified list of exemptions excluding sections 14 and 19, among others. Ian Scott, who was then the Attorney General, explained the intent behind the new section, as follows (at p. M-7):

> ... we have recognized [MPP] Ms. Martel's concern that there should be a public interest override in a number of the exemptions, **but not in others**. (emphasis added)

MPP Evelyn Gigantes moved an amendment to the new section 23 to add, among others, sections 14 and 19 to those that could be the subject of the override. The Committee heard discussion of the merits of

adding both sections 14 and 19 to the override (at pages M-15 and M-17 though M-20) and defeated the amendment which would have added these two exemptions (at p. M-21). Therefore, in my view, the proper conclusion is that the decision not to include sections 14 and 19 in section 23 was deliberate, and relates to the policy purposes underlying those exemptions (i.e. protecting law enforcement activities and preserving solicitor-client privilege).

Schachter also indicates that "reading in" could in some circumstances be justified "in order to respect the purposes of the Charter." The Court provides the following guidance about the availability of "reading in," bearing in mind the dual objectives of respecting the role of the Legislature, and respecting the Charter (at p. 702):

> Reading in should therefore be recognized as a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfil the purposes of the Charter and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the Charter.

Since it appears that reading in would violate the legislature's intention, this remedy would, in my view, not be appropriate in this case as it would fail the test in Schachter of "minimizing" interference with legislative intention.

As an alternative to "reading in," the CLA submits that the section 24(1) remedy of "constitutional exemption" ought to apply to permit access in **this** case without affecting the Act in a permanent way, to avoid an unconstitutional "effect." In my view the authorities do not, overall, support the CLA's request for this type of relief.

In its representations, the AG argues that this remedy is only available if it arises from the unique and special circumstances of a particular individual before the Court, for example, an exception based on one's religious affiliation. This argument is borne out by several cases cited by the CLA.

In R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, the Supreme Court of Canada struck down Alberta's Lord's Day Act because it was found to infringe the guarantee of freedom of religion in section 2(a) of the Charter, and not to be saved under section 1. The Court discusses (but does not apply) the concept of a "constitutional exemption" in the following terms (at p. 315):

> ... it is one thing to claim that the legislation is itself unconstitutional, it is quite another to claim a "constitutional exemption" from otherwise valid legislation, which offends one's religious tenets.

In R. v. Edwards Books and Art, [1986] 2 S.C.R. 713, the Court declined to strike down Ontario's Retail Business Holidays Act, finding that although freedom of religion was abridged, the breach was saved under section 1. The Court provided a further explanation of the concept of "constitutional exemption" in its

refusal to adopt that approach, because of its conclusion that an exception in the legislation itself provided for the necessary exemption (at p. 783):

> In *Big M Drug Mart Ltd.* at p. 315, the majority of the Court left open the possibility that in certain circumstances a "constitutional exemption" might be granted from otherwise valid legislation to **particular individuals** whose religious freedom was adversely affected by the legislation. (emphasis added)

As the AG points out, there is nothing about the CLA that would single it out to permit a constitutional exemption, in the event that I was to conclude that non-disclosure in this case violates the Charter.

The AG's interpretation is also supported in Hogg, Constitutional Law of Canada, 4th ed. (Toronto: Carswell's, Looseleaf), at page 37-16, where the author describes this remedy as follows:

> The Supreme Court of Canada has occasionally indicated, obiter, that it might be willing to grant a "constitutional exemption" from "otherwise valid legislation" that would be unconstitutional in its application to particular individuals or groups.

In R v. Seaboyer, [1991] 2 S.C.R. 577, the Court declined to grant a constitutional exemption to an accused in connection with one of several parliamentary attempts to amend the Criminal Code to include a "rape shield" section that would block testimony about a complainant's prior behaviour. The Court instead struck down the provision, finding that to allow a constitutional exemption in cases where the trial judge felt this was justified would re-introduce the very form of judicial discretion that Parliament was seeking to preclude. In that particular case, the Court did not analyze the "individual characteristics" of the proposed recipients of the exemption but instead based its decision on statutory interpretation.

For the most part, however, when the Supreme Court has considered granting a constitutional exemption, it has been on the basis of the particular characteristics of the individuals requesting that remedy. I find that the CLA does not qualify and therefore this remedy is not available.

Thus the remedies requested by the CLA, namely "consistent interpretation," reading in and constitutional exemption, are not available in the circumstances in these appeals. Nevertheless, as noted above, the section 52(1) remedy of striking down could be available in the event that sections 14 or 19, under which the records at issue are exempt, are inconsistent with the Charter. Because of the unequivocal language of section 52(1) of the Constitution Act, 1982, which stipulates that any law that is inconsistent with the constitution is "of no force or effect," I will consider whether this remedy is available even though it was not specifically requested by the CLA. If my analysis establishes that there is a Charter breach, it also becomes necessary to determine whether the provision is saved as a "reasonable limit" under section 1 of the Charter.

Substantive *Charter* Analysis

Introduction

The "Background" section of this order and the CLA's submissions regarding the public profile of the investigation into allegations of improper behaviour by police and Crown provide the factual underpinning of the CLA's Charter arguments.

As I noted earlier, the CLA has relied on the Supreme Court of Canada decision in R. v. Stinchcombe, supra, one of the leading cases on the importance of Crown disclosure to an accused person. The Court, in unanimous reasons, described the nature of these obligations as follows:

> Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. Surprisingly, in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system has lingered on ...
>
> It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. ...
>
> I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.

The CLA places particular reliance on the last paragraph to justify its argument that there is a section 2(b) right to disclosure of the records at issue for purposes of public discussion.

However, it is important to note that the whole context of Stinchcombe was a criminal prosecution, and the obligation to disclose arises within the context of litigation, as the passages quoted above make clear. As such, notwithstanding the "property of the public" analysis, the obligations established by Stinchcombe require disclosure **to the defence** to ensure that the accused receives a fair trial. This is made explicit in the following passage from R. v. C. (M.H.), [1991] 1 S.C.R. 763), in which McLachlin J. (as she then was) summarized the obligation thus:

> This Court has previously stated that the Crown is under a duty at common law to disclose to the defence all material evidence whether favourable to the accused or not.

As regards its relationship to Charter values, Stinchcombe relates to the right to make full answer and defence that arises under section 7 of the Charter, and not to the right of freedom of expression under section 2(b), as the following passage makes clear:

> The general principles referred to herein arise in the context of indictable offences. While it may be argued that the duty of disclosure extends to all offences, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offences. Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the Charter may be of a more limited nature. A decision as to the extent to which the general principles of disclosure extend to summary conviction offences should be left to a case in which the issue arises in such proceedings. In view of the number and variety of statutes which create such offences, consideration would have to be given as to where to draw the line. Pending a decision on that issue, the voluntary disclosure which has been taking place through the co-operation of Crown counsel will no doubt continue. Continuation and extension of this practice may eliminate the necessity for a decision on the issue by this Court.

This passage also underlines the fact that Stinchcombe is concerned with disclosure in the context of a criminal trial, and that even within that context, its application may well be limited to trials involving indictable offences.

The CLA's representations on this point also mention that "the deliberate suppression of information which should be disclosed may constitute obstruction of justice under the Criminal Code," and that "the obligation of the state to make full and timely disclosure is enshrined as part of the accused's right to make full answer and defence under section 7 of the Charter." In my view, however, these themes also relate to the conduct of a criminal prosecution. In the circumstances of these appeals, this interest addressed in Stinchcombe is met by the fact that, as a result of concerns about non-disclosure to the defence, all charges against the accused individuals were stayed by the trial judge.

The Open Court Principle

The CLA places significant reliance on a line of cases that arise from the principle of open court decisions. These include Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, in which the Court struck down sections 30(1) and (2) of the Alberta Judicature Act, which prohibited publication of anything but the most generic information about matrimonial and civil trials, respectively, on the grounds that they constituted unreasonable limits on freedom of expression which were not saved as "reasonable limits" under section 1.

The CLA cites the following passage from this decision (at p. 1336):

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the Charter which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.

However, as the following passages indicate, the context for this statement is the necessity for open court proceedings, and the importance of having significant cases reported in the media (at pp. 1337 and 1339-40):

> There can be no doubt that the courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens, but for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts. As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public ....
>
> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.
>
> There is another aspect to freedom of expression which was recognized by this Court in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712. There at p. 767 it was observed that freedom of expression "protects listeners as well as speakers." That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings -- the nature of the evidence that was called, the arguments presented, the comments made by the trial judge -- in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as

> to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.

In my view, the connection between freedom of expression and open court proceedings cannot be analogized to create a similar nexus between freedom of expression and criminal investigations undertaken by the police, or the deliberations of crown prosecutors as to whether or not charges should be laid at the conclusion of a criminal investigation. For one thing, as the Court makes clear in Edmonton Journal (at p. 1338):

> The importance of the concept that justice be done openly has been known to our law for centuries. In Blackstone's Commentaries on the Laws of England (1768), vol. III, c. 23, at p. 373, the following observation appears:
>
> > This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk ....

This principle is at the heart of the decision in Edmonton Journal and it is significant that no similar historical principle exists relating to criminal investigations or the Crown's decision-making process regarding the laying of criminal charges. Moreover, there are clearly times when such processes ought not to be public, based on privacy and fairness concerns.

Leafleting

The CLA also cites a line of cases that relate to freedom of expression as regards leafleting. Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139 concerned the prohibition by an airport in Quebec against distribution of political pamphlets by the Committee for the Commonwealth of Canada, purportedly under a section of the Government Airport Concessions Regulation. The judges disagreed on whether the regulation actually applied in this case but all found that the activity was protected by section 2(b). The majority also found that the regulation infringed the Charter and was not saved under section 1. However, the decision consists of six sets of reasons, which differ from each other at times. Nevertheless I believe all would agree with the following sentiments expressed by L'Heureux-Dubé J. in her introduction to the topic (p. 170):

> Freedom of expression cannot be jettisoned in any system which values self-government--political participation is valuable in part because it enhances personal growth and self-realization. Rand J. for this Court in *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306, described freedom of expression as "little less vital to man's mind and spirit than breathing is to his physical existence." Cardozo J., for the United States Supreme Court in *Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327, proclaimed freedom of

> expression to be "the matrix, the indispensable condition, of nearly every other form of freedom."
>
> The importance of the freedoms in s. 2 of the Charter has been articulated from the earliest Charter cases. I would point to *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, in which Dickson J., referring to the American experience, made these remarks albeit in the context of the freedom of conscience and religion in s. 2(a) (at p. 346):
>
> > It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental." They are the sine qua non of the political tradition underlying the *Charter*.

Similar sentiments are expressed in U.F.C.W. v. Kmart Canada Ltd., [1999] 1 S.C.R. 139, 176 D.L.R. (4th) 607, in which the Court found that the definition of "picketing" in section 1(1) of the B.C. Labour Relations Code, which was broad enough to prohibit leafleting, offended section 2(b) and this prohibition was not saved by section 1.

The CLA quotes the following passages from this judgment (at pp. 620-621, D.L.R.):

> Freedom of expression is fundamental to freedom. It is the foundation of any democratic society. It is the cornerstone of our democratic institutions and is essential to their functioning ... Moreover, it has repeatedly been held that rights and freedoms under the *Charter* must be interpreted generously in order to secure the full benefit of the *Charter*'s protection.

In my view, however, the sentiments expressed in these cases are not sufficient to resolve the fundamental problem faced by the CLA in pursuing its Charter claim, which is to establish a right of **access** to this particular information in connection with its section 2(b) rights. The CLA's right to engage in public debate and, in particular, to distribute materials in furtherance of that objective, have not been challenged, as were the rights of those seeking to disseminate information in Commonwealth and in U.F.C.W. v. Kmart.

As the AG points out, the CLA is free to pursue its discussion of the issue of disclosure in criminal proceedings:

> ... the requester is not (as it asserts throughout its submissions) prevented from expression with respect to the topic of Crown disclosure ... The Attorney General submits that the number of press articles listed by the requester shows that there can be, and has been, discussion of this particular case ... The requester, and the press or any other group, are

> free to continue this particular expression and to express desire for further information from the government. Such efforts to bring public pressure on the government and influence government behaviour are at the very core of the s. 2(b) right and the democratic process. S. 2(b), however, does not guarantee that every attempt to influence government will be successful.

"Core Values" of the Charter

The CLA argues that the closer the particular expression is to the "core values" of s. 2(b), the more it is to be fostered and protected. In support of this proposition it relies on Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 139 D.L.R. (4th) 385. This case relates to a publication ban under the Criminal Code, and as such, it arises from the common law tradition of open court proceedings. The passage cited by the CLA states (at p. 394):

> In the case of freedom of expression, this Court has consistently held that the level of constitutional protection to which expression will be entitled varies with the nature of the expression. More specifically, the protection afforded freedom of expression is related to the relationship between the expression and the fundamental values this Court has identified as being the "core" values underlying s. 2(b).

Although this statement about "core values" supports the CLA's position, it must be interpreted in light of the Court's warning against interpreting this guarantee too broadly, which appears at the conclusion of the following passage, later in this same judgment (at pp. 396-398):

> It is by ensuring the press access to the courts that it is enabled to comment on court proceedings and thus inform the public of what is transpiring in the courts. To this end, Cory J. stated in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, at p. 475, 85 D.L.R. (4th) 57 (S.C.C.):
>
> > The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being.
>
> From the foregoing, it is evident that s. 2(b) protects the freedom of the press to comment on the courts as an essential aspect of our democratic society. It thereby guarantees the further freedom of members of the public to develop and to put forward informed opinions about the courts. As a vehicle through which information pertaining to these courts is transmitted, the press must be guaranteed access to the courts in order to gather information. As noted by Lamer J., as he then was, in *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, at p. 129, 52 D.L.R. (4th) 690 (S.C.C.): "Freedom of the press is indeed an important and essential attribute of a free and

> democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom." Similarly, it may be said that measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press. To the extent that such measures prohibit public access to the courts and to information about the courts, they may also be said to restrict freedom of expression in so far as it encompasses the freedom of listeners to obtain information that fosters public criticism of the courts.
>
> At this point, however, I should like to make a number of caveats to the recognition of the importance of public access to the courts as a fundamental aspect of our democratic society ... I do not accept that the necessary consequence of recognizing the importance of public access to the courts is the recognition of public access to all facets of public institutions. The intervener, Attorney General for Saskatchewan argues that if an open court system is to be protected under s. 2(b) of the Charter on the basis that the public has an entitlement to information about proceedings in the criminal courts, then all venues within which the criminal law is administered will have to be accessible to the public, including jury rooms, a trial judge's chambers and the conference rooms of appellate courts. The fallacy with this argument is that it ignores the fundamental distinction between the criminal courts, the subject of this appeal, and the other venues mentioned by the intervener. Courts are and have, since time immemorial, been public arenas. The same cannot be said of these other venues.
>
> Thus, to argue that constitutional protection should be extended to public access to these private places, on the basis that public access to the courts is constitutionally protected, is untenable.

In my view, the CLA's argument of constitutional entitlement to information about matters which do not take place in open court is significantly undermined by this caveat. This is especially so in the circumstances of these appeals. As the AG points out, the open court principle relates closely to section 11(d) of the Charter and its guarantee that "[a]ny person charged with an offence has the right ... to be presumed innocent until proved guilty in a fair and public hearing by an independent and impartial tribunal." This underlines the point that openness of criminal court proceedings is aimed at the protection of the innocent from wrongful conviction, an objective which is fostered by public scrutiny. In this case, charges were stayed and no one is facing a criminal charge.

In this part of its argument, the CLA refers once again to Committee for the Commonwealth of Canada, supra, and quotes the following passage:

> The pursuit of truth, as that notion has developed in the context of freedom of expression, relates to the function of free and open discussion in arriving at the truth. The encouragement of "social and political decision-making" (*Irwin Toy*, at p. 976), which is the essence of the value of "community participation," recognizes the value of public

> discussion and debate on social and political matters. Finally, the encouragement of a tolerant and welcoming environment which promotes diversity in forms of self-fulfilment and human flourishing recognizes the role of expression in maximizing human potential and happiness through intellectual and artistic communication. (at p.241, S.C.R.)

These principles were canvassed in the earlier case of Irwin Toy v. Quebec (Attorney General), [1989] 1 S.C.R. 927. Like Committee for the Commonwealth of Canada, Irwin Toy concerns an attempt to suppress leafleting. In my view, these principles once again relate to the right to **communicate** one's ideas. The CLA does not argue, nor could it, that it is in any way being prevented from expressing its views, based on the published information about the prosecution of those accused of the murder. The orientation of Irwin Toy toward unimpeded expression of one's ideas, as opposed to access to information, is clear from the following passage (at pp 978-9):

> If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee .... If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfilment and human flourishing.

The CLA appears to take the position that failure to disclose the requested information is a means by which the government is "restricting the content of expression." I do not agree. As mentioned above, Irwin Toy is a case in which an attempt was made to restrict leafleting. In other words, it relates, as does the Committee for the Commonwealth of Canada case, to an attempt to suppress the active communication of ideas. It does not advance the CLA's argument that the Charter entitles it to obtain information not now in its possession for the purpose of expanding the information it is able to communicate.

The Rights of Listeners

The CLA also argues that it has a constitutional right to the requested information in order to enhance the rights of "listeners." I have already quoted a passage that deals with this issue from the Edmonton Journal case, above. In my view, that case concerned the principle of open courts and the importance of that principle to foster public confidence in their workings, as evidenced by the following excerpt:

> It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.

Because it relates to the open court principle, and the relevant criminal proceedings in this case are completed, I am not persuaded that Edmonton Journal supports a constitutionally protected right to the information that is at issue in these appeals.

Nor is such a right supported by the other cases referring to the rights of "listeners" advanced by the CLA. Rocket v. Royal College of Dental Surgeons, [1990] 2 S.C.R. 232 concerns the right of dentists to advertise, and strikes down an Ontario regulation prohibiting this activity as an unjustifiable restriction on freedom of expression. RJR-MacDonald Inc. v. Canada (Attorney-General), [1995] 3 S.C.R. 199 reached a similar conclusion about a ban on tobacco advertising. Ford v. Quebec (Attorney General), [1988] 2 S.C.R. struck down Quebec legislation restricting the use of languages other than French in commercial signs for the same reason. Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877 struck down a provision of the Canada Elections Act which prohibited the publication of "new" opinion polls within three days before an election. In each case, the information sought to be published or expressed was in the possession of the person seeking to communicate it.

Elsewhere in its representations, the CLA cites Libman v. Quebec (Attorney General), [1997] 3 S.C.R. 569, in which a restriction on spending by non-registered groups in the Quebec referendum law was struck down on this same basis. In my view, like the cases cited in the previous paragraph, this case, which relates to the importance of public discussion, does not advance the CLA's argument, as it too fails to create or depend in any way on a constitutional right of access to government information.

Access to Property

The CLA cites Committee for the Commonwealth of Canada, supra, and Ramsden v. Peterborough (City), [1993] 2 S.C.R. 1084, which it says stand for the proposition that "[t]he Supreme Court has recognized that access to others' property is necessary in order to allow people to exercise their s. 2(b) freedom of expression meaningfully ..." As noted above, the former case relates to leafleting at an airport and the property in question was the airport itself. Similarly, in Ramsden, the issue was a City by-law prohibiting postering, and the "property" in question was public property. Again, the information being distributed was already in the possession of the persons wishing to distribute it. In my view, it is not possible to make a valid comparison between access to government information in the sense in which "access" is meant in the Act, and the right to physically attend at a particular property or premises.

Freedom of Information Cases

The CLA cites a number of "freedom of information" cases, which it acknowledges are not conclusive. In Russell v. Canadian Security Intelligence Service, [1990] F.C.J. No. 343 (F.C.T.D.), a requester attempted to have the Court strike down exemptions in the federal Privacy Act on the basis of section 2(b) (and other sections) of the Charter. The Court refused to hear these arguments on the ground that they were not properly before it for procedural reasons. In Canada (Information Commissioner) v. Canada (Prime Minister), [1992] F.C.J. No. 1054 (F.C.T.D.), the CLA argues that the Court:

> ... did recognize that if the *Charter* argument were accepted, the exemption under the federal Act would become inoperative or at least limited when documents relating to cores. 2(b) values are at issue. The Court did not deal with the issue because of the failure to serve a Notice of Constitutional Question.

In that case, the Court stated:

> Counsel pointed out that no Canadian court has yet extended the scope of the freedoms protected under paragraph 2(b) to access to government information. Counsel established that freedom of expression in the context of the press not only includes the right to disseminate information but also the right to gather it. Authority was cited in which the freedom to gather information was said to recognize the right of the press to be present at various judicial and even quasi judicial proceedings. Counsel urged that it was not a giant leap of faith to find that paragraph 2(b) applied to the gathering of government information of the type under consideration in this case.
>
> I find the arguments involving the Charter to be complex indeed. For the purposes of my analysis I will assume, without deciding, that paragraph 2(b) of the Charter applies to the type of government information under consideration in this case.
>
> In my view the decision to be made under section 14 [an exemption relating to federal-provincial affairs] is confined to the formulation of an opinion as to whether or not disclosure of information could reasonably be expected to be injurious. While section 14 does not exhaustively list the considerations to be taken into account in the decision-making process, there is no doubt that it does nothing other than empower the making of a decision that documents fall into a category exempt from the general rule of disclosure and permits confidentiality if they do. In my opinion, this is a situation analogous to the first situation identified by Lamer, C.J. in *Slaight Communications*, (*supra*). If access to government information is a protected right then it is section 14 that expressly confers the power to limit that right. As such, a Charter challenge such as the one in this case must be directed against the legislation.
> ...
>
> While there may be circumstances where an argument relating to the construction of a statute does not involve the question of its validity, applicability or operability, I cannot appreciate such a distinction in this case based upon the arguments made. Counsel argues that the information in question here contributes to "core values" thereby creating a prima facie right of access and that in these circumstances the exemption in section 14 is narrowed by paragraph 2(b) of the Charter. This argument if accepted would, to my mind, result in the inapplicability or inoperability of the exemption under section 14 or at least the limiting or narrowing of the applicability or operability of the exemption when documents relating to core values are at issue. If it does not result in the limiting or narrowing of the

> applicability or operability of the exemption then "construing" section 14 in light of the Charter serves no useful purpose.

It is clear from this discussion that the Court's "acceptance" that a successful Charter argument would result in the provision being inoperative or its scope reduced was premised on the assumption that section 2(b) applied to the type of government information under consideration. The Court did not decide that section 2(b) so applied. The case does not, in my view, support a conclusion that section 2(b) would apply to other types of government information, and in fact, expressly acknowledges that this point has not been previously decided.

Positive Obligations to Disclose

The CLA argues that in Haig v. Canada; Haig v. Canada (Chief Electoral Officer), [1993] 2 S.C.R. 995, the Supreme Court of Canada recognized that "government might be subject to a positive obligation to disclose information." The CLA quotes the following passages from the judgment:

> While the basic theoretical framework underlying freedom of expression has remained unchanged over the past two hundred years, the appellants point out that the political, economic and social conditions under which the theory must be applied have changed significantly. They urge that true freedom of expression must be broader than simply the right to be free from interference, referring to Emerson's claim in *The System of Freedom of Expression*, *supra*, at p. 4, that the state "has a more affirmative role to play in the maintenance of a system of free expression in modern society."
>
> I would agree, and it is well understood, that a philosophy of non-interference may not in all circumstances guarantee the optimal functioning of the marketplace of ideas.....
>
> One must not depart from the context of the purposive approach articulated by this Court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information.
>
> In the proper context, these may perhaps be relevant considerations leading a court to conclude that positive governmental action is required.

In the result, the Court found no violation of the guarantee of freedom of expression. With respect to the Court's statement that positive governmental action might be required at times, the Act represents a positive legislative intervention that makes certain kinds of information available, which could at times be used to facilitate the expression of opinion. In my view, Haig does not support the proposition that section 2(b) of the Charter creates a right of access to the records at issue in these appeals.

The CLA also refers to International Covenant on Civil and Political Rights with Optional Protocol (the Covenant) and to International Fund for Animal Welfare Inc. v. Canada (F.C.A.), [1989] 1 F.C. 335 (Fed. C.A.). Canada is a signatory of the Covenant, which states that freedom of expression, to which everyone is entitled, "shall include freedom to seek, receive and impart information."

The International Fund case makes it clear that the Covenant has, in fact, been interpreted as supporting a right of access to government information as an adjunct to freedom of expression. While not a freedom of information case, it involves a successful Charter challenge to a federal regulation limiting access to the seal hunt. The decision in International Fund was written by MacGuigan J.A.. He quotes the following from the reasons of the trial judge (at p. 346):

> An expansive and purposive scrutiny of s. 2(b) [of the Charter] leads inevitably, in my judgment, to the conclusion that freedom of expression must include freedom of access to all information pertinent to the ideas or beliefs sought to be expressed, subject to such reasonable limitations as are necessary to national security, public order, public health or morals, or the fundamental rights and freedoms of others....

He goes on to comment on this passage as follows (at pp. 347-348):

> In my view there can be no doubt that the Trial Judge was right in his "expansive and purposive scrutiny" of the Charter guarantee of freedom of expression. In so doing I believe he was also right in his conclusion that "freedom of expression must include freedom of access to all information pertinent to the ideas or beliefs sought to be expressed." In coming to this conclusion he cited article 19 of the International Covenant on Civil and Political Rights, to which Canada is a party, which reads as follows:
>
> ARTICLE 19
>
> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (4) For respect of the rights or reputations of others;

> (5) For the protection of national security or of public order (ordre public), or of public health or morals.
>
> The inclusion of the freedom to seek information in article 19(2) was a deliberate one, reached against the views of those who wanted the protection limited to the more passive gathering of information: Professor Karl Partsch, "Freedom of Conscience and Expression, Political Freedoms," The International Bill of Rights, New York, Columbia University Press, 1981, p. 218.

The CLA also refers to Order 27-1994 of the British Columbia Information and Privacy Commissioner, stating that "the [B.C.] Commissioner acknowledged the importance of s. 2(b) freedoms in access to information claims." Former B.C. Commissioner David Flaherty cites International Fund, quoting the passage from the trial judge's reasons reproduced above, and goes on to say:

> I agree with the above statements. However, in this case, the applicant is seeking access - not to government information - but to personal information about an individual. That individual has some fundamental rights of privacy, as supported clearly in the *British Columbia Freedom of Information and Protection of Privacy Act* ...

While it certainly can be argued that in these appeals the information at issue is personal information, the aspect that is being subjected to Charter scrutiny involves sections 14 and 19. In my view, the International Fund case and the above-noted order of the B.C. Privacy Commissioner both suggest the possibility of an obligation to disclose in connection with freedom of expression that could impact on the interpretation of access statutes in some circumstances.

A similar issue, also involving section 2(b) of the Charter and the International Fund case, was considered by the Divisional Court in Ontario (Attorney General) v. Fineberg (1994), 19 O.R. (3d) 197 (Ontario Court (Gen. Div.) Div. Ct.). The Court analyzed the issue as follows (at pp. 203-205):

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

Emerson, "Legal Foundations of the Right to Know" (1976), 1 Wash. U. L. Rev. 1; butsee *Houchins v. K.Q.E.D.*, 438 U.S. 1 (1978).
The Canadian legal authority to which we were referred essentially centres on freedom of the press in the context of our courts. Thus, cases such as *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, 45 C.R.R. 1, are distinguishable. They deal with the traditional emphasis which has been placed, in our justice system, upon an open court process. The tradition of open courts runs deep in Canadian society, as does the notion that the media are surrogates for the public. It is against this history that the Supreme Court of Canada has concluded that arguments in favour of the right of the press to report on the details of judicial proceedings are strong and that restrictions on that right clearly infringe s. 2(b). However, even this right has been confined to access to the court in contrast to information not revealed and tested in open court proceedings.

When it comes to government itself, other considerations may pertain. The information government has at its disposal, if looked at generally, potentially affects many interests, including privacy concerns of a constitutional dimension. The issue before us, therefore, is not just one of ensuring that government does its job effectively. Thus, the profound difficulty, represented by the statutory title "*Freedom of Information and Protection of Privacy Act*," in equating responsible or accountable government with transparent governance. Indeed, this may explain why there is no history of unfettered public access to all information controlled by government akin to our almost unqualified tradition of open courts.

By contrast, our political access makes government bureaucracy accountable to elected officials who, in turn, conduct their business in the context of public elections and legislatures and where the media, again, play a fundamental reporting role. Opposition parties ask questions of the government in the legislature and in committees. Opposition parties are also dedicated to causing a critical public evaluation of the government's performance. Against this tradition, it is not possible to proclaim that s. 2(b) entails a general constitutional right of access to all information under the control of government and this is particularly so in the context of an application relating to an active criminal investigation.

This does not mean that governments are unaware of the growth of bureaucracy, the related assembly of vast amounts of information and the difficulties of obtaining information by relying exclusively on the political process as described. Indeed, several mechanisms have been enacted to enhance the disclosure of such information in response to public interest in this area while, at the same time, protecting the public interest in matters of privacy. The statute in question is one example and the Ombudsman is another. There are many others. The difficult accommodation of such profoundly conflicting interests is therefore evolving in a manner consistent with political tradition and discourages sweeping *Charter* pronouncements of the type requested by the cross-applicant. In this case, we

> need not consider whether positive government support in obtaining information, in contrast to government's opposition as in *International Fund for Animal Welfare Inc. v. Canada (Minister of Fisheries & Oceans)*, [1989] 1 F.C. 335, 35 C.R.R. 359, 83 N.R. 303 (C.A.), could ever be constitutionally required.
>
> Most of the representations of the parties concerning the *Charter* centred on the issue of breach. Accordingly, the court did not obtain the assistance it would have liked in regard to s. 1. However, for the sake of completeness, we wish to provide our view on the record before us.
>
> Had there been established a s. 2(b) violation, we would have found, in these circumstances, the interests reflected in s. 14 constitute pressing and substantial objectives sufficient to support a *Charter* limitation. We would also have found, on the state of the record before us, that the institutional design of the statutory mechanisms together with the exemptions in question constitute (1) rational links between the means and the objectives, (2) minimum impairments on the right or freedom asserted, and (3) a proper balance between the effects of the limiting measures and the legislative objectives, recognizing that government need not be held to the ideal or perfect policy instrument.

This discussion takes place in the context of freedom of the press, which is in my view sufficiently linked to freedom of expression (also a section 2(b) right) to indicate that the Fineberg case has potential relevance in the circumstances of these appeals. The CLA seeks to distinguish Fineberg on the basis that sections 52 and 55(1) are not the subject of its Charter challenge. Commenting on the Court's finding that "it is not possible to proclaim that s. 2(b) entails a general constitutional right of access to all information under the control of government," the CLA states:

> Note that the CLA is not attacking any sections of the Act, nor is it asserting that there is a general constitutional right of access to all information under the control of government. Rather, the CLA merely suggests that the exemptions under the Act and s. 23 should be interpreted and applied in a manner which vindicates as much as possible the CLA's 2(b) freedom of expression and, if necessary, that this be done through the remedies of reading in and constitutional exemption.

The Court in Fineberg specifically declines to make a conclusion about "whether positive support in obtaining information, in contrast to government's opposition as in International Fund for Animal Welfare Inc. ... could ever be constitutionally required." In the present appeals, I believe it would be fair to conclude that "positive support in obtaining information" is the very thing the CLA is seeking.

The AG's overall response to the CLA's submissions on the application of section 2(b) are summarized as follows:

> The Attorney General submits that, apart from the open court principle, s. 2(b) of the *Charter* does not include the right to information. Persons are entitled by s. 2(b) to express their thoughts, opinions and beliefs and to receive others' free expressions of thought, opinion and belief. They are not entitled to have given to them all information that could possibly be relevant to whatever expression they might want to make. They are free to express their desire for information and to bring public pressure on the government to disclose it, but they are not constitutionally entitled to succeed in obtaining such information.

The AG goes on to indicate that:

- none of the cases relied on by the CLA support such a right;
- respect in principle for the interests of listeners is not sufficient to found a positive obligation on government to provide information;
- a right to information has far reaching and undesirable implications;
- Crown disclosure to the accused in a criminal proceeding should not be confused with public disclosure in the absence of an outstanding criminal charge;
- the facts of this case do not demonstrate a need for a Charter right to information.

In its reply submissions, the CLA criticizes the AG's approach, in particular its reliance on the fact that none of the cases cited represents a decision under an access statute where the Charter has been applied to require disclosure that would otherwise not have taken place. The CLA argues:

> The Attorney General's position is that the Supreme Court of Canada has not yet interpreted freedom of information legislation in light of s. 2(b) of the Charter. In its words, "none of the cases cited by the requester affirm" the application of s. 2(b) to freedom of information legislation.
>
> If the Attorney General is merely saying that the Supreme Court has never had a freedom of information question raising s. 2(b) issues before it, that is true. But that begs the question in this case. The Supreme Court of Canada has never considered the relationship between s. 2(b) of the Charter and freedom of information legislation but that does not mean that the CLA's submissions are without merit.
>
> The real question, which the Attorney General begs, is whether the Supreme Court jurisprudence – both in terms of the results of the cases and in terms of the very words and principles expressed in the cases – support the CLA's position. In its opening submissions, the CLA has quoted at length from a large number of cases and those words and principles support the CLA's position. The Attorney General does not reply to this. Rather, it seeks

> refuge in the fact that the Supreme Court has never specifically considered whether s. 2(b) should be taken into account as an interpretive device in freedom of information legislation ...
>
> In this case the CLA needs the information in order to speak out effectively on an important public issue. The CLA is only submitting that s. 2(b) be a "make-weight" or as an important factor when interpreting and applying the Act in these unusual circumstances ... It is true that there is no case *precisely* covering the point, but he CLA's position concerning s. 2(b) is only a modest application of an oft-affirmed principle.
>
> A decision by the Commission in this case that s. 2(b) of the Charter has *no application* to this context and cannot be used *at all* as a "make-weight" or as an important factor when applying the Act in these unusual circumstances would be startling in light of the Supreme Court's jurisprudence which recognizes the importance of access to facilities and information as being important aspects of the s. 2(b) freedom. It would also be very much at odds with the purpose of the Act – to afford members of the public information about the workings of government and its institutions so they can comment on them, subject to limited and necessary exceptions.
> ...
>
> The Attorney Generals submissions, if they are accepted, will mean that s. 2(b) can have no application to freedom of information determinations in all cases, for all time, regardless of the situation ... The vindication of the CLA's s. 2(b) interests in this case is not readily exportable to other areas and will not drastically affect the framework of decision-making under the Act.

Conclusions Regarding the Issue of a Section 2(b) *Charter* Violation

The following are the factors which, in my view, may support a finding that the CLA's section 2(b) rights have been infringed:

- the importance of the criminal justice system in our society;
- the well-recognized principle that justice must not only be done but be seen to be done;
- the importance of timely disclosure in criminal proceedings and the possibility that deliberate non-disclosure of relevant information might constitute an offence under the Criminal Code (e.g. obstruction of justice);
- the problems outlined by Justice Glithero regarding this particular prosecution and the apparently contradictory conclusions of the OPP;

- the prominent discussion in the media of the problems with this prosecution, including dissatisfaction with the OPP's unexplained conclusions;

- the context provided by other documented problems in the prosecutions in R. v Elliott, supra, and the Morin case;

- the suggestion in Haig, supra, that there may be situations where "... in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required";

- the statement in International Fund, supra, that "an expansive and purposive scrutiny of s. 2(b) [of the Charter] leads inevitably, in my judgment, to the conclusion that freedom of expression must include freedom of access to all information pertinent to the ideas or beliefs sought to be expressed, subject to such reasonable limitations as are necessary to national security, public order, public health or morals, or the fundamental rights and freedoms of others," which is based on the provisions of Article 19, paragraphs 2 and 3, of the Covenant;

- the statement in Order 27-1994 of the B.C. Information and Privacy Commissioner that "I agree with the above statements" (i.e. the extract from the International Fund case I have just quoted);

- the comment in Fineberg, supra that "we need not consider whether positive government support in obtaining information, in contrast to government's opposition as in [International Fund, supra] could ever be constitutionally required", which suggests that in an appropriate case, such a right might indeed be found to exist in connection with section 2(b) of the Charter, in the context of the Act.

The following are the factors which, in my view, support the opposite conclusion:

- the fact that the cases relied on most strongly by the CLA relate to the open court principle, and do not indicate the existence of a section 2(b) right of access to information beyond what is required for court purposes;

- the conclusion in C.B.C. v. New Brunswick (1996), supra, that a claim for a s. 2(b) right of access to information about the criminal court system extending beyond court proceedings and into "private places" such as a jury room, judge's chambers and conference rooms would be "untenable";

- decisions on leafleting, where the issue is discussion of information already in the possession of a person who wants to disseminate it, such as Committee for the

Commonwealth of Canada, do not further the CLA's position, which relates to information it does **not** have;

- decisions relating to the right of access to public property are readily distinguishable as access to information is a totally different concept, and again deal with situations where the information is already in the possession of the person who wants to disseminate it;

- cases relating to the rights of "listeners" are either derived from the open court principle or from the leafleting cases and are distinguishable as explained above;

- none of the cases cited actually finds a positive obligation to disclose information within the context of access legislation;

- the Fineberg case concludes that there is no general section 2(b) right of access to government information.

It is beyond dispute that the fair operation of the criminal justice system is one of the most fundamental aspects of a democratic society. This principle finds expression in the time-honoured maxim that justice must not only be done, but must also be seen to be done, and in the open court principle discussed in Edmonton Journal, supra. As noted previously, the Edmonton Journal case makes the connection between these concepts and the section 2(b) right of freedom of expression, and strikes down two sections of Alberta's Judicature Act purporting to restrict publication of information about court proceedings. In my view, these concepts provide the most powerful argument in favour of finding a section 2(b) violation in the circumstances of these appeals.

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

Moreover, I have concluded that the information at issue in these appeals falls within the caveat articulated by the Supreme Court of Canada in C.B.C. v. New Brunswick (Attorney General) (1996), supra. As noted above, the Court concluded that it would be "untenable" to argue that section 2(b) would entitle the public to have access to "all venues within which the criminal law is administered." The Court described this argument as a "fallacy" because it fails to recognize the distinction between courts, which have been public areas since "time immemorial", and other venues such as jury rooms, a trial judge's chambers and conference rooms, which have traditionally been private. I also note that, although the Act provides a

mechanism for access to information about the criminal justice system beyond what is required by the open court principle, it includes exemptions such as those at issue in these appeals, whose purposes are consistent with the Court's analysis and conclusions about the limits of section 2(b) in the C.B.C. case. Section 21 recognizes the important public policy interest in protecting the privacy of individuals who are, for example, investigated but not prosecuted. Sections 14 and 19 recognize the public interest in continuing to provide a zone of privacy to facilitate effective police investigations and allowing Crown prosecutors the protection of solicitor-client privilege. In my view, it would be an unwarranted expansion of the open court principle to find that section 2(b) of the Charter guarantees access to information about police investigations and prosecutorial decision-making.

I am reinforced in this view by the comments of the Divisional Court in Fineberg, supra. The Court acknowledged that the tradition of open courts "runs deep in Canadian society" but indicated that even the right of freedom of the press, also protected by section 2(b), "... has been confined to access to the court in contrast to information not revealed and tested in open court proceedings." Although Fineberg concerns freedom of the press and relates to a broad claim for a constitutional right of access to government information, its analysis of the open court issue and its conclusion that no general right of access exists is nevertheless relevant to the Charter issue presented by these appeals.

Accordingly, I find that no Charter violation has occurred as a result of the application of section 14 and 19 to these records, nor as a result of these exemptions not being included in section 23 as exemptions subject to the "public interest override".

Therefore, the remedy of striking down under section 52(1) of the Constitution Act, 1982 is not available, nor is any further remedy under section 24(1) of the Charter.

ORDER:

I uphold the Ministry's decision.

Original signed by: May 5, 2000
Tom Mitchinson
Assistant Commissioner