Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

– and –

THE PRIVACY COMMISSIONER OF CANADA

Intervener

(Application under section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7)

SUPPLEMENTARY MEMORANDUM OF FACT AND LAW OF THE APPLICANT, IN RESPONSE TO THE INTERVENTION

Dated: February 25, 2015

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OVERVIEW

1. The application concerns the practices of the Canadian Transportation Agency (the "Agency"), which are contrary to not only the open court principle, but also the Agency's own policies and rules implementing the open court principle; in addition, the application challenges a specific instance of these practices, where information was redacted from documents *without* any of the parties requesting so and *in the absence of a decision* ordering confidentiality.

Notice of Application, p. 3 **Applicant's Record, Tab 1, p. 3**

2. The Privacy Commissioner of Canada (the "Commissioner") advances a deformed notion of the open court principle, which guarantees public access to evidence and documents tendered only on a "need to know" basis. The Commissioner also conflates the open court principle with the legal principles that allow, in certain cases, the limiting of public access.

3. Lukács submits that the open court principle guarantees public access to all evidence and documents tendered in a (quasi-)judicial proceeding; public access can be limited, on a case-by-case basis, only if the criteria of the *Dagenais/Mentuck* test are met. Generic privacy concerns—absent a specific risk such as identity theft—do not meet the "serious risk" branch of this test.

4. Lukács further submits that if evidence and documents tendered to the Agency in adjudicative proceedings are not excluded or exempted pursuant to the *Privacy Act*, then the *Privacy Act* conflicts with and limits the open court principle in a manner inconsistent with the *Dagenais/Mentuck* test, and thus addressing the constitutional issue becomes inevitable.

5. It is further submitted that the Commissioner's analysis of the application of the *Privacy Act* to the case at bar is misguided and ignores the evidenciary record.

PART I – STATEMENT OF FACTS

6. Lukács adopts the exposition of the relevant facts contained in the Memorandum of Fact and Law dated September 30, 2014.

Memorandum of Fact and Law **Applicant's Record, Tab 4, p. 198**

PART II – STATEMENT OF THE POINTS IN ISSUE

7. The submissions of Lukács address issues raised by the Commissioner:

(i) whether the *Privacy Act* conflicts with the open court principle; and

(ii) the application of the *Privacy Act* to the present case.

PART III – STATEMENT OF SUBMISSIONS

A. THE OPEN COURT PRINCIPLE VS. THE PRIVACY ACT

(i) The meaning of the open court principle

8. The Commissioner erroneously argues that the open court principle does not require unqualified public access to the documents and evidence tendered in judicial or quasi-judicial proceedings (paras. 4 and 32). According to Chief Justice McLachlin:

> The open court principle can be reduced to two fundamental propositions. First, court proceedings, including the evidence and documents tendered, are open to the public. Second, juries give their verdicts and judges deliver their judgments in public or in published form.
>
> [Emphasis added.]
>
> **Chief Justice Beverley McLachlin: "Openness and the Rule of Law"**
> **Intervener's Authorities, Tab 14, p. 501**

9. The Commissioner confuses access to documents of investigations of non-adjudicative bodies with the open court principle (para. 53). The necessity of public access in the context of (quasi-)judicial functions is well established:

> On this basis, the Court has recognized access to information under s. 2(b) in the judicial context: "members of the public have a right to information pertaining to public institutions and particularly the courts" (*Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, at p. 1339). The "open courts" principle is "inextricably tied to the rights guaranteed by s. 2(b)" because it "permits the public to discuss and put forward opinions and criticisms of court practices and proceedings" (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480, at para. 23, *per* La Forest J.).
>
> ***Ontario v. Criminal Lawyers' Association*, [2010] 1 SCR 815, para. 36**
> **Respondent's Authorities, Tab 9, p. 350**
>
> **See also: *Criminal Lawyers' Association v. Ontario*, [2004] O.J. No. 1214, para. 75 Applicant's Supplementary Authorities, Tab 20, p. 805**

(ii) The legal test for limiting public access

10. Similarly to other constitutional rights, the open court principle can be limited, but only in accordance with s. 1 of the *Charter*. The *Dagenais/Mentuck* test is precisely the *Oakes* test tailored for the specific context of reviewing the constitutionality of limiting the openness of (quasi-)judicial proceedings.

***Named Person v. Vancouver Sun*, 2007 SCC 43, para. 94**
Intervener's Authorities, Tab 3, p. 131

11. There is only one legal framework for the exercise of a decision-maker's discretion to limit public access: the *Dagenais/Mentuck* test, which provides a flexible and adaptable analytic framework for balancing the open court principle against other public interests.

Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41, paras. 7 and 26-28
Applicant's Authorities, Tab 18, pp. 728 and 733

***Sierra Club v. Canada (Minister of Finance)*, 2002 SCC 41, paras. 53-55**
Intervener's Authorities, Tab 10, pp. 406-407

12. Thus, the legal test for balancing the open court principle against privacy interests remains the *Dagenais/Mentuck* test (or its adaptation, as in *Sierra*):

> Without denying the importance of protecting privacy and security, we must preserve the essential core of the open court principle, and the broader principle of freedom of expression.
>
> How do we do this? In Canada, we have established a common law test for balancing the open court principle against other interests. Judges may limit the open court principle if: 1) such an order is necessary to prevent a serious risk to the proper administration of justice because other reasonably alternative measures will not prevent the risk; and 2) the salutary effects of the limit on openness outweigh the deleterious effects on the rights and interests of the parties and the public.
>
> [Emphasis added.]

Chief Justice Beverley McLachlin: "Openness and the Rule of Law"
Intervener's Authorities, Tab 14, p. 523

13. The risk under this test must be real and substantial, well grounded in the evidence, and posing a serious threat to an interest that can be expressed in terms of public interest in confidentiality.

***Sierra Club v. Canada (Minister of Finance)*, 2002 SCC 41, paras. 54-55**
Intervener's Authorities, Tab 10, p. 407

14. It is settled law that a mere preference for personal or financial privacy and/or to be free from embarrassment does not meet this onerous requirement.

***Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, para. 97**
Intervener's Authorities, Tab 12, p. 488

***Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 SCR 175, pp. 8-9**
Applicant's Authorities, Tab 10, pp. 536-537

15. Therefore, contrary to the Commissioner's position (para. 50), the Agency cannot lawfully redact evidence and documents in its adjudicative files in the absence of evidence of a serious risk necessitating redaction, and a confidentiality order made by a Member of the Agency based on such evidence.

(iii) Open access cannot be limited in the absence of "serious risk"

16. Contrary to the Commissioner's claim (para. 55), the Supreme Court of Canada never held that limiting public access is consistent with the principle of openness. Instead, it recognized that the impugned provisions of the *Criminal Code* violate s. 2(b) of the *Charter*, but held that they could be saved under s. 1. Each of the cases cited by the Commissioner was driven by a "serious risk" (or lack thereof) and not by mere generic privacy concerns:

(a) In *F.N. (Re)*, although constitutionality of the legislation was not in issue, it was observed that publication of the names of juvenile offenders "may seriously impair" the rehabilitative goals of the juvenile justice system.

***F.N. (Re)*, paras. 14-17** **Intervener's Authorities, Tab 11, pp. 437-439**

(b) In *A.B. v. Bragg Communications Inc.*, the court underscored that the concern was not about A.B.'s privacy, but rather about protecting her from being revictimized and further harmed by way of cyberbullying.

***A.B. v. Bragg Communications Inc.*, 2012 SCC 46, paras. 14 and 20**
Applicant's Authorities, Tab 1, pp. 285-287

(c) *Canadian Newspapers Co. v. Canada (Attorney General)* makes no explicit reference to "privacy"; instead, it focuses on the substantial risk to the proper administration of justice, namely, that serious crime (sexual assault) may go unreported in the absence of a publication ban.

***Canadian Newspapers Co. v. Canada*, [1988] 2 SCR 122 at 131j-132d**
Intervener's Authorities, Tab 9, pp. 379-380

(d) In *CBC v. New Brunswick (Attorney General)*, which again involved sexual offences, the court confirmed the constitutionality of the discretionary powers of a judge hearing a criminal matter to exclude the public "in the interest of public morals, the maintenance of order or the proper administration of justice." The court noted that this discretion must be exercised in conformity with the *Charter*, and quashed the exclusion order in question because there was no evidence that it was necessary for the proper administration of justice.

***CBC v. New Brunswick*, [1996] 3 S.C.R. 480, paras. 51-52 and 89**
Applicant's Authorities, Tab 3, pp. 357-358 and 366-367

17. In both *Coltsfoot* and *Singer*, one or more of the parties proactively sought protection of their own information, and the court ordered only redaction of *sensitive* information, that is, information that may be used for identity theft. There is no doubt that identity theft is a serious risk and that items (1)-(6) listed in *Coltsfoot* are sensitive information (although (7) and (8) are less so). The redaction of the SIN in *Singer* is consistent with the approach of *Coltsfoot*;

however, in *Coltsfoot*, the court stressed that the redaction was not ordered because of the mere preference for personal or financial privacy of the parties.

> ***Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83,**
> **paras. 46-51 and 97 Intervener's Authorities, Tab 12, pp. 476 and 488**
>
> ***Singer v. The Attorney General of Canada*, 2011 FCA 3**
> **Intervener's Authorities, Tab 13, p. 492**

18. The Commissioner cited no case where public access or publication was limited in the absence of evidence (including judicial notice) of a concrete serious risk that goes well beyond generic privacy concerns.

19. The *Model Policy* cited by the Commissioner (paras. 56-57) is consistent with the risk-based approach of *Coltsfoot* and *Singer*, and focuses on the concrete risk of identity theft, and not on generic privacy concerns. Even with respect to highly sensitive "personal data identifiers," the *Model Policy* calls only for limiting "remote access" (i.e., over the Internet) and not for barring public onsite access to information of this nature (see paragraphs 4.6.2 and 4.6.3).

> ***Model Policy for Access to Court Records in Canada***
> **Intervener's Authorities, Tab 17, pp. 573-574**

20. Lukács takes no issue with a party before the Agency seeking a confidentiality order in the same way as in *Coltsfood* and *Singer*, based on evidence of a serious risk. Indeed, the Agency's rules contain procedures for a party seeking confidential treatment of sensitive information contained in documents, and the Agency has jurisdiction to make a confidentiality order. It is submitted, however, that the redaction of documents *without* any of the parties making a request for confidentiality, *without* evidence of a serious risk, and *in the absence of a decision* ordering confidentiality, is unlawful.

(iv) The *Privacy Act* is not based on "serious risk"

21. As the Commissioner correctly pointed out (para. 14), subsection 8(1) of the *Privacy Act* creates a general prohibition on the disclosure of personal information by government institutions without the consent of the individual.

22. The general nature of this prohibition means that disclosure is prohibited regardless of whether there is evidence of a serious risk if information is disclosed. Consequently, the scope of the prohibition in the *Privacy Act* is mandatory and incomparably broader than the "serious risk"-based analytic framework of the *Dagenais/Mentuck* test, which is discretionary.

23. Therefore, if evidence and documents tendered in the Agency's adjudicative files are not excluded or exempted under ss. 69(2) or 8(2) of the *Privacy Act*, then the general prohibition of s. 8(1) does purport to bar public access to documents to which access is guaranteed by the open court principle, and it does so in a manner that is inconsistent with the *Dagenais/Mentuck* test. Hence, in such a case, the *Privacy Act* does purport to limit the open court principle, and addressing the constitutional issue raised becomes inevitable.

B. APPLICATION OF THE PRIVACY ACT TO THE PRESENT CASE

24. The Commissioner's submissions are based on several false factual assumptions. First, contrary to the evidence, the Commissioner assumes that only "personal information" was redacted from the Agency file in question. Second, the Commissioner erroneously assumes that the redactions were made by the Agency. The evidence, however, shows that decisions as to what to redact were made by Ms. Patrice Bellerose, who is not a Member of the Agency, and who has not been delegated such discretionary powers.

(i) Exclusion for "publicly available" personal information: s. 69(2)

25. As the Commissioner conceded, "publicly available" information within the meaning of s. 69(2) of the *Privacy Act* includes information in a "court registry." This reflects a legislative intent to avoid any possible conflict with the open court principle, and to exclude documents falling within the scope of the open court principle from the application of the prohibitions of the *Privacy Act*.

> ***House of Commons Debates*, 32nd Parl., 1st session, No. 94 (8 June 1982) at 2205 (Hon. Francis Fox) Intervener's Authorities, Tab 16**

26. Evidence and documents tendered to the Agency in adjudicative matters are publicly available, unless they are subject to a confidentiality order.

> [...] section 23 of the General Rules provides that any document filed in respect of any proceeding will be placed on its public record, unless the person filing the document makes a claim for its confidentiality. [...] The record of the proceeding will therefore be public unless a claim for confidentiality has been accepted.
>
> [Emphasis added.]
>
> ***Tenenbaum v. Air Canada*, CTA Decision No. 219-A-2009, para 45 Applicant's Authorities, Tab 16, p. 689**

> Pursuant to the General Rules, all information filed with the Agency becomes part of the public record and may be made available for public viewing.
>
> [Emphasis added.]
>
> **"Important privacy information" notice of the Agency provided to parties Applicant's Record, Tab 2I, p. 121**

27. Consequently, the information contained in such documents has, as a matter of fact, been publicly available on an ongoing basis. Therefore, s. 69(2) of the *Privacy Act* preempts the Agency's ability to subsequently refuse public access to the documents based on s. 8 of the *Privacy Act*. (The legality of placing the documents on public record in the first place is addressed below.)

(ii) Act of Parliament or regulation authorizing disclosure: s. 8(2)(b)

28. Contrary to the Commissioner's position (para. 27), an implicit authorization to disclose information can satisfy s. 8(2)(b) of the *Privacy Act*.

***Wakeling v. United States of America*, 2014 SCC 72, footnote 1**
Applicant's Supplementary Authorities, Tab 24, p. 889

29. In the case of the Agency, there are two sources of authorization for disclosure of information: the open court principle and the Agency's own rules.

30. First, the Agency must exercise its powers in accordance with the *Charter*, and in particular, it is subject to the open court principle that is "inextricably tied to the rights guaranteed by s. 2(b)" (*CBC v. New Brunswick*, para. 23). The open court principle not only authorizes, but *mandates* public access to all evidence and documents tendered, subject only to orders made in accordance with the *Dagenais/Mentuck* test.

31. Section 17(b) of the *Canada Transportation Act* permits the Agency to make rules about "the circumstances in which hearings may be held in private." This further reinforces the conclusion that Parliament intended proceedings before the Agency to be presumptively open to the public, in accordance with the open court principle.

***Canada Transportation Act*, s. 17(b)**
Applicant's Record, Tab 4A, p. 242

***El-Helou v. Courts Administration Service*,2012 CanLII 30713 (CA PSDPT), para. 61**
Applicant's Authorities, Tab 6, p. 455

32. Second, both the Old and the New Rules of the Agency require placing documents received by the Agency in respect of any proceeding on its "public record," unless the person filing the document makes a claim for confidentiality.

***Canadian Transportation Agency Rules (Dispute Proceedings)*, S.O.R./2014-104, s. 7(2) Applicant's Record, Tab 4A, p. 248**

***Canadian Transportation Agency General Rules*, S.O.R./2005-35, s. 23(1) Applicant's Record, Tab 4A, p. 257**

33. The common and ordinary meaning of the phrase "public record" is that the record is publicly accessible. This interpretation is further reinforced by the context, which contrasts documents placed on "public record" with documents with respect to which confidentiality has been claimed and which are placed on the "confidential record" of the Agency.

34. The Commissioner's doubts as to the meaning of "public record" (paras. 29-30) can be easily resolved by referring to the Agency's own interpretation of its rules in *Tenenbaum v. Air Canada*, *supra* and the Agency's "Important privacy information" provided to parties, which confirm that in order to comply with the open court principle, "all information" filed with the Agency is available for public viewing, unless the Agency grants a confidentiality order.

***Tenenbaum v. Air Canada*, CTA Decision No. 219-A-2009, para 45 Applicant's Authorities, Tab 16, p. 689**

"Important privacy information" notice of the Agency provided to parties Applicant's Record, Tab 2I, p. 121

35. In light of the foregoing, the Commissioner's adoption of the Agency's position (para. 31) that no Act of Parliament or regulation exists to support a permissible disclosure under s. 8(2)(b) of the *Privacy Act* is woefully misguided.

36. Therefore, it is submitted that the only reasonable interpretation of the open court principle and the Agency's own rules is that they require, and thus authorize, public disclosure, within the meaning of s. 8(2)(b) of the *Privacy Act*, of all documents in adjudicative files not subject to a confidentiality order.

37. It is further submitted that the relevance-based access policy proposed by the Commissioner (para. 32) is inconsistent with the open court principle and the *Dagenais/Mentuck* test. Permitting a tribunal to confine public access to those portions of the evidence that support its decision would defeat the very purpose of the open court principle, because it would allow tribunals to shield themselves from public criticism for ignoring facts that do not support the tribunal's conclusion. The Commissioner's position is tantamount to shifting the burden of proof from the person seeking to restrict public access to the person seeking access, and shifting the focus from "serious risk" to "need to know." The *Dagenais/Mentuck* test, however, calls for examining the issue of minimal impairment to the open court principle only in the second branch of the test, after evidence of a "serious risk" has been found in the first branch. If there is no serious risk, there is no justification for even minimally limiting public access.

***Tenenbaum v. Air Canada*, CTA Decision No. 219-A-2009, paras. 67-69**
Applicant's Authorities, Tab 16, p. 692

(iii) Consistent use: s. 8(2)(a)

38. Lukács agrees with the Commissioner that reasonable expectation of privacy is a relevant consideration in the context of the exemption pursuant to s. 8(2)(a). This consideration lends further support to the position of Lukács that the Agency may disclose information received in the course of adjudicative proceedings. Indeed, the "Important privacy information" notice, which the Agency provides to the parties, removes any expectation of privacy:

> Pursuant to the General Rules, all information filed with the Agency becomes part of the public record and may be made available for public viewing.
>
> [Emphasis added.]

"Important privacy information" notice of the Agency provided to parties
Applicant's Record, Tab 2I, p. 121

39. The Agency's mandate includes carrying out quasi-judicial functions. The legitimacy of the Agency's authority requires that confidence in its integrity and understanding of its operations be maintained, and this can be effected only if its proceedings are open to the public, including the evidence and documents tendered. Thus, providing public access to evidence and documents tendered in adjudicative proceedings before the Agency is an inherent part of the Agency's function as a quasi-judicial tribunal.

***Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329, para. 9** **Applicant's Authorities, Tab 15, p. 681**

40. Therefore, evidence and documents are tendered to the Agency in an adjudicative proceeding for the purpose of the Agency carrying out its mandate as a quasi-judicial tribunal, with everything that it entails, including public access. Hence, granting public access to evidence and documents thus received constitutes "consistent use" within the meaning of s. 8(2)(a) of the *Privacy Act*.

(iv) Disclosure in the public interest: s. 8(2)(m)(i)

41. The Commissioner erroneously submits that paragraph 8(2)(m)(i) of the *Privacy Act* is similar to the analysis undertaken by the courts with respect to limiting the open court principle (para. 38). As a matter of fact, the two are completely opposite to each other: while paragraph 8(2)(m)(i) presumes non-disclosure, and requires public interest considerations for permitting disclosure, the open court principle presumes public interest in disclosure, and permits limiting disclosure only if there is evidence of a "serious risk."

42. Lukács agrees with the Commissioner that there is no evidence that the Agency considered paragraph 8(2)(m)(i) or any other exemption or exclusion found in the *Privacy Act* in relation to the impugned redactions.

43. This shortcoming underscores the fundamental flaw in the impugned practices of the Agency, which include Agency Staff who are not Members purporting to make, without lawful authority, decisions that affect the rights of the public pursuant to the open court principle.

PART IV – ORDER SOUGHT

44. The Applicant, Dr. Gábor Lukács, is seeking an Order as set out in the Memorandum of Fact and Law dated September 30, 2014.

Memorandum of Fact and Law **Applicant's Record, Tab 4, p. 223**

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

February 25, 2015

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Applicant

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Canadian Charter of Rights and Freedoms,
ss. 2(b) and 24(1)

Canada Transportation Act, S.C. 1996, c. 10,
ss. 1-41

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings),
S.O.R./2014-104, ss. 7(2), 31(2)

Canadian Transportation Agency General Rules,
S.O.R./2005-35, ss. 23(1), 23(6)

Privacy Act, R.S.C. 1985, c. P-21
ss. 8(2)(a), 8(2)(b), 8(2)(m)(i), 69(2)

CASE LAW

A.B. v. Bragg Communications Inc., 2012 SCC 46

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480

Canadian Newspapers Co. v. Canada (Attorney General), [1988] 2 SCR 122

Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security), [2004] O.J. No. 1214

Coltsfoot Publishing Ltd. v. Foster-Jacques, 2012 NSCA 83

El-Helou v. Courts Administration Service,
2012 CanLII 30713 (CA PSDPT)

F.N. (Re), 2000 SCC 35

CASE LAW (CONTINUED)

Named Person v. Vancouver Sun, 2007 SCC 43

Nova Scotia (Attorney General) v. MacIntyre, [1982] 1 SCR 175

Ontario v. Criminal Lawyers' Association, [2010] 1 SCR 815

Sierra Club v. Canada (Minister of Finance), 2002 SCC 41

Southam Inc. v. Canada (Minister of Employment and Immigration), [1987] 3 F.C. 329

Tenenbaum v. Air Canada, Canadian Transportation Agency, Decision No. 219-A-2009

Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41

OTHER AUTHORITIES

House of Commons Debates, 32nd Parl., 1st session, No. 94 (8 June 1982) at 2205 (Hon. Francis Fox)

Chief Justice Beverley McLachlin, "Openness and the Rule of Law," Remarks at the Annual International Rule of Law Lecture (London, U.K., Jan. 8, 2014)

Model Policy for Access to Court Records in Canada, Judges Technology Advisory Committee, Canadian Judicial Council, September 2005

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(Application under section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7)

SUPPLEMENTARY BOOK OF AUTHORITIES OF THE APPLICANT, IN RESPONSE TO THE INTERVENTION

Dated: February 25, 2015

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Case Name:

Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety and Security)

IN THE MATTER OF the Judicial Review Procedure Act, R.S.O. 1190, c. J.1
AND IN THE MATTER OF the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, as amended
IN THE MATTER OF Order PO-1779 dated May 5, 2000 issued by Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario
Between
The Criminal Lawyers' Association, applicant, and
The Ministry of Public Safety and Security (formerly the Ministry of the Solicitor General) and Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario, respondent, and
The Attorney General of Ontario, intervenor

[2004] O.J. No. 1214

70 O.R. (3d) 332

237 D.L.R. (4th) 525

184 O.A.C. 223

13 Admin. L.R. (4th) 26

30 C.P.R. (4th) 267

116 C.R.R. (2d) 322

130 A.C.W.S. (3d) 78

61 W.C.B. (2d) 166

Divisional Court File No. 730/00

Ontario Superior Court of Justice
Divisional Court

Blair, Gravely and Epstein JJ.

Heard: October 9-10, 2003.
Judgment: March 25, 2004.

(122 paras.)

Civil rights -- Freedom of speech or expression -- General principles -- Expression, what constitutes -- Freedom of expression, scope of -- Limitations on -- Freedom of access to information.

Application by the Criminal Lawyers' Association for judicial review of an order made by a Privacy Commissioner dismissing the Association's appeal, from the refusal of the Ministry of the Public Safety and Security, to provide the Association with access to certain records. The records consisted of a police report, a memorandum and a letter relating to a police investigation into findings by a trial judge that the rights under the Canadian Charter of Rights and Freedoms of the two men accused of murder had been violated, by abusive conduct on the part of police and Crown officials. The Ministry refused to disclose the records on the grounds that the report was a law enforcement record and the latter two records were protected by solicitor-client privilege as set out in sections 14 and 19 of the Freedom of Information and Privacy Act. The Commissioner found the Ministry was correct and held that the Association's section 2(b) rights under the Charter were not infringed by the non-disclosure.

HELD: Application dismissed. The expressive activity in issue was the Association's desire to publicly comment on the affair and fell within the meaning of expression. The government did not, as part of the Association's section 2(b) Charter rights or based on the principle of democracy, have a positive obligation to provide access to law enforcement and privileged information, in order to facilitate the Association's expressive activity. The Association was not being precluded from commenting on the affair. The open court principle did not apply to investigations by non-adjudicative bodies. The expressive activity did not fall within the sphere of section 2(b) of the Charter.

Statutes, Regulations and Rules Cited:

Agricultural Labour Relations Act, 1994, S.O. 1994, c. 6.

Canada Evidence Act, s. 39.

Canada Labour Code.

Canadian Charter of Rights and Freedoms, 1982, ss. 1, 2(b), 2(d), 7, 11(d), 15(1).

Freedom of Information and Privacy Act, R.S.O. 1990, c.
F.31, ss. 1, 2, 10, 10(2), 12,
13, 14, 14(2)(a), 15, 16, 17, 18, 19, 20, 21, 21(3)(b),
21.1, 22, 23.

Ontario Labour Relations Act, 1995, S.O. 1995, c. 1.

Public Service Staff Relations Act.

Counsel:

David Stratas, Jeffrey Oliver, and Brad Elberg, for the applicant.
Shaun Nakatsuru and Priscilla Platt, for the Ministry of Public Safety and Security and the Attorney General of Ontario.
John Higgins, for the Information and Privacy Commissioner.

REASONS FOR DECISION

The judgment of the Court was delivered by

I

OVERVIEW

1 BLAIR J.:-- The issues raised by the Criminal Lawyers' Association[1] on this judicial review concern the ambit of their right to freedom of expression under section 2(b) of the Canadian Charter of Rights and Freedoms, and the unwritten constitutional principle of democracy.

2 The application is to review the order made by Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario, dated May 5, 2000 (Order PO-1779). In that order, the Assistant Commissioner dismissed the CLA's appeal from a refusal of the Ministry of the Solicitor General - now the Ministry of Public Safety and Security - to provide the CLA with access to certain records under the Freedom of Information and Privacy Act, R.S.O. 1990, c. F.31 ("the Act").

3 The records in question consist of a 318-page police report, a March 12, 1998 memorandum, and a March 24, 1998 letter. The records relate to an Ontario Provincial Police ("OPP") investigation into findings by a Superior Court of Justice trial judge that the Charter rights of two

men accused of murder had been violated by "abusive conduct" on the part of police and Crown officials. The Ministry refused to disclose these records on the grounds that the former constituted "law enforcement records" and the latter two consisted of documents protected by "solicitor-client privilege", relying upon the exemptions contained in sections 14 and 19 of the Act, respectively. The CLA says this refusal violates its section 2(b) freedom of expression and, further, that it violates the fundamental constitutional principle of democracy.

4 The background giving rise to the judicial review is as follows.

Background

5 In 1983 Dominic Racco was murdered. Mr. Racco was reputed to be an underworld gangster and his murder to have been a "mob hit". There was considerable public interest in the event. Four men were initially charged with his murder and ultimately pleaded guilty in 1985 to lesser charges of being an accessory to murder and conspiracy to commit murder.

6 In 1990, two other men - Graham Court and Peter Monaghan - were also charged with the Racco murder. Seven years later, in 1997, these charges were stayed in a very high-profile decision of Mr. Justice Glithero in the Superior Court, R. v. Court and Monaghan (1997), 36 O.R. (3d) 263. Court and Monaghan had been held in pre-trial custody since their arrest. In his scathing judgment, Glithero J. held that their rights under sections 7 and 11(d) of 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" (at 299-301). He was particularly critical of the Crown in its prosecutorial role and of the police in their investigative role.

7 Following the judgment of Glithero J., the OPP was asked to review the conduct of the police officers and Crown counsel involved. Nine months later the OPP issued a terse press release simply stating, in effect, that it had found no evidence of any attempts to obstruct justice.

8 The CLA is an organization actively engaged in monitoring matters concerning the integrity of the criminal justice system in Canada and in advocating for changes in that regard. It was justifiably concerned about the apparent discrepancy between the OPP's laconic statement and the detailed acts of abusive conduct contained in the judgment of Glithero J. Its then president, Mr. Alan Gold, submitted a request to the Ministry under the Act, seeking access to the records underlying the OPP's investigation into the Court and Monaghan affair and lying behind the conclusion expressed in its short press release.

9 When the Ministry processed the CLA request it found the records indicated above were responsive to the request. However, it declined to produce any of them, invoking in support of the refusal the exemptions contained in sections 14 (law enforcement records), 19 (solicitor-client privilege) and 21 (personal privacy) of the Act. The CLA challenged this decision before the Assistant Commissioner.

10 The Assistant Commissioner found that the records were exempt under sections 14, 19 and 21. He concluded that there was a compelling public interest in the disclosure of the documents sufficient to override the section 21 exemption, but that since the "public interest override" provisions of section 23 of the Act did not apply to law enforcement records (s. 14) or to documents protected by solicitor-client privilege (s. 19), the records could not be disclosed. He rejected the CLA's claim that its section 2(b) rights had been infringed by the denial of access to the records in question.

11 The CLA seeks to set aside that decision.

12 For the reasons that follow, I would dismiss the application.

II

THE STANDARD OF REVIEW

13 Counsel agree that the standard of review for determinations of the Assistant Commissioner concerning Charter issues is correctness: see Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121 at 130 (S.C.C.); Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658 at 686 (S.C.C.); U.F.C.W. Local 1518 v. KMart Canada Ltd., [1999] 2 S.C.R. 1083, 176 D.L.R. (4th) 607 at 642-643 (S.C.C.).

14 Determinations of the Assistant Commissioner regarding the interpretation and application of the provisions of the Act falling within his area of expertise are subject to a standard of reasonableness. The Court of Appeal has applied this standard to decisions involving various exemptions under the Act, including law enforcement (s. 14), personal information and privacy (ss. 2 and 21) and the public interest override (s. 23): Ontario (Minister of Finance) v. Higgins (1999), 118 O.A.C. 108 at 109-110 (C.A.), leave to appeal denied [1999] S.C.C.A. No. 134; Ontario (Information and Privacy Commissioner) v. Ontario (Minister of Labour) (1999), 46 O.R. (3d) 395 at 400-402 (C.A.); Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 at paras. 2-3 (C.A.).

15 The Court of Appeal has also determined that the standard of review for the Commissioner's determinations under the solicitor-client privilege exemption in section 19 is correctness: Ontario (Attorney General) v. Big Canoe (2002), 220 D.L.R. (4th) 467 at 469-470 (Ont. C.A.).

III

THE RELEVANT STATUTORY PROVISIONS[2]

16 The purpose of the Act is twofold; namely, (a) to provide a statutory right to access to government information where no such general right existed previously - subject to specific exemptions - and, (b) to protect personal privacy. Section 1 states:

> The purposes of the 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 disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

17 Section 10 provides a general right of access to a government record unless the record falls within one of the exemptions set out in sections 12 to 22 of the Act, or unless the head of the institution is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. Subsection 10(2) requires the head to disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

18 Some of the exemptions in sections 12 to 22 are mandatory; some are discretionary; some provide a duty on the part of the head to disclose. The exemptions are worth noting in summary, for purposes of context. They are:

a) cabinet records (s. 12);
b) advice to government by a public servant or other employee (s. 13);
c) law enforcement records (s. 14);
d) relations with other governments (s. 15);
e) defence records (s. 16);
f) commercial third party records (s. 17);
g) economic and other interests of Ontario (s. 18);
h) solicitor-client privilege (s. 19);
i) disclosure of records that can threaten the safety or health of someone (s. 20);
j) personal information about a person to a third party (s. 21);
k) disclosure of records that can put fish or wildlife species at risk (s. 21.1); and
l) information soon to be published (s. 22).

[underlining added]

19 Section 23 of the Act is central for purposes of this judicial review. It provides a "public interest override" to most of the categories of exempted records. Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

20 Section 23 does not apply to cabinet records (s. 12), law enforcement records (s. 14), defence records (s. 16), records that fall within the purview of solicitor-client privilege (s. 19), and information that will soon be published (s. 22).

21 Sections 14 (law enforcement records) and 19 (solicitor-client privilege) are the other provisions central to this judicial review. It is worth noting, however, that if the CLA is correct in its submissions as to the reach of its rights to freedom of expression under section 2(b) of the Charter, the same arguments would apply to the disclosure of cabinet and defence records (ss. 12 and 16).

22 The Ministry relied upon subsection 14(2)(a) of the Act which states:

> 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.

23 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.

IV

THE ASSISTANT COMMISSIONER'S DECISION

24 The Assistant Commissioner found that the 318-page document containing details of the OPP investigation constituted "a report" prepared in the course of law enforcement by an agency which has the function of enforcing and regulating compliance with a law, as contemplated by section 14 of the Act. He found that the March 12, 1998, memorandum and the March 24, 1998, letter were documents relating to legal advice regarding the laying of criminal charges following the investigation, and were therefore subject to the exemption for solicitor-client privilege under section 19. With respect to the section 21 exemption concerning personal information, the Assistant Commissioner held that the documents contained personal information regarding the police officers and Crown counsel in question, as well as personal information regarding witnesses, the victim, the

accused and others. He accepted that there was a presumed unjustified invasion of personal privacy under paragraph 21(3)(b) of the Act and therefore that the records were exempt under section 21.

25 The Assistant Commissioner concluded, however, that there was "a compelling public interest" in disclosure that "clearly outweighed" the interest in non-disclosure and would have ordered disclosure in relation to the section 21 exemption under the section 23 override. Disclosure of the records could not be ordered, however, because the section 14 "law enforcement" and section 19 "solicitor-client privilege" exemptions are not subject to the section 23 override.

26 The Assistant Commissioner considered the Charter arguments raised by the CLA. He decided that he had the jurisdiction to determined Charter issues, but he accepted the Ministry's arguments that the Applicant's section 2(b) rights had not been violated.

27 The argument that disclosure ought to be ordered based upon the principles of democracy was not raised before the Assistant Commissioner.

V

SUMMARY OF THE ARGUMENT

28 On behalf of the CLA, Mr. Stratas makes two primary submissions.[3] He argues that the CLA's right to freedom of expression provided by section 2(b) of the Charter is infringed in a fashion that is not justified by section 1 of the Charter, and, further, that the constitutional principle of democracy is infringed by:

a) the unavailability of the public interest override in section 23 of the Act in the case of exemptions under sections 14 and 19; and
b) the failure of the Assistant Commissioner to take into account the CLA's rights and the constitutional principle of democracy in interpreting and applying the sections of the Act that provide for exemptions to disclosure.

29 As a result of the foregoing, section 23 of the Act is said to be under-inclusive, and it must therefore be "read up" to accord with section 2(b) of the Charter and the constitutional principle of democracy to include sections 14 and 19 in the sections which are specifically subject to the public interest override. The Assistant Commissioner's decision must therefore be quashed and the matter remitted to him for re-determination on that basis.

30 An additional submission was also advanced. The Assistant Commissioner's interpretation and application of sections 14 and 19 of the Act are said to be unreasonable because he failed to take into account the fact that the records in question "are records that are not akin to private materials" but rather - as is the case with all records in the possession of the Crown in the criminal justice system - are "the property of the public to be used to ensure that justice is done".[4]

31 I shall deal with each of these submissions in order.

VI

ANALYSIS

32 Stripped to its essentials, the Applicant's position is that members of the public have a general constitutional right - founded upon the section 2(b) freedom of expression and the principle of democracy - to have access to government-held information and documentation, and to comment thereon, unless a balancing exercise, conducted on a case by case basis, demonstrates that what is in the public interest favours non-disclosure. To the extent that the Freedom of Information and Privacy Act excludes law enforcement records and documentation protected by solicitor-client privilege from this "public interest override", it is unconstitutional.

33 Mr. Stratas urges us to accept that this is not a case of the CLA simply seeking access to government information in order to exercise its section 2(b) rights more fully and completely. Rather, it is a case of the CLA being denied the opportunity to exercise those rights at all with respect to a wide range of very important questions relating to the administration of justice in Ontario. The list of potential questions includes the following, for example:[5] What caused the failure of the justice system in this incident and who was responsible for that failure? What can be learned from the incident? What steps should be taken to ensure that this sort of failure never happens again? On what basis did the OPP review reject the conclusions of Glithero J.? Are the matters that led to the failure being addressed or are they being whitewashed?

34 These questions raise important issues for the administration of justice in Ontario, to be sure. In whatever manner the argument is crafted, however, it boils down to the submission that the public has a constitutional right to know, subject to a case-by-case public interest balancing test. In my view, there is no such constitutional right in the circumstances of this case.

35 I begin the analysis of the Applicant's position with the observation that prior to the enactment of the Freedom of Information and Protection of Privacy Act there was no public right to have access to the types of information covered by it. The objectives of the legislation included providing access to such state-controlled information, while at the same time providing necessary and limited exceptions to that access in order to protect state and other interests (including the integrity and confidentiality of law enforcement processes and the confidentiality of legal advice and litigation preparation). Thus, the fact that the Act exempts law enforcement and privileged information does not alter the common law situation.

36 The question, then, is whether, as a component of the CLA's section 2(b) rights, and/or based upon the principle of democracy, government is under a positive obligation to provide access to law enforcement and privileged information, subject to reasonable limits in the public interest, in order to facilitate the CLA's expressive activity. If the answer is "No", then that is the end of the matter; the exemption provisions of the Act are unproblematic because they simply result in the

government not providing the CLA with information to which it does not have a right of access in any event. If the answer is "Yes", consideration must then be given to whether section 23 of the Act is under inclusive and, if so, whether it can be saved, or whether the remedies sought by the Applicant should be granted.

37 Mr. Stratas seeks to construct the Applicant's position on the twin foundations of section 2(b) and the unwritten constitutional principle of democracy. In my view the latter principle is of little assistance to the Applicant, and I shall therefore deal with it first.

The Principle of Democracy

38 The principle of democracy is one of several unwritten principles that the Supreme Court of Canada confirmed underpin the Canadian Constitution in Reference re Secession of Quebec, [1998] 2 S.C.R. 217. Others are the principles of federalism, constitutionalism and the rule of law, and respect for minorities. At para. 49 the Court described the nature of these constitutional principles as follows:

> What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.

39 The CLA argues that the principle of democracy necessarily includes a principle that institutions fundamental to our society - like the courts and the criminal justice system - must be subject to scrutiny and open discussion. Information concerning their operation must be accessible to the public, based on this governing principle of openness and subject to reasonable limits and restrictions imposed in the public interest.

40 Mr. Stratas acknowledges there are no cases affirming this right-to-know-subject-to-reasonable-limits as an aspect of the principle of democracy; but neither, he says, are there cases against it. He relies upon the jurisprudence respecting section 2(b) as reflecting these precepts, although the principle of democracy has not been argued in them. He also relies on certain European and Asian decisions that will be reviewed later in these Reasons. Mr. Stratas submits, in any event, that even if the principle of democracy standing alone does not support the proposition he advances, the combination of that principle and section 2(b) does.

41 I do not accept this submission. As Professor Hogg has noted, "unwritten constitutional principles are vague enough to arguably accommodate virtually any grievance about government policy" and the courts should be cautious about invalidating government initiatives on the basis of such principles: Peter W. Hogg, Constitutional Law of Canada, 3rd ed., loose-leaf (Scarborough: Carswell, 1992) at 15-47 to 15-48. In Babcock v. Canada (Attorney General), [2002] 3 S.C.R. 3, 214 D.L.R. (4th) 193, the Supreme Court rejected the argument that section 39 of the Canada Evidence Act, which allows the federal government to withhold cabinet documents from court proceedings to which the documents are irrelevant, contravened unwritten constitutional principles. At para. 55, McLachlin C.J. noted that "the unwritten principles must be balanced against the principle of Parliamentary sovereignty."

42 More particularly, it does not assist to address the Applicant's position through the prism of the unwritten constitutional principle of democracy, in my view. First, I am inclined to accept Mr. Higgins' submission that that principle is more concerned with matters relating to the proper functioning of responsible government, and with the proper election of legislative representatives and the recognition and protection of minority and cultural identities, than it is with promoting access to information in order to facilitate the expressive rights of individuals.[6] Secondly, and in any event, the principle of democracy already underlies and informs the freedoms outlined in section 2(b) of the Charter.

43 In this latter regard, I note that in Irwin Toy v. Quebec, [1989] 1 S.C.R. 927 at 976, Chief Justice Dickson identified the following factors as "the principles and values underlying the vigilant protection of free expression in a society such as ours": the pursuit of truth, the encouragement of participation in social and political decision-making, and the cultivation of diversity in forms of self-fulfillment and human flourishing. These are classic hallmarks of a democratic society. See Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712 at 765-767, to the same effect.

44 Thus it would be redundant to apply the unwritten principle of democracy as a separate ground for attacking the purported governmental restriction on the Applicant's expressive activity. Moreover, to do so would undermine the equilibrium mechanism carefully put in place by the Charter, namely, the constitutional entrenchment of freedom of expression in section 2(b) balanced by the section 1 saving justification. If the unwritten constitutional principles are imbedded in the section 2(b) freedom in the first place then it does not advance the argument to re-consider them, either separately, or under the guise of being combined with the section 2(b) analysis. I would therefore not give effect to the Applicant's submissions based upon the unwritten constitutional principle of democracy.

45 I now turn to the section 2(b) analysis.

The Section 2(b) Argument

46 This case is not about the importance of the right to freedom of expression as guaranteed by section 2(b) of the Charter. Innumerable authorities at the highest level have affirmed the bedrock

quality of that principle in our democratic society: see Haig v. Canada, [1993] 2 S.C.R. 995, per L'Heureux-Dubé J. at 1033-1034, and cases cited therein. Rather, this case is about the reach of that important right. More specifically, it raises the question of whether a positive obligation on the part of government to provide access to information in order to facilitate expressive activity is a component of the section 2(b) right. It is in this context that the question of balancing the public interest arises.

47 In Irwin Toy, supra, at 978, the Supreme Court outlined the two-step analysis to be followed in determining whether there has been a section 2(b) violation:

> When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression.

48 Subsequent decisions have interpreted the first step in the Irwin Toy analysis to involve two inquiries: does the activity in question comprise expression, and, if so, is that expression protected by section 2(b)? See Ramsden v. Peterborough (City), [1993] 2 S.C.R. 1084 at 1095-1096. The second step encompasses a consideration of whether either the government's purpose or the effect of the government's actions was to restrict freedom of expression: Irwin Toy at 978-979.

49 The CLA argues that the activity at issue on this judicial review falls within the scope of section 2(b) and is within the protected sphere of conduct (step one). It concedes that the purpose of the legislative failure to make sections 14 and 19 of the Act subject to the section 23 public interest override is not to restrict expression, but submits that the effect of the government action is to do so (step two). Finally, the CLA contends that the section 2(b) violation cannot be justified under section 1 of the Charter since it does not meet the rational connection, minimum impairment, and proportionality tests of R. v. Oakes (1986), 26 D.L.R. (4th) 200.

50 On the other hand, Mr. Nakatsuru submits on behalf of the Respondent:

a) that the CLA is not engaged in expressive activity within the meaning of section 2(b);
b) that even if it is engaged in expressive activity, there is neither a constitutional right to know, nor any positive obligation on the part of government to disclose information to the CLA to feed its section 2(b) rights, and therefore, the activity in question does not fall within the scope of section 2(b);

c) that there is no evidence on the present record to demonstrate the effect of the refusal to produce the records on the CLA's freedom of expression; and, in any event,
d) that the legislative scheme is saved by section 1 of the Charter.

51 On behalf of the Assistant Commissioner, Mr. Higgins concentrated his section 2(b) arguments on the areas covered by Mr. Nakatsuru's points (b) and (d) above.

52 I turn to these issues now.

Expression

53 Section 2(b) protects an individual's freedom of "expression". The jurisprudence indicates that "activity is expressive if it attempts to convey meaning": see Irwin Toy, at 969, 978-979; R. v. Sharpe, [2001] 1 S.C.R. 45.

54 Here, Mr. Nakatsuru argues that no expressive activity of the Applicant is being prohibited or limited by the impugned provisions of the Act. He proposes a narrow view of the activity in question and says it is simply a request for information from the Ministry under the Act and is not the equivalent of an attempt to convey meaning. The CLA's broader desire to use the information obtained later, in order to express itself on the implications of the Court and Monaghan affair and the OPP investigation into it, is several steps removed from the conduct that is being prohibited by the Act, i.e., the inclusion of case-specific public interest considerations regarding law enforcement and privileged records. Lastly, Mr. Nakatsuru submits that the Applicant is free to engage in any act to convey meaning about this subject, at any time, and anywhere. He points out that the record demonstrates the CLA had spoken out and exercised its freedom of expression liberally, and with considerable vigour, in relation to these issues, and has also had access to the detailed and voluminous court proceedings in the Superior Court and the Court of Appeal regarding the Court and Monaghan case.[7]

55 It is arguable that the CLA's request to the Ministry is an attempt to convey meaning - i.e., "we want information" - but it is true that nothing has inhibited the Applicant from making its request. In my view, however, confining the section 2(b) "activity" in this case to simply the request by the CLA for information under the Act is approaching the analysis too narrowly. The expressive activity at issue here is the CLA's desire to comment publicly on the Court and Monaghan affair, the OPP investigation into it, and the discrepancies between the short O.P.P conclusion and the detailed indictment of the police and Crown officials by Glithero J.; the CLA also wishes to make suggestions and recommendations about how such problems may be avoided in the future. That type of expressive activity is unquestionably "[an attempt] to convey meaning". Accordingly, I would not give effect to Mr. Nakatsuru's first argument.

56 What the CLA seeks to do falls within the meaning of "expression". The second question, however, is whether engrafting upon that expressive desire an obligation on the part of government

to provide access to the information sought in order to fuel the Applicant's expressive activity, subject to a public-interest balancing test, takes the expressive activity outside the sphere of section 2(b).

Is the Activity within the Protected Sphere of Conduct?

57 This latter question is the major issue to be determined on this application for judicial review.

58 In my opinion, the authorities do not support the Applicant's position and I would be reluctant to extend the law to establish that there is a constitutional right to know, or a positive obligation on the part of government to disclose information - even subject to public interest balancing - in the circumstances of this case.

59 Mr. Stratas acknowledges that there is no case in Canada establishing by itself that a denial of information by government can give rise to a constitutional objection under section 2(b), or by reason of the principle of democracy. He submits, however, that there are "various strands" in the authorities pointing in that direction. Those various strands consist of the following:

a) the suggestion by the Supreme Court in Haig, supra, that, in certain circumstances, there may be a requirement for positive government action to ensure public access to certain kinds of information;
b) the principles enunciated in cases concerning access to public places and holding that individuals may be granted access to public facilities to ensure they are able to engage in meaningful expression;
c) the principles enunciated in cases dealing with the "open courts" principle and confirming that courts must be open to the public and that records placed before the court must be accessible so that expression is facilitated; and
d) statements made in certain American, European, and Indian authorities.

General Statements Concerning Section 2(b) and the Obligation to Provide Access to Information

60 Haig concerned the right of an individual to vote in the 1982 referendum concerning the proposals arising out of the Charlottetown constitutional conference. There were, in fact, two referendums. One was a national referendum directed by the federal government to be held in all provinces and territories except Quebec. The other was a separate referendum to be held in Quebec. Because he had moved from Ontario and had not resided in Quebec for six months prior to the date of the referendum, Mr. Haig was not eligible to vote in the Quebec referendum. Because he was not ordinarily resident in one of the polling divisions established for the federal referendum at the enumeration date, he was not eligible to vote in Ontario. He sought a declaration, amongst other things, that the denial of his right to vote in the federal referendum violated his rights under section

2(b) of the Charter. He was unsuccessful.

61 The Court held that freedom of expression did not include a constitutional right for all Canadians to be provided with a specific means of expression and that section 2(b) does not impose on government a positive obligation to consult its citizens through the mechanism of a referendum. The government was under no constitutional obligation to extend the referendum platform for expression to anyone (at 1041). Writing for the majority, L'Heureux-Dubé J. canvassed the cases and doctrinal writings concerning the theories underlying the concept of freedom of expression. She asked the question at 1034: "Does freedom of expression include a positive right to be provided with specific means of expression?" In responding to that question, she noted that freedom of expression has traditionally been conceptualized (at 1034, 1035) "in terms of negative rather than positive entitlements", and observed that "in colloquial terms ... the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones." After referring to various articles and works articulating the traditional view, and to others adopting the stance that freedom of expression may, in modern times, involve more than the absence of government interference - including the dissent of Dickson C.J. in Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313 at 361 - L'Heureux-Dubé concluded that there may be circumstances in which a court might conclude positive governmental action was required, but that such considerations did not apply in Mr. Haig's case concerning the referendum. In the passage heavily relied upon by the CLA, she stated at 1039:

> However, as Dickson C.J. rightly observed,[8] this language cannot be used in a dogmatic fashion. The distinctions between "freedoms" and "rights", and between positive and negative entitlements, are not always clearly made, nor are they always helpful. 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.

[emphasis added]

62 In two subsequent decisions, though, the Supreme Court has declined to apply the foregoing approach and refused to hold there is a positive obligation on the part of government in connection with section 2(b) rights. First, in Native Women's Assn. of Canada v. Canada, [1994] 3 S.C.R. 627 the Court ruled that the government's refusal to provide the applicant with funding and the right to participate in the Charlottetown Accord conference did not violate the NWAC's section 2(b)

freedom of expression. Sopinka J. observed at 655:

> Haig establishes the principle that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or a group. However, the decision in Haig leaves open the possibility that, in certain circumstances, positive governmental action may be required in order to make the freedom of expression meaningful [emphasis added].

63 Sopinka J. concluded, however, at 663:

> The freedom of expression guaranteed by s. 2(b) of the Charter does not guarantee any particular means of expression or place a positive obligation upon the Government to consult anyone. The right to a particular platform or means of expression was clearly rejected by this Court in Haig. The respondents had many opportunities to express their views through [other organizations] ....
>
> [underlining added]

64 Secondly, in Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989, the Supreme Court held that the section 2(b) rights of an RCMP officer were not violated by the fact that he was precluded from creating an independent employee association for RCMP members.[9] Writing for the majority, Bastarache J. said at 1022-1023:

> The appellant argues, however, that the main purpose of forming a recognized association is to convey a collective message that is distinct from that of its members ....
>
> ...
>
> In the current situation, the message of solidarity is the same whether it is expressed by an association the employer does not recognize or by an employee organization. Only the effectiveness of the message differs from one situation to the other. The medium used to convey the message must not be confused with the message itself. Although s. 2(b) may be violated when Parliament restricts access to a medium, it does not require Parliament to make that medium available .... The message of solidarity the appellant wishes to express exists independently of any official form of recognition. Even if the exclusion of RCMP members by the PSSRA diminished the effectiveness of the conveyance of this message, this would not violate s. 2(b). [underlining added]

65 There is one case in which the Supreme Court has imposed a positive obligation on government to act. In Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016, it required the

Ontario government to include a class of individuals in labour legislation. The case concerned the exclusion of farm workers in Ontario from the labour relations regime set out in the Ontario Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A. In 1994 trade union and collective bargaining rights had been extended to agricultural workers through the enactment of the Agricultural Labour Relations Act, 1994, S.O. 1994, c. 6 [rep. 1995, c. 1, s. 80]. With a change in government, that Act was repealed. Mr. Dunmore and others challenged the repeal of the Act and their exclusion from the Labour Relations Act on the basis that their freedom of association under section 2(d) of the Charter had been violated (as well as their equality rights under section 15(1)). The Court agreed. Dunmore is distinguishable from the present situation, and from the circumstances in Haig, Native Women's Assn. of Canada, and Delisle, however, because in it the appellants were precluded from any form of organization without the protection of the legislation. In those exceptional circumstances, when the individuals could not exercise their freedom of association at all, there was a positive obligation upon government to include them in the legislation. Here, the CLA is not precluded from commenting on the Court and Monaghan affair and the OPP investigation; rather, the effectiveness of its ability to convey its message has been diminished: see Delisle.

66 This Court has previously dealt with whether government has an obligation to provide access to information as a component of the section 2(b) Charter freedom. It did so in the context of section 14 of the Freedom of Information and Protection of Privacy Act, and rejected the argument. Ontario (Attorney General) v. Fineberg (1994), 19 O.R. (3d) 197 (Div. Ct.) involved a request made under the Act by a newspaper reporter for information on funding in relation to an ongoing law enforcement investigation. There were other issues apart from the section 2(b) argument, but in that regard Adams J., writing for an unanimous court, said at 203:

> 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 ...

Adams J. continued at 204:

> 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.

67 The existence of a general constitutional "right to know" has been questioned as well by the Federal Court in Travers v. Canada (Board of Inquiry on the Activities of the Canadian Airborne Regiment Battle Group in Somalia), [1993] F.C.J. No. 833 at para. 17 (T.D.), aff'd [1994] F.C.J. No. 932 at paras. 2, 3 (C.A.), and in Yeager v. Canada (Correctional Service), [2001] F.C.J. No. 687 at para. 29 (T.D.), reversed on other grounds (2003), 223 D.L.R. (4th) 234 at 255 (F.C.A.), leave to appeal denied [2003] S.C.C.A. No. 120. In National Bank of Canada v. Melnitzer (1991), 5 O.R. (3d) 234 (Gen. Div.) at 239, Justice Killeen observed - in the context of the freedom of the press aspect of the section 2(b) right and the open courts principle - that, although freedom of the press is a "vital principle" it is not limitless and "is not the equivalent of a Freedom of Information Act nor does it have the effect of appointing the press as a sort of permanent and roving Royal Commission entitled at its own demand and in every circumstance to any and all information or documentation which might be extant in civil or criminal litigation".

68 Based on the foregoing authorities, then, it would appear that the Supreme Court has left the door open to the possibility there might be circumstances in which "positive government action may be required in order to make the freedom of expression meaningful" (Native Women's Assn. of Canada at 655), but in no case has that Court, or any other, chosen to walk through that door. This is so even in cases where the circumstances would seem to be as compelling as those of the present application, for example: the right to vote, in Haig; the right to express oneself while participating in national conference dealing with the Constitution of Canada itself, in Native Women's Assn. of Canada; and a request for information regarding a law enforcement investigation under the Act in Fineberg.

69 Mr. Stratas seeks to couple the suggestion that positive governmental action may be required to fulfill the section 2(b) right with the results in decisions concerning access to public facilities for purposes of expressive activity and in those dealing with the "open courts" principle.

Cases Concerning Access to Public Facilities

70 There are a number of authorities in which the Supreme Court has held that, in certain circumstances, individuals may have a right to use public facilities in order to ensure they are able to engage in meaningful expression: see, for example, Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139, which involved leafleting in the Dorval [now Pierre Elliott Trudeau] airport; and Ramsden v. Peterborough (City), [1993] 2 S.C.R. 1084, which involved postering on utility poles, in contravention of a by-law prohibiting all postering on public property. These cases, however, are distinguishable from the present application. They both involve the expression of information already in the possession of the person seeking to express it. The government activity in question simply attempted to suppress the public communication of that

information, and the ideas associated with it, on government property. The Court held that government must refrain from prohibiting that expression. Here, the CLA is free to express the opinions it holds; but it seeks more information to be able to express those opinions more fully. There is no positive obligation on government that extends to that point. As Bastarache J. noted in Delisle at 1023:

> A similar issue arose in Ramsden v. Peterborough (City), [1993] 2 S.C.R. 1084, where this Court held that entirely prohibiting postering on utility poles violated s. 2(b), but that the freedom of expression did not require the government to install notice boards to promote postering. [emphasis added]

71 I do not find the case law on access to public facilities in order to exercise the section 2(b) freedom to be of assistance to the Applicant.

The "Open Courts" Principle

72 I agree with the Assistant Commissioner that the Applicant's strongest argument is based on the open courts principle. However, I do not think it can carry the day.

73 The Assistant Commissioner dealt with this argument carefully, and at length. At the conclusion of his decision, Order PO-1779, Public Record, Vol. 4, Tab 71A, he said at 994-995:

> 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.[10] 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.[11] 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".

74 The foregoing statement followed a very thorough analysis of the authorities and the

circumstances of this case. In my view, the analysis of the Assistant Commissioner is correct.

75 The "open court" principle is fundamental to our justice system. However, its application has been limited to assuring public access to judicial and quasi-judicial proceedings; it does not apply to investigations by non-adjudicative bodies. See, for example, Canada (Canadian Transportation Accident Investigation and Safety Board) v. Canadian Press, [2000] N.S.J. No. 139 at paras. 17, 46, 49 (S.C.) and Travers, supra. Moreover, as the Assistant Commissioner noted, the principle does not extend to other parts of the criminal justice system that have not traditionally been "public arenas": Canadian Broadcasting Corp., supra, at 499.

76 Law enforcement investigations and matters protected by solicitor-client privilege have never been part of the public arena. In fact, for valid policy reasons, they have been the opposite, characterized by confidentiality. It would be unwarranted, in my view, to engraft the principles pertaining to the notion of the importance of public access to the courts onto the guarantee of freedom of expression under s. 2(b) of the Charter.

International Jurisprudence

77 Mr. Stratas also referred us to a series of international authorities in support of the CLA's contention that openness and access to information are fundamental to a democratic society and mandate government disclosure subject to public interest balancing factors. These "strands" were put forward in support of both the section 2(b) and the principle of democracy arguments.

78 He first drew our attention to various United Nations' publications and a white paper from the U.K. Cabinet Office, all accentuating the importance of promoting and protecting the right to freedom of opinion and expression and of the public's right to know: see Report of the Special Rapporteur, Mr. Abid Hussain, Promotion and Protection of the Right to Freedom of Opinion and Expression (UN ESC, 1994, UN Doc. E/CN.4/1995/32; Right to Freedom of Opinion and Expression, ESC Res. 1999/36, UN ESCOR, 1999, Supp. No. 3, UN Doc. E/CN.4/1999/167, 134; Report of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression, Mr. Abid Hussain, UN ESC, 1999, UN Doc. E/CN.4/1999/64; U.K., Cabinet Office (Office for Public Service), Your Right to Know: The Government's Proposals for a Freedom of Information Act (White Paper) by Chancellor of the Duchy of Lancaster (London: Her Majesty's Stationary Office, 1997), c. 1.3.

79 Not surprisingly, these sources highlight the fundamental importance of freedom of expression to the integrity of democracy and the enhancement of human dignity. They do not advance the proposition, however, that there is a positive duty on government to provide access to information in all areas of government activity, subject to a public interest balancing. Article 19(3) of the International Covenant on Civil and Political Rights provides that the right to freedom of expression, which includes the "freedom to seek, receive and impart information and ideas of all kinds", is subject to certain restrictions, including laws "for the protection of national security or of public order, or of public health or morals" (para. b). In the first of the above-noted reports, the

Special Rapporteur notes at para. 19 that "in principle, the State is not obligated to guarantee the right with positive measures."[12] The U.K White Paper simply deals with the British Government's proposal to introduce freedom of information legislation similar to that already in place in Canada and elsewhere. The proposal would exempt law enforcement investigations and confidential communications from disclosure.

80 We were also referred to certain international court decisions in which minority opinions expressed the view that government may have a duty to take positive measures to disclose information as a part of the freedom of expression right. However, the majority in all cases save one - a decision of the Supreme Court of India - declined to find such an obligation. See Houchins v. KQED, Inc., 438 U.S. 1 (1978); Guerra v. Italy (1998), 26 E.H.R.R. 357; Netherlands v. Council, C-58/94, [1996] E.C.R. I-2169; S.P. Gupta v. President of India and Ors, [1982] A.I.R. (S.C.) 149.

81 Houchins, supra, arose out of the refusal of prison officials to allow a broadcaster permission to inspect jail facilities and interview prisoners about problems in the jail. For the majority, Chief Justice Berger held that the American First Amendment does not guarantee a right of access to sources of information within government control, and that a special privilege of access for the media is not a right that is essential to guarantee the freedom to communicate or publish. He drew a distinction between the freedom of the press to communicate information already obtained and the argument that the constitution requires the government to provide the press with information to facilitate further comment. The minority took the view that an official prison policy of concealing knowledge about possible violations of prisoners' constitutional rights abridged the freedom of speech and of the press protected by the First and Fourteenth Amendments.

82 Guerra, supra, is a decision of the European Court of Human Rights. It involved an application by a group of individuals who lived close to a high risk chemical factory and who argued, based on Article 10 of the European Convention, that the State had an obligation to take steps to provide them with information about the risks related to the factory and about how to react in the event of an accident. Article 10 is a freedom of information provision. It states that everyone is entitled to the right of freedom of expression, which includes the right to hold opinions and to receive and impart information and ideas without interference by public authority. The freedom, however, is subject to limitations and restrictions as prescribed by law and necessary in a democratic society; included in those limitations and restrictions are such purposes as the prevention of crime and the prevention of the disclosure of information received in confidence. The majority of the court held that Article 10 was not applicable to the circumstances of the case. They concluded that the specific right to receive information in Article 10 "cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion"(at 382).

83 Netherlands, supra, is a decision of the Court of Justice of the European Communities, in Luxembourg. The Court rejected a challenge by the Government of the Netherlands to a Code of Conduct that had been promulgated regarding public access to documents in the possession of the

Council of the European Union and in the possession of the Commission. The Code of Conduct had been established at the instance of the members of the European Community who were concerned that general rules be put in place following acceptance of the Final Act of the Treaty on European Union (the Maastricht Treaty) to ensure the right of public access to documents held by Community institutions. In rejecting the Government's challenge, the Court relied upon the link between the public's need to have access to governmental information and the democratic nature of the Community's institutions, and pointed to various acts of affirmation of that principle subsequent to the ratification of the Treaty. The Court observed that "it was in order to conform to this trend, which discloses a progressive affirmation of individuals' right to access to documents held by public authorities, that the Council deemed it necessary to amend the rules governing its internal organization" (at I-2197).

84 There is strong language in Netherlands - in both the decision of the Advocate General and in the decision of the Court affirming the Advocate General - about the connection between "democracy" and public access to government information. For example, the Advocate General stated at I-2182:

> [T]he basis for such a right should be sought in the democratic principle, which constitutes one of the cornerstones of the Community edifice, as enshrined now in the Preamble to the Maastricht Treaty and Article F of the Common Provisions ... Hence it is the democratic principle and the content which it has progressively assumed in the various national systems which requires access to documents no more to be allowed only to the addressee of a measure of the public authority ...

And, at I-2175 he stated:

> In the final analysis, since openness of decision-making processes constitutes an innate feature of any democratic system and the right to information, including information in the hands of the public authorities, is a fundamental right of the individual, the Netherlands Government - associating itself with the European Parliament's observations on this subject in its statement in intervention - accordingly considers that determining the procedures, conditions and limits for public access to documents of the Community institutions cannot be left to the discretion of each institution, but must be a matter for the normal legislative' processes provided for in the Treaty and should be accompanied by the necessary guarantees as to the effectiveness of the relevant right.

85 Nonetheless, the "procedures, conditions and limits for public access to documents of the Community institutions" that were upheld and approved in Netherlands reflected very similar limits to those of the Freedom of Information and Protection of Privacy Act that are at issue in this application. Article 4(1) listed the ground on which access to Council and Commission documents may not be granted, including where its disclosure would undermine the protection of the public

interest (public security ... court proceedings, inspections and investigations) and the protection of confidentiality. Thus, while the case is of some relevance in that it confirms a European trend connecting more open access to government information and the principle of democracy, it is of little assistance to the Applicant in support of the proposition that government has a positive obligation to make law enforcement and confidential information available to the public to facilitate the public's ability to comment more fully, subject to public interest balancing.

86 The Applicant has drawn our attention as well to Gupta, supra. Mr. Stratas argues that this decision of the Constitution Bench of the Supreme Court of the world's largest democracy squarely supports the CLA's position, and indeed it does highlight a number of arguments put forward by the Applicant. Gupta concerned the validity of the transfer of the Chief Justice of the Patna High Court to the Madras High Court, and the non-extension of the term of another temporary High Court judge for a fresh term. Ancillary to these issues, however, was an issue regarding the disclosure of certain correspondence between the Law Ministry and the Chief Justice of India and the Chief Justice of Delhi, and the notings made by them, with respect to these matters. Section 123 of the Evidence Act of India prohibited anyone giving evidence that "derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit." The Court refused, however, to uphold the Government's refusal to produce the correspondence in the litigation because without it the judge complaining about the non-extension of term would not be able to show whether the extension had or had not been refused on proper grounds. It did so in ringing language emphasizing the importance of openness and disclosure in democratic societies. Notwithstanding the lack of any "public interest balancing" provision in the Evidence Act, the Court held that it must balance the public interest in disclosure and in the integrity of the administration of justice against the public interest in non-disclosure of certain state documents. Bhagwati J., for the majority, stated at 234:

> The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a) [of the Constitution of India]. Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.

Bhagwati J. continued at 235:

> Now we agree ... that public interest lies at the foundation of the claim for protection against disclosure enacted in S. 123 and it seeks to prevent production of a document where such production would cause public injury but we do not

> think ... that the interest which comes into conflict with the claim for non-disclosure is the private interest of the litigant in disclosure. It is rather the public interest in fair administration of justice that comes into clash with the public interest sought to be protected by non-disclosure and the court is called upon to balance these two aspects of public interest and decide which aspect predominates.

87 This language is very close, of course, to that of the submissions made to us by the CLA. Gupta is of no binding significance to this Court, however, and in any event I am not persuaded that it goes so far as to support the proposition urged upon us by the Applicant, namely that the Ministry of Public Safety and Security in Ontario has a constitutional obligation to produce law enforcement investigation reports and privileged documents to facilitate a citizen organization's expressive rights, subject to a public interest balancing exercise on a case-by case-basis. This is particularly so when - as here - the Legislature has specifically engaged in that very public interest debate in enacting the legislation and rejected the notion of subjecting such disclosure to public interest balancing on a case-by case-basis. I shall return to this latter point in a moment.

88 In arriving at its conclusion in Gupta, the Supreme Court of India nonetheless recognized that there were certain classes of documents for which class immunity would be justified. Cabinet documents were one. Another class, though, "which has always been recognised by the Court as entitled to the same immunity ... consists of documents evidencing the sources from which the police obtain information" (at 241-242). Moreover, the Gupta decision has to do with the production of privileged documents in court proceedings; it is therefore akin to the "open court" cases in Canadian jurisprudence, and properly founded on those principles. I have already concluded, however, that the open court cases do not assist the Applicant in the circumstances of this case.

Legislative History and the Public Interest Debate

89 The legislative history of the Freedom of Information and Protection of Privacy Act demonstrates that the framers of that legislation grappled with the very public interest balancing issue now raised by the Applicant.

90 The Act emanated from the recommendations of the Williams' Commission in 1980. The report of that Commission noted that while "there is a compelling public interest in open government, there is also a compelling public interest in effective government", and that "[a] rule of absolute openness with respect to government documents would impair the ability of governmental institutions to discharge their responsibilities effectively": Ontario, Report of the Commission on Freedom of Information and Individual Privacy (1980) at 235. The Commission recognized that the public interest in effective government required confidentiality in the areas of law enforcement and solicitor-client privilege, at 294-296 and 338-339.

91 In introducing the legislation (Bill 34) the then Attorney General, the Hon. Ian Scott, indicated that the freedom of information portion of it was based upon three principles, namely:

a) that government information should be more readily available to the public;
b) that necessary exceptions to access to government information should be limited and specific; and
c) that decisions by ministers and government officials on what information will be disclosed should be reviewed by an independent commissioner accountable only to the assembly.

Ontario, Legislative Assembly, Hansard Official Report of Debates, 1st Session, 33rd Parl., No. 21 (12 July, 1985).

92 Before the Standing Committee of the Legislative Assembly, the specific exemptions pertaining to law enforcement investigations and solicitor-client privilege were considered carefully, as was the public interest override provision. An amendment was suggested that law enforcement and privilege should be included in section 23. It was defeated. In the Legislature, a similar amendment was put forward, and was also defeated. Mr. Scott's opposition to the amendment was supported by the then opposition critic (and, recently, Attorney General himself), the Hon. Norman Sterling.

93 Thus in enacting the present public interest override scheme, including the exclusion of sections 14 and 19 from that scheme, the Legislature considered fully - and, indeed, conducted - the public interest balancing exercise which the CLA now suggests should be required on a case-by-case basis.

Conclusions Respecting the Section 2(b) Argument

94 The implications of the Applicant's position are wide-ranging. In the law enforcement field it would mean that ongoing high profile criminal investigations, and some not so high profile, would be subject to requests under the Act by members of the media and by public interest groups such as the Applicant. Each request would be conveyed in the ringing rhetoric of freedom of expression, the principle of democracy, and the right of the public to know. These are vitally important principles but the balancing issue has already been debated and decided - in my view correctly - by the Legislature. The potential hindrance to such investigations, the risks inherent in publicizing confidential aspects of the investigations, and the diversion of resources and energy on the part of law enforcement officials, while the "openness" issues are battled out before the appropriate police and ministry officials, then before the Commissioner, and finally, before the courts, are self-evident. These concerns were well summarized by the Williams' Commission in its 1980 report at 294-295. They include:

* The need to protect confidential informants and to ensure the continued flow of information from other law enforcement agencies;
* The concern that disclosure of law enforcement techniques would reduce their effectiveness;

* The risks of possible retaliation by offenders against informants and law enforcement personnel;
* The risk that public access to investigative files would frustrate the conduct of investigations and that premature disclosures prior to trial would impair the ability of the prosecution to present its case;
* The risk of intimidation and coercion of witnesses identified before trial; and,
* The potential of impairing an accused's right to a fair trial as a result of prejudicial pre-trial publicity.

95 Solicitor-client privilege is not absolute, but is nonetheless jealously guarded by the courts because of its importance to the criminal justice system. Clients must be free - and feel that they are free - to tell everything to their lawyer without fear of disclosure. There are limited exceptions to the privilege where innocence or public safety may be at stake. Whether a document falls within such an exception is a matter for the Commissioner to consider and determine when deciding if the document is caught by section 19 of the Act. If the CLA's position is correct, it would mean that documents which are fully covered by solicitor-client privilege and which do not meet the very limited exceptions outlined in such cases as R. v. McClure, [2001] 1 S.C.R. 445, and Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink (2002), 216 D.L.R. (4th) 257 (S.C.C.) at 284-285, could be subject to public disclosure. I find this proposition startling.

96 In the result, I am satisfied that the instant case is more analogous to the "platform" and "means of expression" cases (Haig, Native Women's Assn. of Canada, and Delisle) than to the "postering/leafleting" cases (Committee for the Commonwealth of Canada, Ramsden). Dunmore is distinguishable from the case at bar. While "the tradition of open courts runs deep in our society", as Adams J. noted in Fineberg, supra, at 203, the accessibility precepts of that tradition have been confined to judicial and quasi-judicial tribunals, and the courts have been cautious about extending them to wider areas of application: see Canadian Broadcasting Corp., supra.

97 I am not satisfied, therefore, that the "various strands" which the Applicant asks us to splice together to create the constitutional link between the CLA's section 2(b) rights and access to the law enforcement and privileged information here in question, enable us to do so. I reject the position that there is a constitutional obligation upon the government to provide access to the information.

98 In my view, the expressive activity sought to be engaged in by the Applicant does not fall within the sphere of section 2(b) of the Charter. It is therefore unnecessary to consider further the Applicant's argument about the effect of the restriction on the CLA's rights.

The Section 1 Justification

99 Even if the scope of the CLA's section 2(b) freedom of expression is broad enough to encompass an obligation on the part of government to provide access to the information in question

here, and even if the effect of the legislation is to restrain that freedom, I am satisfied that the failure to include sections 14 and 19 in the section 23 public interest override would be saved by section 1 of the Charter. The object of the Act in providing access to information not previously accessible to the public, while at the same time preserving certain limited and specific exemptions, is pressing and substantial. There is a rational connection between the means employed by the Legislature and its objectives. The Applicant's section 2(b) rights are minimally impaired. There is an appropriate, proportional, balance between the effects of the limiting provisions and the objectives in question: see Oakes, supra.

100 This Court previously reached that same conclusion with respect to section 14 in Fineberg.

101 In Oakes, and in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, the Supreme Court articulated the criteria that must be established if a limit to a Charter right is to be held to be reasonable and demonstrably justified in a free and democratic society. The following passage from Oakes, per Dickson C.J.C., at 227, summarizes the criteria:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd ... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Secondly, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big Drug Mart Ltd. ... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd. ... Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has

been identified as of "sufficient importance". [emphasis in original]

102 There can be little debate, in my view, that the objectives of the Legislature in enacting the scheme to ensure that government information is more readily available to the public, subject to limited and specific necessary exceptions, as set out in the Act "relate to concerns that are pressing and substantial in a free and democratic society". Greater accessibility to such information - promoting, as it does, greater transparency and accountability in government - is responsive to important principles underlying our democratic society, as the authorities referred to us by the Applicant demonstrate. At the same time, however, the policy of protecting confidentiality in law enforcement investigations is deeply rooted in our society and other democratic societies as well: see Report of the Commission on Freedom of Information and Individual Privacy, supra, at 295-296; Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711 at 744-745. So, too, is the policy of ensuring that "solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance": Lavallee, Rackel & Heintz, supra, at 284-285; see also Pritchard v. Ontario Human Rights Commission (2003), 63 O.R. (3d) 97 at 103-105 (C.A.). The objective of providing "necessary exemptions" to the general purpose of providing rights of public access to information therefore relates to concerns that are pressing and substantial in society.

103 I am also persuaded that the measures selected by the Legislature to achieve its objectives meet the Oakes proportionality test.

104 First, the exemptions pertaining to law enforcement investigations and solicitor-client privilege under sections 14 and 19 of the Act, and the exclusion of those exemptions from the public override in section 23, are rationally connected to the need to protect the confidentiality and integrity of the records at issue. It is necessary for government to show, on a civil standard, that "the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt": Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211, per Wilson J. at 291. See also RJR-MacDonald Inc. v. Canada, [1995] 3 S.C.R. 199, per McLachlin J. at 339 and Iacobucci J. at 352. That onus is met here.

105 Secondly, the measures adopted in the Act minimally impair the Applicant's section 2(b) freedom of expression. The standard is not one of perfection, but rather one of reasonableness, and the legislature may select among a range of reasonable options. In this case it has carefully crafted certain "limited and specific" exemptions to the general principle of greater public accessibility to government information (sections 12 - 22 of the Act), and it has provided even more limited and specific exclusions to the potential public interest override of those exemptions (cabinet records (s. 12), law enforcement records (s. 14), defence records (s. 16), privileged documents (s. 19), and near-publication information (s. 22)). As McLachlin J. noted in RJR-MacDonald at 276:

> The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the new law falls within a range of reasonable

> alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.

106 For this reason the fact that some of the provinces have chosen not to exempt law enforcement and privileged records from their public interest override provision is not determinative. The federal government and the Legislatures of most provinces have a scheme similar to that of Ontario. Consequently, the choices Ontario has made fall within a reasonable range of alternatives.

107 Finally, I conclude for the foregoing reasons that the relationship between the effects of the measures in question and the objectives outlined above are appropriately proportional, and strike the right balance. The Oakes criteria for a section 1 justification have therefore been met.

108 In Fineberg at 205, although he found no section 2(b) violation, Adams J. provided the following succinct section 1 analysis on behalf of this Court (with which I agree and which in my view applies equally to both sections 14 and 19 of the Act):

> 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.

109 I therefore conclude that even if the failure of the Legislature to subject the law enforcement and solicitor-client privilege exemptions of sections 14 and 19 to the public interest override provisions of section 23 of the Act constitutes a violation of the CLA's section 2(b) rights under the Charter, the scheme of the Act is saved under section 1 of the Charter as reasonable and demonstrably justified in a free and democratic society.

> The Commissioner's Failure to Take into Account the Constitution in Interpreting the Exemptions.

110 The Applicant also argued that the Assistant Commissioner failed to take into account its section 2(b) rights and the constitutional principle of democracy in interpreting and applying the section 14 and 19 exemptions. Therefore, his decision should be quashed and the matter remitted for further consideration on proper principles.

111 There is no merit to this argument.

112 First, the argument is essentially the same as the section 2(b) and principle of democracy contentions already addressed and rejected. The argument is simply dressed in the clothing of statutory interpretation instead of that of a direct constitutional attack.

113 Secondly, it is well established that Charter values are not imported in interpreting a statute that is clear and unambiguous. Where statutory provisions are open to more than one interpretation, the courts will prefer the interpretation that is consistent with the Charter. However, provisions that are unambiguous must be assessed directly for validity against the Charter, including the justification requirements of section 1. Otherwise, the Charter, with its checks and balances in section 1, may be circumvented. See Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, per Lamer J. at 1078; Symes v. Canada, [1993] 4 S.C.R. 695 at 752; R. v. Zundel, [1992] 2 S.C.R. 731, per McLachlin J. at 771. Iacobucci J. summarized the principle in the following passage in Bell Express Vu Jasper Partnership v. Rex, [2002] 2 S.C.R. 559 at 598-599:

> The last point touches, fundamentally, upon the proper function of the courts within the Canadian democracy. In Vriend v. Alberta, [1998] 1 S.C.R. 493, at paras. 136-42, the Court described the relationship among the legislative, executive, and judicial branches of governance as being one of dialogue and mutual respect. As was stated, judicial review on Charter grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches. "The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even over-arching laws under s. 33 of the Charter)" (Vriend, supra, at para. 139).
>
> To reiterate what was stated in Symes, supra, and Willick, [1994] 3 S.C.R. 670, supra, if courts were to interpret all statutes such that they conformed to the Charter, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on Charter grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on Charter rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the Charter right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret this sort of enactment in light of Charter principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the Charter to achieve a different

result.

[underlining in original; italics added]

114 There is no ambiguity in section 23 of the Act. Sections 14 and 19 are simply not included in the exemption provisions to which the public interest override may be applied. Charter values have no place in the interpretation exercise. For similar reasons, an interpretative approach based on applying the constitutional principle of democracy is likewise inappropriate.

115 Mr. Oliver submitted on behalf of the CLA that the notion of Charter-consistent interpretation comes into play when the Assistant Commissioner is asked to exercise his discretion under sections 14 and 19 - or, more accurately, I suppose, where the Assistant Commissioner is asked to exercise his reviewing discretion with respect to the head's exercise of discretion under those sections. He argues that there is an ambiguity built into this process because of the discretionary nature of the exercise, and therefore that the discretion must be exercised in a fashion that is consistent with Charter values and the principles of democracy. I do not accept this submission. It cannot prevail for the same reasons that the court does not resort to the principle of Charter-consistent interpretation in the case of unambiguous language. If the Applicant is correct in this contention there would be no need for the section 23 override for any of the exemptions. The submission is simply an indirect way of putting forward the Applicant's main contention that there has been a section 2(b) violation and a failure to comply with the principle of democracy.

116 Finally, it was argued that the Assistant Commissioner erred in his application of sections 14 and 19 of the Act by failing to take into account that the records requested by the CLA are records that are not akin to private materials. Rather, as records in the possession of the Crown, they are "the property of the public to be used to ensure that justice is done": R. v. Stinchcombe, [1991] 3 S.C.R. 326 at 333. Since the Applicant is in effect asserting that there was an abuse of process and that in order "to ensure that justice is done" it should have access to the "property of the public", Stinchcombe principles should apply. In my view, however, the Stinchcombe principles regarding disclosure to the defence in a criminal case have no application to a situation where a public interest group seeks to require government to release documents to facilitate the group's ability to comment on a matter of public interest.

VII

CONCLUSION AND DISPOSITION

117 For all of the foregoing reasons I am satisfied that the Applicant's section 2(b) right to freedom of expression is not violated by the legislative scheme in the Freedom of Information and Protection of Privacy Act and, in particular, the failure of the Legislature to provide for a public interest override with respect to the law enforcement records exemption in section 14 of the Act and the exemption respecting solicitor-client privilege in section 19. In any event, the scheme would be

saved by section 1 of the Charter as the measures selected by the Legislature to attain its legislative objectives are reasonable and demonstrably justified in a free and democratic society.

118 The constitutional principle of democracy is of no assistance to the Applicant as a separate ground for reading in a public interest balancing provision, as the argument based on it is essentially the same argument as the section 2(b) contention, but dressed in different garb. In any event, the constitutional principle of democracy already underpins and informs the section 2(b) right. It need not be put forward twice.

119 Similarly, the argument that the Assistant Commissioner erred in failing to approach the interpretation of sections 14, 19 and 23 of the Act in a manner consistent with the Charter and the constitutional principle of democracy must be rejected. There is no ambiguity in the provisions. Any other use of Charter values and the principle of democracy in this regard would constitute an indirect constitutional attack on the legislation without the balancing factors inherent in direct constitutional analysis.

120 Accordingly, I would dismiss the application.

121 If the parties cannot agree with respect to costs, brief written submissions in that regard may be filed within 30 days of the release of this decision.

122 In closing, I would like to thank counsel for their very skillful and helpful advocacy.

BLAIR J.
GRAVELY J.
EPSTEIN J.

cp/e/nc/qw/qlrme/qlkjg

1 I shall refer to "the Criminal Lawyers' Association" in these Reasons as "the CLA".

2 The following outline is taken from the helpful summary contained in the Factum of the Ministry of Public Safety and Security.

3 See Factum of the CLA at para. 21.

4 Factum of the CLA at para. 42, citing R. v. Stinchcombe, [1991] 3 S.C.R. 326 at 333.

5 Ibid, at para. 14.

6 Factum of the Information and Privacy Commissioner at paras. 67, 69.

7 See the Factum of the Ministry of Public Safety and Security at para. 29.

8 In Reference re Public Service Employee Relations Act (Alta.), supra [footnote added].

9 RCMP members were excluded from the application of the Public Service Staff Relations Act and Part I of the Canada Labour Code.

10 Re Edmonton Journal v. Alta. (1983), 5 D.L.R. (4th) 240 (Alta. Q.B.); aff.'d (1984), 13 D.L.R. (4th) 479 (Alta. C.A.).

11 Canada Broadcasting Corp. v. New Brunswick (Attorney-General), [1996] 3 S.C.R. 480.

12 This is qualified in the 1999 Report at para. 12 by the observation that there is a positive obligation on States to ensure access to information that is required to be accessible, "particularly with regard to information held by Government in all types of storage and retrieval systems - including film, microfiche, electronic capacities, video and photographs - subject only to such restrictions as referred to in article 19, paragraph 3, of the International Covenant on Civil and Political Rights."

Case Name:

Law Society of Upper Canada v. Xynnis

Between
The Law Society of Upper Canada, Appellant, and
Nicolas Xynnis, Respondent

[2014] L.S.D.D. No. 38

2014 ONLSAP 9

File No.: LAP14/13

Law Society of Upper Canada Appeal Panel
Toronto, Ontario

Panel: David A. Wright, Chair; Marion Boyd; Mark Sandler

Heard: November 28, 2013.
Decision: February 21, 2014.

(58 paras.)

Tribunal Summary:

Xynnis -- Appeal -- Publication ban -- The Law Society appealed the decision of the hearing panel to order a publication ban on a term of its order, portions of its reasons and the fact of the publication ban itself -- The ban prohibited publication of medical information the Lawyer relied upon to argue for a less serious penalty than that sought by the Law Society -- The appeal was allowed and the publication ban was overturned -- The adjudicator erred in not giving the parties an opportunity to prepare submissions based on the law and in deciding, without considering the authorities, to issue the publication ban -- The publication ban was not justified -- There was no evidence that the Lawyer or anyone else would be harmed by disclosure of what was presented to the hearing panel, and any harm was outweighed by the interest in open justice because the information was central to understanding the decision.

Appearances:

Danielle Smith, for the appellant.

Ian R. Smith, for the respondent.

REASONS FOR DECISION

1 DAVID A. WRIGHT (for the panel):-- This appeal raises the issue of when a publication ban should be issued in Law Society Tribunal[1] proceedings. The Law Society appeals the decision of the hearing panel to order a publication ban on a term of its order, portions of its reasons and the fact of the publication ban itself. The ban prohibited publication of medical information the Lawyer relied upon to argue for a less serious penalty than that sought by the Law Society. The issues raised invite a general consideration of the legal principles to be applied in balancing openness against other interests in hearings before the Tribunal. For the reasons that follow, we find that the publication ban should be overturned.

THE HEARING

2 The publication ban was issued in a summary hearing before a single member panel. On the basis of an admission and Agreed Statement of Facts, the adjudicator held that the Lawyer committed professional misconduct by failing to co-operate with a spot audit and with a Law Society investigation.

3 The parties had different positions on penalty. The Law Society sought a one-month suspension on the basis that this was the second time the Lawyer had committed professional misconduct by failing to co-operate. The Lawyer submitted there should not be a suspension, and proposed instead a reprimand, fine and other terms. The Lawyer relied, among other things, upon the fact that he had experienced difficult personal circumstances, some health issues, and was receiving counselling from a medical professional. He proposed that a term of the order could be continuing counselling if no suspension was ordered.

4 The adjudicator gave an oral ruling, with further written reasons to follow. She accepted the Lawyer's arguments and did not order a suspension. One of the terms ordered, in addition to a reprimand and fine, was that the Lawyer continue counselling with a named medical professional.

5 The Lawyer, through his counsel, requested a conference call with the adjudicator, at which he sought guidance since he was considering a motion for a publication ban on the term related to counselling. His counsel asked that the adjudicator advise whether such a request was doomed to fail, to avoid preparing motion materials and arguing the motion if this was the case. The Law Society took the position that motion materials should be filed if the adjudicator was going to consider the issue, and the Lawyer did not dispute that this was appropriate.

6 The adjudicator directed the parties to make submissions on the publication ban issue immediately, during the conference call, dispensing with the requirement for motion materials. She made an oral ruling, with formal reasons to follow, that there be an order banning publication of the term of the order relating to counselling, that portions of the reasons relating to this issue be redacted and that there be no indication on the face of the order that any terms had been removed from it.

7 The order that followed prohibited publication of the first paragraph of the original order that contained the counselling term and directed the renumbering of the remaining paragraphs in any published version. It also banned publication of any reference in the decision or order to counselling, treatment or the name of the medical professional. It ordered that the section of the reasons dealing with these issues was not to be published and was to be marked subject to a non-publication order. Finally, the order banned publication of the publication ban order, the reasons for it and the fact that the non-publication motion was made.

8 In her written reasons on the publication ban, the adjudicator concluded that publicizing the mental health aspect of the original order would have a disproportionate impact on the Lawyer's career, as he practises in the criminal law field. She also took into account the nature of the misconduct, which was a summary matter. She emphasized that she considered this case to be unique, noting the underlying confluence of several unusual personal events and the contrition and remorse expressed by the Lawyer.

INTERIM PUBLICATION BAN IN THE APPEAL PANEL

9 After the appeal was filed, there were further publication bans made by the appeal panel to preserve the hearing panel's order and to avoid limiting the appeal panel's ability to decide how, if at all, the Lawyer's privacy should be protected. The transcripts and endorsements of two Appeal Management Conferences were subject to publication bans pending a decision on the appeal. The Lawyer's motion to delay publication of the hearing panel's order in the Ontario Reports and on the Orders and Dispositions section of the Law Society website pending a decision on the appeal was granted (see 2013 ONLSAP 39.) The Lawyer's name was anonymized in that decision, also pending appeal (see para. 14.)

OPEN JUSTICE AND TRANSPARENT PROFESSIONAL REGULATION

10 It is a basic principle that proceedings of courts and administrative tribunals should be open to the public, with the ability to be publicized and reported upon. The open court principle protects democracy by ensuring that the exercise of decision-making power can be scrutinized. The right to publish information about court and tribunal proceedings falls within the right to freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms.* Various cases have recognized the importance of this principle at the Tribunal: see, for example, *Law Society of Upper Canada v. Richard Keith Watson*, 2012 ONLSHP 53; *Law Society of Upper Canada v. Roy Francis DMello*, 2011 ONLSHP 114; *Law Society of Upper Canada v. Warren Augustine Lyon*,

2014 ONLSHP 1.

11 The Supreme Court of Canada explained the reasons for and importance of the open court principle in *Vancouver Sun (Re)*, 2004 SCC 43 at paras. 23-26:

> This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings: *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 187; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at paras. 21-22; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 13 and to put forward opinions about the functioning of public institutions. "Indeed a democracy cannot exist without that freedom to express new ideas. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized": *Edmonton Journal*, *supra*, at p. 1336.
>
> The open court principle has long been recognized as a cornerstone of the common law: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 21. The right of public access to the courts is "one of principle . . . turning, not on convenience, but on necessity": *Scott v. Scott*, [1913] A.C. 417 (H.L.), *per* Viscount Haldane L.C., at p. 438. "Justice is not a cloistered virtue": *Ambard v. Attorney-General for Trinidad and Tobago*, [1936] A.C. 322 (P.C.), *per* Lord Atkin, at p. 335. "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity": J. H. Burton, ed., *Benthamiana: Or, Select Extracts from the Works of Jeremy Bentham* (1843), p. 115.
>
> Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.
>
> The open court principle is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at

> para. 17. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Edmonton Journal, supra*, at pp. 1339-40. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions: *Edmonton Journal*, at pp. 1339-40. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.

12 Openness is particularly important for the Law Society Tribunal as part of a self-governing profession. Proceedings must be transparent so that members of the public and of the profession are aware of and can have confidence in the impartial and fair resolution of issues that come before us. As noted, for example, in the May 26, 2005 Tribunals Task Force report to Convocation at paras. 113-115:

> The public, the profession and the media have become increasingly interested in matters that Law Society panels hear and in their orders and reasons.
>
> Law Society conduct hearings are held in public as a matter of course. This has been the case since 1987. The orders and reasons delivered at the conclusion of the hearings are also made available to the public through publication on CanLII, QuickLaw and the Ontario Lawyers Gazette.
>
> The Law Society adopted this policy of openness to reflect its public interest mandate and the requirements of the *Statutory Powers Procedure Act*. The profession has been given the authority to discipline its members, and must do so in a manner that the public can observe. This commitment to transparency is one of the principles the Task Force has determined is essential to the tribunals process and procedures.

13 The Tribunal exercises significant powers, and its decisions affect both the public and the ability of licensees who come before us to earn a living. Open proceedings enhance its legitimacy, allowing the public, lawyers and paralegals to understand how the Tribunal makes decisions about the regulation of legal professionals.

PERSONAL INFORMATION AND PUBLIC DECISIONS IN AN INFORMATION AGE

14 As a result of the Internet and social media, information about tribunal and court proceedings and decisions can spread far more quickly than it did in the past, without journalists as an intermediary. A decision which 30 years ago would only have been available in printed form in a law library if a reporting service decided to publish it is now posted almost instantly on the Internet,

and a tweet may bring thousands of people's attention to it. There is significantly less "practical anonymity" in court and tribunal decisions.

15 Litigation often involves personal information, including health information, and there is nothing unique in this regard about proceedings before this Tribunal. Personal details about individuals' lives become part of many other types of legal proceedings. To give just three examples, custody disputes may involve extensive psychological information about parents and children, a human rights case about accommodation of a mental health disability will likely include evidence about the employee's health, and personal injury actions may involve detailed reference to the plaintiff's present and past employment and health records. The open court principle, however, requires that such information should be public absent particular circumstances, and a demonstrated justification.

16 Of course, the effect of including personal information in open proceedings can be particularly pronounced in this context. Like other professional regulators, the Law Society publicizes Tribunal orders to the profession, in our case through publication in the Ontario Reports and on its website. Lawyers and paralegals are more likely to refer to CanLII or seek access to Tribunal files than other professionals, and so details about Tribunal cases may be more likely to come to the attention of professional peers.

DRAFTING REASONS AND ORDERS

17 It is essential to consider privacy issues, particularly those respecting third parties, when drafting all reasons and orders. If personal information is not germane to the reasoning or the result, it may be unnecessary to include it. For example, if a licensee's explanation for a failure to respond to the Law Society is that his or her spouse was in hospital for an extended period due to illness, there may be no need to identify the illness or the name of the spouse's doctor in order to explain the arguments raised and the decision on those arguments. If a client's name or details about his/her case are privileged, the client can generally be identified by initials and the case described without reference to privileged or identifying information. This requires careful drafting, but so long as the reasons remain clear and fully show the panel's reasoning, personal information can often be avoided in reasons and orders.

18 The considerations suggested by the Canadian Judicial Council in its 2005 publication, *Use of Personal Information in Judgments and Recommended Protocol*[2] at paras. 19-20 (Protocol), may be of assistance both to adjudicators and to parties when drafting agreed statements of fact or proposed orders:

> ... There are four objectives which must be taken into account when determining what information should be included or omitted from reasons for judgment:
>
> 1) ensuring full compliance with the law;

2) fostering an open and accountable judicial system;

3) protecting the privacy of justice system participants where appropriate; and

4) maintaining the readability of reasons for judgment.

> Compliance with the law relates to decisions where there are legal publication restrictions in place. Openness of the judicial system requires that even where restrictions are in place or a case involves highly personal information, such as in family matters, the public still should have access to the relevant facts of the case and the reasons for the judge's decision. The tensions among these objectives need to be considered when editing judgments for privacy concerns. For example, publishing egregious facts in a case may be seen to violate privacy concerns of a litigant, but if these facts are highly relevant to the case and in particular, to an understanding of the decision reached, their omission would deny the public full access to the judicial system. It is also important to ensure that judgments are understandable and that the removal of information does not hinder the ability of the public to comprehend the decision that has been reached.

19 Prior to considering publication bans or closed hearings, adjudicators and parties should always consider whether privacy interests can be addressed through careful drafting. Of course, in such circumstances, the media or others have access to the Tribunal file, including any personal information, but information is not disseminated in the easily accessible form of reasons and orders. As noted in the Protocol at para. 32, this maintains some level of protection while protecting the openness principle:

> It should be noted that where there is no publication ban in place, the identity of persons sought to be protected by editing reasons for judgment may still be ascertainable by examining the actual court file. Thus, full access to the record is maintained for those who have sufficient reason to take the extra step of attending at the registry or doing an online search for court records. However, by not disseminating the information to easily accessible court websites, some level of protection is maintained.

20 Before ordering a publication ban, a closed hearing or that a document not be public, therefore, it should be clear that the issues of concern cannot be dealt with through the exercise of discretion in drafting reasons and orders.

ORDERS AVAILABLE: PUBLICATION BANS, NON-PUBLIC DOCUMENTS AND CLOSED HEARINGS

21 Tribunal hearings are presumptively open to the public: see Rule 18.01 of the *Rules of Practice and Procedure*. In the absence of an order to the contrary, the public may attend, the Tribunal Office will provide copies of file documents and exhibits upon request, and the court reporting service will provide a copy of the transcript, on payment of any appropriate fees. Absent an order, anyone can report on what occurs in the hearing and what is contained in public documents.

22 Pursuant to Rule 18 and the Tribunal's power to control its own process, the Tribunal can issue the following orders that depart from full openness:

a. a publication ban, which does not close the hearing or prohibit materials in the court file from being provided upon request, but prevents their publication. A notice as to the existence of a publication ban and its terms may be placed on the cover of relevant documents or transcripts as an effective means of ensuring compliance. The power to issue a publication ban is implicit in the right to control access to information in Rule 18 and is part of the Tribunal's inherent power over its process;

b. an order that specific documents not be public, which means that if requested, they will not be provided by the Tribunal office and no one may disclose them (Rule 18.05);

c. An order that a hearing be held, in whole or in part, in the absence of the public and that no one disclose any documents or information about what occurred (Rule 18.02). Anyone except for those listed in Rule 18.03 must leave the room, and documents and transcripts relating to a closed hearing are not provided by the Tribunal office or the court reporting service. Those who are present may not disclose what occurred.[3]

23 We emphasize several key points at this point in the reasons. First, where an order must be made, it must be the type of order that affects openness the least while accomplishing the objective of protecting sensitive information. The parties should therefore organize their materials and submissions to facilitate the least intrusive order possible.

24 For example, if it is necessary that a certain document or part of a document be received in the absence of the public, counsel may be able to make their submissions and lead evidence without specific reference to the information that prompted the order. In such circumstances, the hearing can continue in public. When a document or document book cannot be fully public, two versions should

generally be prepared, one with redactions, so that the public can have access to the portions that do not require protection.

25 As stated by the hearing panel in *James Maurice Melnick v. Law Society of Upper Canada*, 2012 ONLSHP 179 at para. 15:

> Therefore, when contemplating removing matters from the public record, restraint must be the order of the day. Where a remedy short of excluding the public will address the concerns, then an order providing for evidence "in the absence of the public" is not appropriate. The public is entitled to monitor how the Law Society is carrying out its statutory mandate, and public hearings are an important facet in their ability to do so. Where identifying information can be redacted rather than received in the absence of the public, efforts should be made to pursue this course to promote open and transparent hearings.

26 Second, the Tribunal should be even more reluctant to place restrictions on the openness of reasons and orders than on evidence and submissions. The explanation for a decision is critical to showing the public how the Tribunal administers justice and how the Law Society regulates its members. The nature of an order is essential to the public's understanding. It often identifies for the public any terms of, or limits on the licensee's practice.

27 Third, it is essential that the Tribunal be transparent about and give reasons for a non-publication order or decision to close a hearing, even where such a request is on consent. It is hard for us to imagine circumstances in which it would be justified to place a ban on publishing the fact of a closed hearing or that a publication ban has been imposed. The principles behind open justice make it especially necessary to advise the public and the media when and why there are proceedings or materials to which they cannot have access.

28 Fourth, the Tribunal Office should never be called upon to go through documents or transcripts and make redactions to try to fulfill a non-specific order by the Tribunal. It is not well situated to determine, for example, what redactions are necessary to ensure compliance with such an order. It is essential that materials filed completely redact any information that cannot be disclosed, and that orders and proposed orders be precise as to which exhibit numbers and pages of the transcript are not public.

29 Fifth, a panel should never instruct the reporter to edit the transcript. While a redacted version of the transcript may be available to the public, when a transcript is ordered there must always be a version in the file that reflects precisely what was said and done in the hearing room.

BALANCING OPENNESS AND OTHER VALUES

30 We address now the principles that should be applied in deciding whether to make any of the above orders. The burden is on the person seeking limits on openness to establish the need for an

order. The basis should be established through evidence or facts of which judicial notice may be taken, unless the category of information is something that has been recognized as justifying a publication ban, such as the protection of children or sexual assault complainants: *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 at para. 16.

31 The Tribunal must consider the impact on open justice and the importance of that right even if there is no one present opposing the order: *R. v. Mentuck*, 2001 SCC 76 at para. 38. This means that parties seeking a closed hearing or publication ban on consent must explain why it is justified, and the panel must independently weigh the issues against the right to open courts and freedom of expression.

32 To obtain a publication ban, a non-disclosure order or a closed hearing, the party seeking such an order must establish first, that such an order is necessary to prevent a serious risk to the administration of justice because reasonable alternative measures will not do so; and second, that the benefits outweigh the effects on the right to free expression and the efficacy of the administration of justice: see *Dagenais v. Canadian Broadcasting* Corporation, [1994] 3 S.C.R. 835, *Mentuck, supra,* at para. 32 and *Bragg, supra,* at para. 11.

33 In considering the first stage of the test, the risk must be to the administration of justice, and must go beyond the desire to avoid publicity or the normal stresses of disclosure of personal matters in litigation. In *M.E.H. v. Williams*, 2012 ONCA 35, the Court of Appeal said at para. 25:

> ... The interest jeopardized must, however, have a public component. Purely personal interests cannot justify non-publication or sealing orders. Thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public will not, standing alone, satisfy the necessary branch of the test...

34 We turn next to a discussion of some of the kinds of interests that may be raised in proceedings in this Tribunal, and make brief comments on the application of the *Dagenais/Mentuck* test in those circumstances.

PRIVILEGED INFORMATION

35 Issues before this Tribunal raise particular considerations because they often relate to a work by a licensee on behalf of a client. Rule 18.02(b) provides that a hearing may be closed where it is necessary to preserve the confidentiality of a privileged document or communication. Under s. 49.8 of the *Law Society Act*, R.S.O. 1990, c. L.8, the Society may compel the production of or be provided with solicitor-client privileged information. Even when such information is admitted in Tribunal proceedings, the privilege is maintained for all other purposes.

36 Solicitor-client privilege has significant weight in our legal system. The privilege is a fundamental legal right and is almost absolute, in order to ensure free and candid communication

between lawyer and client: *R. v. McClure*, 2001 SCC 14.

37 Orders that documents not be public or closing Tribunal hearings to protect disclosure of solicitor-client information are generally justified under the *Dagenais/Mentuck* test. There would be a serious risk to the administration of justice if clients, who are not parties to tribunal proceedings, could not be assured that their privileged communications would be protected if their lawyer became the subject of Tribunal proceedings. There is often no method to preserve the information of the client, who is not a party to the proceeding, short of making documents admitted not public. Protecting a client's confidences, in a case that relates to the lawyer's professional conduct, is an exceptional circumstance that outweighs the principle of open legal proceedings.

38 However, where privileged documents or communications are introduced as evidence, the hearing and materials should be organized to limit openness as little as possible. In addition to preparing two versions of document books, the parties should prepare their submissions and oral evidence so that privileged information is not reflected in the transcript unless absolutely necessary, and the hearing itself can remain open, for example, by using initials in oral evidence.

OTHER TYPES OF PERSONAL INFORMATION

39 Rule 18.02(c) provides for the possibility of closed hearings (and by implication, publication bans) where:

> intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

40 In some cases, a publication ban or closed hearing may be justified to protect information about persons who are not parties to the litigation and who are not protected by privilege. For example, in *Melnick, supra*, the issue was the lawyer applicant's sexual relationship with a student while he had been a teacher, for which he had been convicted. Emails between him and the student were received in the absence of the public, to protect the interests of the victim.

41 Children, in particular, are entitled to special protection of their privacy:*Bragg, supra,* at paras. 17-20. Various statutes recognize that addressing this vulnerability in particular contexts takes priority over open justice. For example, s. 43 of the *Child and Family Services Act,* R.S.O. 1990, c. C.11, establishes a presumption that child protection hearings are closed subject to a limited exception for media, and prevents anyone from identifying the child or a member of the child's family. Part 6 of the *Youth Criminal Justice Act,* S.C. 2002, c. 1, contains various restrictions on the identification of children and young persons who are accused, victims or witnesses in proceedings under that legislation.

42 Similarly, the effect on third parties who are complainants or victims in sexual assault matters, or the disclosure of confidential commercial information (*Law Society of Upper Canada v. Richard Keith Watson*, 2012 ONLSHP 53, *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41) have been legally recognized as leading to harm that could outweigh openness, applying the *Dagenais/Mentuck* test.

43 It is common for personal information about licensees and their families to be raised in Tribunal proceedings. In capacity applications, the licensee's health is the focus of the proceeding. In other types of applications, licensees and licensee applicants often introduce information about their health and other personal circumstances to explain their actions, in particular since extenuating personal circumstances are one of the factors in determining penalty.

44 As held in *M.E.H., supra*, the desire to avoid publicity, effect on one's career, or embarrassment of having justice done in public when one is a party to litigation, is not sufficient to meet the first branch of the test. Nor is it sufficient to refer to the general stigma, which unfortunately still exists in our society, about mental health issues and addictions or other personal health issues. While such stigma exists, it does not justify a departure from open justice absent evidence of specific harm and a tie between that harm and the administration of justice.

45 The closer the facts sought to be shielded come to the core of the issues before the Tribunal and the actions of the parties to the proceeding, the harder it will be to justify restrictions on openness. For example, the more directly the nature of the evidence bears on the defence of a licensee or a factor related to penalty, the more cautious the Tribunal should be in restricting openness. Similarly, restrictions on publishing information about the identity or actions of employees of the Law Society can only be justified in the most exceptional of cases.

46 Where facts are at the heart of the case and are about the subject of the proceeding, limits on transparency should be imposed on such information only in particular and unusual circumstances, based on evidence that shows a risk of harm to the administration of justice through evidence based upon the specific facts of the case.

APPLICATION TO THIS CASE

47 The adjudicator erred in not giving the parties an opportunity to prepare submissions based on the law as they requested and deciding, without considering the authorities, to issue a significant publication ban. Where there is urgency and a real basis for concern, an interim order can be made to give the parties a chance to consider the issues and make full argument. Rule 18 orders, in particular those that involve issues other than privilege, must be considered in light of full submissions.

48 The publication ban orders were not justified. The Lawyer had failed to co-operate once before. His ongoing counselling, as the adjudicator acknowledged in the publication ban decision, was an important factor that explained the hearing panel's decision not to impose a suspension, but a

reprimand. The public was entitled to fully know why a second, similar offence did not attract a more severe penalty. The restructuring of the public order and reasons to delete reference to the counselling term was deeply problematic since it left, albeit inadvertently, the erroneous impression that the order did not address the need for ongoing counselling.

49 There was not particularly intimate or sensitive information disclosed during the hearing that would justify a Rule 18 order under the *Dagenais/Mentuck* test. There was no evidence that the Lawyer or anyone else would be harmed by disclosure of what was presented to the hearing panel beyond a desire to avoid publicity, embarrassment or the reactions of colleagues and clients. The first stage of the test was not met. Moreover, even if this could constitute sufficient harm to meet the first stage, any harm was outweighed by the interest in open justice because the information was so central to understanding the decision.

50 The Lawyer's central argument is that the mere disclosure of the fact that he was in counselling with a particular type of professional would be stigmatizing. He argues that harm was shown because it can be inferred that licensees will be less likely to seek treatment for mental health or addiction issues if there is no guarantee that such issues can be raised in a closed hearing or without being referred to in the reasons. There is no evidence in support of this assertion and no basis for judicial notice to be taken of it.

51 For these reasons, we cannot agree that a publication ban was supported in those circumstances. The hearing panel erred in law in doing so. The publication ban must be overturned in its entirety.

52 That being said, the hearing panel would have been entitled, in the exercise of its discretion, to craft its order to refer to the requirement of ongoing counselling without necessarily identifying the counsellor. This discretion is, of course, different than imposing a publication ban or making an order that prevents access to such information if otherwise contained in the record. Rather than remit the matter back to a hearing panel to determine whether, in its discretion, the order should be worded in that way, we are content to amend the order.

REMEDY

53 The appeal of the publication ban order is allowed. All of the publication bans previously imposed, at both the hearing and appeal stages, will be lifted. The reasons and the July 25, 2013 Order will be published without redactions, with the exception that in the exercise of our discretion, we will amend the first term of the July 22, 2013 Order to remove the name of the medical professional and substitute the words "his current medical practitioner."

54 The Lawyer asks that his name not be used in this decision and that the anonymization of his name pending this decision in the previous appeal panel decision be maintained. We do not believe there are grounds to depart from the principle that reasons should identify the parties as part of open justice, given the absence of demonstrated specific harm.

55 The Lawyer asks that any decision not take effect immediately so that he can consider his options for further appeal. The appeal panel's order will take effect two weeks from the date of this decision.

56 Neither party seeks costs and none are awarded.

57 We thank both counsel for their excellent advocacy.

ORDER

58 The Order will provide as follows:

1. The appeal is allowed, and the publication bans issued by the hearing panel and appeal panel are lifted effective two weeks from the date of this Order. The hearing panel reasons shall be published with no redactions after that date.

2. The first paragraph of the hearing panel's Order of July 22, 2013 is amended to read as follows:

   The Lawyer shall continue counselling with his current medical practitioner or another qualified practitioner until his medical practitioner advises the Monitoring and Enforcement Department of the Law Society that such counselling is no longer required and the Lawyer also so advises the Law Society. Provided that if the current medical practitioner ceases to counsel the Lawyer while counselling is still required, the replacement counsellor shall be qualified in the care areas necessary to take over treatment of the Lawyer.

3. The previous appeal panel reasons in this matter shall be amended to reflect the Lawyer's name in the style of cause.

4. The Order of the hearing panel, with the above modifications, shall be published in the Ontario Reports and on the Law Society website no earlier than two weeks from the date of this Order.

5. There are no costs awarded on this appeal.

1 On March 12, 2014, pursuant to the *Modernizing Regulation of the Legal Profession Act*, S.O. 2013, c. 17, the Hearing and Appeal Panels will become the Hearing and Appeal Divisions of the Law Society Tribunal. For ease of reference, these reasons refer to these entities collectively as the Tribunal.

2 Available at http://cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_UseProtocol_2005_en.pdf

3 The Tribunal may also order those who were present at an open hearing not to disclose what occurred and make the transcript and documents not public, effectively closing the hearing retroactively (Rule 18.05).

Indexed as:

Travers v. Canada (Board of Inquiry on the Activities of the Canadian Airborne Regiment Battle Group in Somalia)

Between
R. James Travers and Southam Inc., Applicants, and Admiral J.R. Anderson, Chief of Defence Staff (Convening Authority of a Board of Inquiry on the Activities of the Canadian Airborne Regiment Battle Group in Somalia), Major-General T.F. deFaye (President of a Board of Inquiry on the Activities of the Canadian Airborne Regiment Battle Group in Somalia) and the Attorney General of Canada, Respondents

[1993] F.C.J. No. 833

[1993] 3 F.C. 528

80 F.T.R. 145

18 C.R.R. (2d) 135

Action No. T-1482-93 Reported at

Action No. T-1482-93

Federal Court of Canada - Trial Division
Ottawa, Ontario

Joyal J.

Heard: July 6, 1993
Judgment: August 23, 1993

(10 pp.)

Civil rights -- Fundamental freedoms -- Freedom of the press -- Access to information -- Limitations - -- Court proceedings -- Exclusion from board of inquiry under National Defence Act.

This was an appeal from a decision excluding the media from a hearing before a board of inquiry. The defendant chief of defence staff ruled that the proceedings of the board of inquiry as to the Canadian Airborne Regiment Battle Group assigned as a peacekeeping force in Somalia would not be open to the public although the report would be made public. The appellants argued the decision breached freedom of press under section 2(b) of the Canadian Charter of Rights and Freedoms, 1982.

HELD: The appeal was dismissed. The statutory and regulatory framework under the National Defence Act indicated that the Board of Inquiry was more of an in-house procedure rather than a public forum. The function of the Board, based on its terms of reference, did not automatically trigger a concomitant right to sit in on its deliberations. There was no absolute right to information. To suggest otherwise would be to change the process of internal inquiry into an adjudication function characteristic of judicial proceedings. The right of access to information as a corollary to freedom of the press that arose in judicial and quasi-judicial proceedings did not always apply to hearings of committees, boards of inquiries and similar boards. No wrong- doing was involved. No individual rights or duties were subject to scrutiny as part of the terms of reference. The fact that the results of the inquiry were to be made public did not change its nature and render the closed-door policy contrary to section 2(b) of the Charter. Absent a breach of a Charter provision, the appropriateness of this policy was a matter for political debate not judicial comment.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 2(b). National Defence Act, s. 45(1).

Richard G. Dearden, for the Applicant.
Graham Garton and Pamela Owen-Going, for the Respondents.

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1 **JOYAL J.** (Reasons for Order):-- This application is in respect of a challenge launched by the applicants under Section 2(b) of the Canadian Charter of Rights and Freedoms. It came on for hearing on an expeditious basis on July 6, 1993. The next morning, July 7, 1993, I ruled that the application be dismissed and delivered brief oral reasons therefor. These reasons have now been reduced to writing.

2 The challenge concerns a decision by the defendant Chief of Defence Staff that the proceedings of a Board of Inquiry on the subject of the Canadian Airborne Regiment Battle Group not be open to the public. The appellants contend that this decision is a breach of the rights conferred under Section 2(b) of the Charter and that the public, which of course includes the media, be given access to the proceedings.

3 It seems to me, as a preamble, that the freedom set out in Section 2 of the Canadian Charter of Rights and Freedoms, particularly in regard to freedom of the press, has most often been analyzed in the context of a system of justice being conducted in an open court.

4 Long before the Charter, the doctrine of open court had been well established at Common Law. Before English as well as Canadian courts, numerous are the reiterations of that doctrine. Although variously expressed from time to time, the essence of that doctrine is that the better if not the only way to assure the proper exercise of judicial functions is to have court proceedings open to the public. The public, in such fashion, is a permanent or standing jury whose role is to ensure that the integrity of the judicial system is maintained.

5 Yet the open court doctrine is not absolute. In many instances, the doctrine comes into conflict with competing rights where a balance must often be struck. It is thus that courts have often resorted to in camera proceedings or have restricted their publication. Whether an open policy might be prejudicial to a particular litigant or accused, or whether the identity of a complainant in sexual assault cases would inhibit any complainant from coming forward, or whether by reason of the age of young offenders and the stigma which might be forever attached to them, the legislature on the one hand by statutory enactment or courts on the other in the exercise of their inherent jurisdiction to determine the conduct of their proceedings, both authorities have from time to time departed from the well-established norm and have ruled that certain proceedings be conducted behind closed doors or that various restrictions be placed on the publication of certain elements or parts of the proceedings..

6 Since the adoption of the Charter, it is true that the open door doctrine has been applied to certain administrative tribunals. While the bulk of precedents have been in the context of court proceedings, there has been an extension in the application of the doctrine to those proceedings where tribunals exercise quasi-judicial functions, which is to say that, by statute, they have the jurisdiction to determine the rights and duties of the parties before them.

7 This more extensive doctrine would appear to be entirely consistent with its original purpose. If justice is to be patently and evidently done in the courts, there is no reason why it should not also be done when a tribunal exercises substantially the same judicial functions. Again, however, by way of exception, proceedings before administrative tribunals may in certain circumstances be permitted behind closed doors.

8 Is the enquiry currently conducted by the defendants of a nature to have the doctrine applied to it? This requires some analysis. It is not a court of record, it has no power to summon witnesses by way of subpoena or otherwise, nor does it determine rights or impose obligations. Further, nothing it does is executory or enforceable. Its powers are determined by its Terms of Reference and in that regard, it can only issue recommendations which in due course are submitted to the Chief of Defence Staff who may adopt or reject all or any part of them. Herewith is the text of the Terms of Reference dated April 28, 1993:

1. An investigation shall be conducted pursuant to subsection 45(1) of the National Defence Act and in accordance with the provisions of Queen's Regulations and Orders for the Canadian Forces Chapter 21 and Canadian Forces Administrative Order 21-9.
2. The Board of Inquiry is composed of:

President -	Major-General T.F. de Faye, OMM, CD
Member -	Brigadier-General C.J. Addy, CD
Member -	Brigadier-General J.C.A. Emond, CD
Member -	Professor Harriet Critchley
Member -	Mr. Stephen Owen
Adviser -	Lieutenant-Colonel K.W. Watkin, CD
Adviser -	Chief Warrant Officer J. Marr, OMM, CD

3. The Board of Inquiry shall assemble to investigate the leadership, discipline, operations, actions and procedures of the Canadian Airborne Regiment Battle Group. To the extent relevant to a determination of those issues, the Board of Inquiry shall investigate the Battle Group's antecedants in Canada and higher headquarters in Somalia prior to and during its employment in Somalia. No inquiry shall be made into any allegation of conduct that would be a service offence under the National Defence Act, and in particular any Criminal Code offence, that has resulted in the laying of a charge, the arrest of a person or the ordering of a military police investigation.
4. Should the Board of Inquiry receive evidence it reasonably believes relates to an allegation of a service offence, including a Criminal Code offence, for which an election to be tried by court martial must be given pursuant to article 108.31(1)(a) of Queen's Regulations and Orders for the Canadian Forces, or that can only be tried by court martial, the Board of Inquiry shall cease the inquiry into that allegation and report the matter to the Convening Authority.
5. In conducting the investigation, the Board shall gather information and provide findings and recommendations in respect of the matters referred to in paragraph 3 , but not limited to, the following:

    a. the state of discipline during training leading up to the

deployment to Somalia and while in theatre;

b. the training objectives and standards which were used to prepare for deployment;
c. the selection and screening of personnel for employment in Somalia;
d. the effectiveness of leadership at all levels during training leading up to the deployment and while in theatre;
e. the adequacy of the promulgation and understanding of the Rules of Engagement within the Airborne Regiment Battle Group;
f. the Airborne Regiment Battle Group's composition and organization related to its mission and tasks assigned;
g. the extent, if any, to which cultural differences affected the conduct of operations;
h. the attitude of all rank levels towards the lawful conduct of operations; and,
i. the appropriateness of professional values and attitudes in the Canadian Airborne Regiment and the impact of deployment in Somalia on those values and attitudes.

6. In addition, but subject to paragraph 3 and 4, the Board of Inquiry will make recommendations on any other matter arising from its inquiry.
7. The President may seek authorization from the Convening Authority for additions and/or amendments to these Terms of Reference.
8. Pursuant to article 21.12 of Queen's Regulations and Orders, the proceedings of the Board of Inquiry shall not be opened to the public.
9. The Minutes of Proceedings of the Board of Inquiry shall be unclassified except as otherwise provided for by law.
10. The Minutes of Proceedings of the Board of Inquiry shall be made available to the public except as otherwise provided for by law.
11. The Board of Inquiry shall commence its proceedings as soon as practicable.
12. The Board of Inquiry shall submit its Minutes of Proceedings to the Convening Authority no later than 30 July 1993.

9 It is clear to me that the Terms of Reference of the Board of Inquiry limit the hearings to a review of the various principles, policies and practices of the Canadian Airborne Regiment Battle Group, an elite battle group which was recently called upon to exercise a peacekeeping role in a distraught environment called Somalia. Incidents there have received copious attention from the media and it is of record that criminal charges have been filed against four members of the Regiment. These incidents are of a nature to attract the attention of the public and to merit even

more the attention of the media which, with respect, feel obliged to make sure that the attention of the public does not wane.

10 It is clear on the evidence before me that the mandate given to the Board must be exercised within a very short time. When first established on April 28, 1993, it was given a 90-day life span. Yet it was bestowed with a wide generic field of enquiry, which would necessarily involve in its proceedings the kind of communication which might be classified or might be prejudicial to any one or more of the named accused, or which might otherwise be contrary to public interest to disclose or which would constrain the proper exercise of Canada's international peacekeeping role. No serious observer would conclude that these are not at least plausible grounds for a discreet approach. As elaborated by the respondent, Major-General deFaye, in the course of his cross-examination by the applicants, an open policy would have required a series of voir dire's on what evidence was to be adduced, on what was classified or not, on what was directly or by implication prejudicial to individuals. These voir dire's would of course have had to be conducted behind closed doors, otherwise the whole purpose of the enquiry within the enquiry would have been aborted.

11 It is further noted in the evidence that the report of the Board of Inquiry will be made public, subject to such constraints as are noted in the Board's Terms of Reference or as imposed by law.

12 An analysis of the statutory and regulatory framework under the National Defence Act indicates to me that a Board of Inquiry is far more an in-house procedure than a public forum which citizens may freely attend or on which the media may freely report. Whether or not it is constituted under a particular provision of the National Defence Act and its constitution made public, or simply organized by ministerial directive, the function of the Board, on a reading of its Terms of éreference, is such that, in my view, it does not necessarily or automatically trigger a concomitant right to sit in on the collection or collation of the evidence or on the deliberations of the members of the enquiry dealing with these Terms of Reference. To suggest otherwise is to propound the right to information in absolute terms and to effectively metamorphose a process of an internal enquiry into an adjudication function characteristic of judicial proceedings.

13 There is abundant case law, of course, that with respect to judicial proceedings, freedom of the press encompasses a right of access, as in RE. Southam Inc. and the Queen (No.1) (1983), 3 C.C.C. (3d) 515, and in RE. Southam Inc. and the Queen (1986), 26 D.L.R. (4th) 479. As was stated by MacKinnon A.C.J.O. in RE. Southam (No.1):

> There can be no doubt that the openness of the courts was and is a felt necessity; it is a restraint on arbitrary action by those who govern and by the powerful.

14 The question may then be asked: what is a judicial proceeding? Mr. Justice Dickson, as he then was and, as he continued to be, a master of the analytical method to resolve such questions, has suggested the following tests in Minister of National Revenue v. Coopers and Lybrand (1979), 1 S.C.R. 495, at page 504:

(1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached? [underline mine]
(2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
(3) Is the adversary process involved?
(4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in the broad sense?

15 Freedom of the press as encompassing a right to information or a right of access to judicial proceedings is a well-established doctrine which, as I have already mentioned, has been known and respected for decades prior to the advent of the Charter. Similarly, the doctrine has been applied to other proceedings, as for a hearing under the Police Act dealing with a charge of discreditable conduct against a police officer: Ottawa Police Force vs. Lalande, 57 O.R. 21; or as for a detention review hearing under the Immigration Act, Southam Inc. et al. v. M.E.I. et al. [1987] 3 C.F. 329, where Rouleau J. at page 336 found that

> Statutory tribunals exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the administration of justice.

16 It seems to me in the circumstances that the right of access to information, as a corollary to the freedom of the press, has been consistently recognized when the right is claimed to cover judicial or quasi-judicial proceedings. That right, however, is no more than the expression of the "open court" doctrine. If open courts are to be the rule, there is no issue as to the press generally having access to them and to the information their proceedings disclose.

17 I should nevertheless seriously doubt that the right of access to information applies to hearings of committees, board of enquiries, study groups, task forces or any similar group which might be entrusted to hear evidence and submissions, and make recommendations thereon to the authority which appointed them. If I should express this thought in doubtful terms, it is to eschew the temptation to make any kind of generalized statement on the issue. It is not the name given to an enquiry which determines its judicial or quasi-judicial characteristics; it is rather the nature of its function which would either meet or not meet the test set out by Mr. Justice Dickson in Coopers & Lybrand (supra).

18 It is in this light that the enquiry before me must be analyzed to see whether or not it is of a nature where the applicants can place reliance on the jurisprudence otherwise favourable to them and which deal either with judicial or quasi-judicial proceedings or with enquiries where some kind of modus vivendi was reached as to access in whole or in part. Counsel referred among others to the Marin Enquiry which, albeit under media pressure, did change its Terms of Reference to allow

limited access to its proceedings. The nature of the enquiry, in any event, related to any evidence of wrongdoing on the part of the R.C.M.P., a term of reference not found in the board of enquiry before me.

19 Similarly, it was a policy decision of the well-known McDonald Commission to hold limited public hearings and again, the Commission had been asked to investigate R.C.M.P. activities not authorized or provided for by law, in other words, to gather evidence, if any, of wrongdoing.

20 The enquiry before me is evidently not of the same nature. No impropriety or wrongdoing is involved. No individual rights or duties are made subject to scrutiny. No general determination of rights and duties is part of its mandate. An analysis of its Terms of Reference indicates to me that it is much more an internal affair by which the Chief of Defence Staff, faced with certain anomalies in the conduct of a crack battle group in Somalia, wishes to obtain findings and recommendations in respect of the leadership, discipline, operations, actions and procedures of that group and, as I interpret the Terms of Reference, the appropriateness of its particular training, conditioning and disciplinary methods in the conduct of peace-keeping operations.

21 In my view, it is the kind of enquiry which goes on within the National Defence establishment and which, in normal circumstances, is conducted as a matter of course. The fact that the constitution of the enquiry was made public does not change its nature. The purpose behind such public announcements is not for this Court to decide nor is it material to a finding as to the nature of the enquiry. It is not, I repeat, not involved in the individual conduct of certain members of the battle group which, we all recognize, is what provoked the media's attention and what in turn created a highly politicized atmosphere both inside and outside Parliament.

22 Pursuant to its mandate, the enquiry could have been open to the public. The Convening Authority, for the reasons stated, decided otherwise. Many would not agree that the reasons advanced are sufficient or appropriate. Many would suggest that they are spurious, facile or essentially self-serving. A continuing public debate might flow from all this, but I respectfully submit that they raise policy issues and not legal issues.

23 In this light, the forceful arguments advanced by counsel for the applicants deal not so much with constitutional guarantees as with a policy decision which the Convening Authority was empowered to make. As it is not the kind of enquiry to which the intended "right of access to information" can apply, I fail to see that the closed door policy is in breach of Section 2(b) of the Charter.

24 The appropriateness of that policy, absent a breach of the Charter, is perhaps a matter for continuing political and media debate, but I should find that it lies beyond the field of judicial comment.

25 I would therefore dismiss the application.

JOYAL J.

Indexed as:

Travers v. Canada (Board of Inquiry on the Activities of the Canadian Airborne Regiment Battle Group in Somalia) (F.C.A.)

Between
R. James Travers and Southam Inc., Appellants, and Admiral J.R. Anderson, Chief of Defence Staff (Convening Authority of a Board of Inquiry on the Activities of the Canadian Airborne Regiment Battle Group Somalia), Major-General T.F. deFaye (President of a Board Inquiry on the Activities of the Canadian Airborne Regiment Battle Group in Somalia) and the Attorney General of Canada, Respondents

[1994] F.C.J. No. 932

[1994] A.C.F. no 932

81 F.T.R. 319 n

171 N.R. 158

24 C.R.R. (2d) 186

48 A.C.W.S. (3d) 1305

Appeal No. A-548-93

Federal Court of Appeal
Ottawa, Ontario

Isaac C.J., Mahoney and Hugessen JJ.

Heard: June 15, 1994
Oral judgment: June 15, 1994

(4 pp.)

Civil rights -- Freedom of the press -- Right to be present at inquiry.

This was an appeal from a judgment holding that there was no constitutionally protected right for the appellant to be present at an inquiry.

HELD: The application was dismissed. The judge took the correct approach in looking at the function of the Board of Inquiry appointed to determine whether the rules relating to open court should apply. Where access was sought to an inquiry it was proper to look to its functions and purposes which the judge did. His conclusion that the decision whether to hold the inquiry in private or in public was a matter of policy was clearly correct.

STATUTES, REGULATIONS AND RULES CITED:

Canadian Charter of Rights and Freedoms, 1982, ss. 1, 2(b). National Defence Act, R.S.C. 1984, c. N-5, s. 45.

Richard G. Dearden and Randall J. Hofley, for the Appellants.
G. Garton, for the Respondent.

The judgment of the Court was delivered by

1 **HUGESSEN J.** (orally):-- We are in general agreement with the reasons given by Joyal J. for dismissing the appellants' application. In particular we think that the judge took the correct approach in looking at the function of the Board of Inquiry appointed under section 45 of the National Defence Act[1] in order to determine whether the rules relating to open court hearings should apply to it. Since the Board manifestly has no dispositive or decision-making role, the judge's conclusion that the decision whether to hold the inquiry in private or in public was purely a matter of policy was also clearly right.

2 The appellants seek to take some comfort from this Court's decision in IFAW v. Canada.[2] That case had to do with a regulation whose effect was to deny the media and others access to an open, public, commercial seal hunt carried out on the ice of the Gulf of St. Lawrence. To attempt to read it as creating a general journalistic right of access to anything which may be of interest to the media is to rip it from its context and to confound journalistic interest with public interest. By the same token we can see nothing in any of the differing opinions given in Committee for the Commonwealth of Canada v. Canada[3] which would turn section 2(b) of the Charter into a key to open every closed door in every government building and requiring a section 1 justification to keep it closed.

3 Before any "right" of access, whose denial would require to be justified under section 1, can be asserted it is necessary to ask what it is to which access is sought. Where, as here, access is sought to an inquiry or investigation it is proper to look to its function and purposes. That is exactly what

the judge did and in our view he was right to conclude that there was no constitutionally protected right for the appellants to be present at the inquiry.

4 The appeal will be dismissed with costs.

HUGESSEN J.

1 R.S.C. 1984 c. N-5

> 45.(1) The Minister, and such other authorities as the Minister may prescribe or appoint for that purpose, may, where it is expedient that the Minister or any such other authority should be informed on any matter connected with the government, discipline, administration or functions of the Canadian Forces or affecting any officer or non-commissioned member, convene a board of inquiry for the purpose of investigating and reporting on that matter.
>
> (2) A board of inquiry may administer oaths and take and receive affidavits, declarations and solemn affirmations relating to any matter that the board is convened to investigate.

2 [1989] 1 F.C. 335.

3 [1991] 1 S.C.R. 139.

** Preliminary Version **

Case Name:

Wakeling v. United States of America

Andrew Gordon Wakeling, Appellant;
v.
Attorney General of Canada on behalf of the United States of America and Attorney General of British Columbia, Respondents.
And between
Andrew Wakeling, Appellant;
v.
Attorney General of Canada on behalf of the Minister of Justice, Respondent, and
Attorney General of Ontario, Attorney General of Quebec, Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Information and Privacy Commissioner of Ontario and Privacy Commissioner of Canada, Interveners.

[2014] S.C.J. No. 72

[2014] A.C.S. no 72

2014 SCC 72

15 C.R. (7th) 1

2014 CarswellBC 3341

2014EXP-3536

J.E. 2014-1995

EYB 2014-244333

File No.: 35072.

Supreme Court of Canada

Heard: April 22, 2014;
Judgment: November 14, 2014.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

(151 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional Law -- Canadian Charter of Rights and Freedoms -- Reasonable limits on Charter rights -- Legal rights -- Life, liberty and security of person -- Protection against unreasonable search and seizure -- Appeal by Wakeling from a judgment of the British Columbia Court of Appeal affirming a decision issuing a committal order against him, dismissed -- The main issue in this appeal was whether federal legislation which authorized the sharing of lawfully obtained wiretap information between Canadian and foreign law enforcement agencies was constitutional and specifically, whether the legislation fell short of the constitutional standards mandated by the Charter -- Inter-agency cooperation was critical to the prevention, detection, and punishment of cross-border crime -- Recognizing this, Parliament authorized the cross-border sharing of wiretap communications under section 193(2)(e) of the Criminal Code -- The disclosure in this case was lawfully authorized by that provision, and the legislation, taken as a whole, did not violate section 8 of the Charter -- Furthermore, there was no evidence that the manner of disclosure was unreasonable.

Appeal by Wakeling from a judgment of the British Columbia Court of Appeal affirming a decision issuing a committal order against him. Wakeling was the subject of a Canadian drug investigation. Over the course of the investigation, the RCMP lawfully monitored and recorded communications between Wakeling and others. These communications revealed a plot to transport drugs across the Canada-U.S. border. Canadian authorities provided this information to U.S. authorities, who used it to intercept and seize 46,000 ecstasy pills at a border crossing. The U.S. sought Wakeling's extradition from Canada for his involvement in the ecstasy shipment. At the extradition hearing, Wakeling argued that the provisions breach sections 7 and 8 of the Charter, and that the wiretap information provided to U.S. law enforcement authorities should therefore not be admitted as evidence against him. The extradition judge considered and rejected all of Wakeling's arguments, as did the British Columbia Court of Appeal. The main issue in this appeal was whether federal legislation which authorized the sharing of lawfully obtained wiretap information between Canadian and foreign law enforcement agencies was constitutional and specifically, whether the legislation

fell short of the constitutional standards mandated by the Charter.

HELD: Appeal dismissed. Section 193(2) was not structured as an explicit authorizing provision. Nonetheless, it represented Parliament's attempt to regulate the disclosure of intercepted communications and specify the circumstances in which such disclosures could lawfully be made. Section 193(2)(e) implicitly authorized the disclosure of wiretap information in accordance with the conditions prescribed therein. The highly intrusive nature of electronic surveillance and the statutory limits on the disclosure of its fruits suggested a heightened reasonable expectation of privacy in the wiretap context. Once a lawful interception has taken place and the intercepted communications were in the possession of law enforcement, that expectation was diminished but not extinguished. Parliament recognized that wiretap interceptions were an exceptional and invasive form of search, and it was therefore perfectly appropriate that section 8 protections should extend to wiretap disclosures by law enforcement. Furthermore, there was a residual and continuing expectation of privacy in wiretap information that persisted even after it had been lawfully collected. The disclosure in this case was authorized by law. Given the limitations inherent in section 193(2)(e), the Court was not persuaded that the provision granted police a "limitless" power to disclose. Disclosure had to be for a legitimate law enforcement purpose, such as the prevention of cross-border drug trafficking. Section 193(2)(e was not unconstitutionally vague. Section 193(2)(e) was not devoid of accountability measures. Rather, accountability was built into the scheme for the disclosure of wiretap communications. The impugned legislation did not fall short of the constitutional standards mandated by section 8 of the Charter. Furthermore, there was no evidence that the manner of disclosure was unreasonable.

Statutes, Regulations and Rules Cited:

Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act, S.C. 1993, c. 40,

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 1, s. 7, s. 8, s. 24

Criminal Code, R.S.C. 1985, c. C-46, s. 183, s. 184.1, s. 184.2, s. 184.4, s. 185, s. 186, s. 193, s. 193(1), s. 193(2), s. 193(2)(b), s. 193(2)(e), s. 195, s. 196, s. 487.01

Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56, s. 8(1)

Privacy Act, R.S.C. 1985, c. P-21, s. 8, s. 8(2)(f)

Response to the Supreme Court of Canada Decision in R. v. Tse Act, S.C. 2013, c. 8,

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the

Canada Supreme Court Reports.

Court Catchwords:

Constitutional law -- Charter of Rights -- Search and seizure -- Fundamental justice -- Interception of communications -- Exemption from offence of disclosing intercepted private communication without consent -- Provision of Criminal Code exempting disclosure of lawfully intercepted private communication to person or authority with responsibility in a foreign state for investigation or prosecution of offences if disclosure is intended to be in the interests of the administration of justice in Canada or elsewhere -- Whether provision unjustifiably infringes s. 7 or 8 of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C. 1985, c. C-46, s. 193(2)(e).

Criminal Law -- Interception of communications -- Disclosure of information -- Exemption from offence -- Whether exemption provision which authorizes sharing of lawfully enforcement agencies is constitutional -- Canadian Charter of Rights and Freedoms, ss. 7, 8 -- Criminal Code, R.S.C. 1985, c. C-46, s. 193(2)(e).

Court Summary:

The RCMP lawfully intercepted private communications between W and others that revealed a plot to transport drugs into the United States of America. The wiretap information was disclosed to U.S. authorities, who used it to seize a large quantity of ecstasy pills at a border crossing. The U.S. requested W's extradition. At the extradition hearing, W submitted that legislation authorizing the disclosure violates ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*, and the intercepted communications should not be admitted as evidence. The extradition judge rejected W's arguments and issued a committal order. The Court of Appeal dismissed the appeal.

Held (Abella, Cromwell and Karakatsanis JJ. dissenting): The appeal should be dismissed.

Per LeBel, Rothstein and **Moldaver** JJ.: The ability to share information between law enforcement agencies facilitates the effective investigation of domestic and multi-jurisdictional crime. Part VI of the *Criminal Code* sets out a comprehensive scheme intended by Parliament to exclusively govern the interception and use of private communications for law enforcement purposes. Therefore, there is no need to consider the constitutionality of s. 8(2)(*f*) of the *Privacy Act*. Section 193(2)(*e*) of the *Criminal Code* is the governing provision in this case. Although not structured as an explicit authorizing provision, it implicitly authorizes cross-border disclosure of lawfully intercepted wiretap information. Accordingly, the arguments raised by W properly go to the constitutionality of s. 193(2)(*e*).

Section 8 of the *Charter* is engaged. Although a disclosure is not a search within the meaning of s. 8, s. 8 protects wiretap targets at both the interception and disclosure stages under Part VI of the *Criminal Code*. Wiretap interceptions are highly invasive and pose heightened privacy concerns. There is a residual, albeit diminished, expectation of privacy in wiretap information after it has been

lawfully collected. W's s. 7 arguments need not be addressed. They are subsumed under the s. 8 analysis.

In order for a search to be reasonable under s. 8, it must be authorized by law, the law itself must be reasonable, and the search must be carried out in a reasonable manner. This same framework applies, *mutatis mutandis*, to disclosures made pursuant to s. 193(2)(*e*). Applying this framework to the facts at hand, there is no violation of s. 8. The disclosure in this case was lawfully authorized by s. 193(2)(*e*), and the legislation, taken as a whole, is reasonable. Furthermore, there is no evidence that the manner of disclosure was unreasonable.

With respect to the first step of the s. 8 framework, the disclosure in this case was authorized by law. A disclosure will be authorized by law where it is carried out in accordance with the procedural and substantive requirements the law provides. Section 193(2)(*e*) requires that the recipient must be a person or authority with responsibility in a foreign state for the investigation or prosecution of offences, and the disclosure must be intended to be in the interests of the administration of justice in Canada or elsewhere. The disclosure in this case was provided to U.S. law enforcement authorities for the purpose of foiling a cross-border drug smuggling operation. In making the disclosure, Canadian authorities intended to advance the administration of justice in Canada and the United States.

Turning to the second step, section 193(2)(*e*) is a reasonable law. First, it is not unconstitutionally overbroad. It limits the type of information that may be disclosed, the purpose for which it may be disclosed, and the persons to whom it may be disclosed. Second, it is not unconstitutionally vague. While "the administration of justice" as used in s. 193(2)(*e*) is a broad concept, it is not one that so lacks in precision as to give insufficient guidance for legal debate. In this context, the phrase "the administration of justice" means that the disclosure must be for a legitimate law enforcement purpose.

Third, s. 193(2)(*e*) is not unconstitutional for lack of accountability or transparency mechanisms. Part VI of the *Criminal Code* contains numerous privacy safeguards. The judicial authorization relating to the initial interception requires privacy interests to be balanced with the interests of law enforcement. The interception of communications is also subject to notice and reporting requirements. Additionally, accountability has been built into the disclosure scheme itself. A disclosure that fails to comply with s. 193(2)(*e*) can lead to criminal charges against the disclosing party or result in the exclusion of improperly disclosed evidence at a subsequent proceeding. This provides a powerful incentive for Canadian authorities to comply with s. 193(2)(*e*). Finally, although not constitutionally mandated in every case, adherence to international protocols and the use of caveats or information-sharing agreements may be relevant in determining whether a disclosure was intended to advance the administration of justice, and therefore was authorized by s. 193(2)(*e*).

As regards the third step of the s. 8 framework, the use of protocols, caveats, or agreements may

also be relevant to assessing whether the disclosure was carried out in a reasonable manner. The disclosure in this case was carried out in a reasonable manner. Nothing suggests that the police acted unreasonably. However, in different factual contexts, there may be significant potential dangers posed by the disclosure of intercepted communications to foreign authorities. Where a disclosing party knows or should have known that the information could be used in unfair trials, to facilitate discrimination or political intimidation, or to commit torture or other human rights violations, s. 8 requires that the disclosure, if permissible at all, be carried out in a reasonable manner. In the most serious cases, s. 8 will forbid disclosure. In other cases, information-sharing protocols or caveats may sufficiently mitigate the risks.

Per **McLachlin** C.J.: The only issue on this appeal is whether the disclosure of the intercepted communications violated s. 8 of the *Charter*, and, if so, whether the evidence should have been excluded under s. 24(2). It is not necessary to consider the constitutionality of s. 193(2)(*e*), s. 193(2)(*b*) or the *Privacy Act* to answer that question. W has not shown an infringement of his s. 8 rights. The individual whose communications are lawfully intercepted under a valid and reasonably executed warrant cannot complain that use of the information for law enforcement breaches his right to privacy. This principle is not confined to the use of information in Canada. Sharing the information for purposes of law enforcement does not violate s. 8. Sections 7 and 8 of the *Charter* protect against unreasonable uses of lawfully intercepted information but in this case, where the information was disclosed to U.S. authorities for law enforcement purposes, these residual concerns about unreasonable use do not arise. W's rights were not violated.

Section 193(2)(*e)* does not change this. It is not an authorizing provision. It does not confer a power on Canadian authorities to share information with foreign counterparts. The provision operates by exempting officers from prosecution where they disclosed intercepted communications under their common law powers. Section 193(1) of the *Criminal Code* makes it an offence to disclose intercepted private communications without consent. Section 193(2)(*e*) is an exemption from that offence. It preserves the common law power of law enforcement authorities to share lawfully obtained information for purposes of law enforcement both domestically and abroad. The exception prevents law enforcement officers from being convicted for using information obtained under warrant for purposes of law enforcement. It is therefore unnecessary to opine on the constitutionality of s. 193(2)(*e*).

Per Abella, Cromwell and **Karakatsanis** JJ. (dissenting): Section 193(2)(*e)* violates s. 8 of the *Charter* in a manner that is not justified under s. 1. It permits disclosure of wiretapped information to foreign officials without safeguards or restrictions on how the information may be used and without accountability measures for this broad state power. Nothing restrains foreign law enforcement officials from using this highly personal information in unfair trials or in ways that violate human rights norms, from publicly disseminating the information, or from sharing it with other states. The torture of Maher Arar in Syria provides a chilling example of the dangers of unconditional information sharing. Section 8 requires that when a law authorizes intrusions on privacy, it must do so in a reasonable manner. A reasonable law must have adequate safeguards to

prevent abuse. It must avoid intruding farther than necessary. It must strike an appropriate balance between privacy and other public interests. Section 193(2)(*e*) falls short on all three counts. The permitted disclosure to foreign officials without safeguards renders the Part VI wiretap regime of the *Criminal Code* unconstitutional. The appropriate remedy is to strike the words "or to a person or authority with responsibility in a foreign state" from s. 193(2)(*e*). It is unnecessary to consider the constitutionality of s. 8(2)(*f*) of the *Privacy Act* or arguments with respect to s. 7 of the *Charter*.

Balancing the state's interest in a search and the public interest in protecting privacy involves asking what level of privacy protection we are entitled to expect. International cooperation and information-sharing are essential to law enforcement. Canadian interests are served by appropriate information-sharing with other jurisdictions. Timely disclosure will often be critical in the investigation of serious transnational crimes. However, when information is shared across jurisdictional lines, safeguards that apply in domestic investigations lose their force. Section 193(2)(*e*) does nothing to prevent the use of disclosed information in proceedings which fail to respect due process and human rights. The requirement of prior judicial authorization does not provide sufficient protection against inappropriate future use. The failure to require caveats on the use of disclosed information is unreasonable. Caveats or standing agreements would not undermine the objectives of the wiretap scheme. They are commonplace in international law enforcement cooperation and provide some assurance that disclosed information will only be used in accordance with respect for due process and human rights.

For a law to provide reasonable authority for a search or seizure, it must include some mechanism to permit oversight of state use of the power. Accountability mechanisms deter and identify inappropriate intrusions on privacy. None of the safeguards in Part VI apply to disclosure to foreign officials. Improper or hazardous information sharing is unlikely to come to light without record-keeping, reporting or notice obligations. It is for Parliament to decide what measures are most appropriate, but, at a minimum, the disclosing party should be required to create a written record and to make the sharing known to the target or to government.

The infringement of s. 8 of the *Charter* is not justified under s. 1. The objective of international cooperation in law enforcement is pressing and substantial, and disclosure of wiretap information is rationally connected to that objective. However, s. 193(2)(*e*) as it is presently drafted interferes with privacy to a greater extent than necessary. The inclusion of accountability mechanisms and limits on subsequent use would cure the constitutional deficiencies without undermining Parliament's goals.

Cases Cited

By Moldaver J.

Referred to: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *R. v. Duarte*, [1990] 1 S.C.R. 30; *Imperial Oil v. Jacques*, 2014 SCC 66; *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. Samson* (1982), 37 O.R. (2d) 237;

R. v. Finlay (1985), 52 O.R. (2d) 632.

By McLachlin C.J.

Referred to: *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Imperial Oil v. Jacques*, 2014 SCC 66.

By Karakatsanis J. (dissenting)

R. v. Duarte, [1990] 1 S.C.R. 30; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531; *R. v. Quesnelle*, 2014 SCC 46; *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *Brown v. The Queen*, 2013 FCA 111, 2013 D.T.C. 5094; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *R. v. Colarusso*, [1994] 1 S.C.R. 20; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Thompson*, [1990] 2 S.C.R. 1111; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

Statutes and Regulations Cited

Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act, S.C. 1993, c. 40.

Canadian Charter of Rights and Freedoms, ss. 1, 7, 8, 24.

Criminal Code, R.S.C. 1985, c. C-46, Part VI, ss. 183, 184.1, 184.2, 184.4, 185, 186, 193, 195, 196, 487.01(5).

Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56, s. 8(1).

Privacy Act, R.S.C. 1985, c. P-21, s. 8.

Response to the Supreme Court of Canada Decision in R. v. Tse Act, S.C. 2013, c. 8.

Authors Cited

Austin, Lisa M. "Information Sharing and the 'Reasonable' Ambiguities of Section 8 of the Charter" (2007), 57 U.T.L.J. 499.

Canada. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. *Report of the Events Relating to Maher Arar: Analysis and Recommendations*. Ottawa: Public Works and Government Services, 2006.

Franklin, Ben A. "Wiretaps reveal Dr. King feared rebuff on nonviolence", *The New York Times*, September 15, 1985.

Roach, Kent. "Overseeing Information Sharing", in Hans Born and Aidan Wills, eds., *Overseeing Intelligence Services: A Toolkit*. Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2012, 129.

Sanchez, Julian. "Wiretapping's true danger", *Los Angeles Times*, March 16, 2008.

United Kingdom. Intelligence and Security Committee. *Rendition*. London: The Committee, 2007.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Low, Groberman and MacKenzie JJ.A.), 2012 BCCA 397, 328 B.C.A.C. 174, 558 W.A.C. 174, 293 C.C.C. (3d) 196, 267 C.R.R. (2d) 279, [2012] B.C.J. No. 2057 (QL), 2012 CarswellBC 3067, affirming a decision of Ross J., 2011 BCSC 165, 268 C.C.C. (3d) 295, 228 C.R.R. (2d) 239, [2011] B.C.J. No. 212 (QL), 2011 CarswellBC 1468. Appeal dismissed, Abella, Cromwell and Karakatsanis JJ. dissenting.

Counsel:

Gregory P. Delbigio, Q.C., for the appellant.

W. Paul Riley and *Jeffrey G. Johnston*, for the respondent the Attorney General of Canada on behalf of the United States of America and on behalf of the Minister of Justice.

M. Joyce DeWitt-Van Oosten, Q.C., for the respondent the Attorney General of British Columbia.

Joan Barrett, for the intervener the Attorney General of Ontario.

Jean-Vincent Lacroix, Dominique A. Jobin and *Émilie-Annick Landry-Therriault*, for the intervener the Attorney General of Quebec.

Peter M. Rogers, Q.C., and *Jane O'Neill*, for the intervener the Canadian Civil Liberties Association.

Michael A. Feder and *Emily MacKinnon*, for the intervener the British Columbia Civil Liberties Association.

David Goodis and *Stephen McCammon*, for the intervener the Information and Privacy Commissioner of Ontario.

Mahmud Jamal, Patricia Kosseim and *Jennifer Seligy*, for the intervener the Privacy Commissioner of Canada.

The judgment of LeBel, Rothstein and Moldaver JJ. was delivered by

MOLDAVER J.:--

I. Introduction

1 The ability to share information between law enforcement agencies, including lawfully intercepted wiretap information, facilitates the effective investigation of both domestic and multi-jurisdictional crime. But the effective investigation of crime must proceed in accordance with the rights guaranteed by the *Canadian Charter of Rights and Freedoms*. The main issue in this appeal is whether federal legislation which authorizes the sharing of lawfully obtained wiretap information between Canadian and foreign law enforcement agencies is constitutional -- specifically, whether the legislation falls short of the constitutional standards mandated by the *Charter*.

II. Background

2 Andrew Gordon Wakeling was the subject of a Canadian drug investigation. Over the course of the investigation, the RCMP lawfully monitored and recorded communications between Mr. Wakeling and others. These communications revealed a plot to transport drugs across the Canada-U.S. border. Canadian authorities provided this information to U.S. authorities (the "Impugned Disclosure"), who used it to intercept and seize 46,000 ecstasy pills at the International Falls, Minnesota border crossing on April 5, 2006.

3 The U.S. sought Mr. Wakeling's extradition from Canada for his involvement in the ecstasy shipment. At the extradition hearing, Mr. Wakeling submitted that the legislation authorizing the Impugned Disclosure was unconstitutional. Specifically, he argued that the provisions breach ss. 7 and 8 of the *Charter*, and that the wiretap information provided to U.S. law enforcement authorities should therefore not be admitted as evidence against him.

4 The extradition judge, Ross. J., rejected Mr. Wakeling's arguments and issued a committal order. That order was upheld by the British Columbia Court of Appeal. Before this Court, Mr. Wakeling requests that the committal order be quashed and that a new extradition hearing be held.

5 For the reasons that follow, I would dismiss Mr. Wakeling's appeal.

III. Statutory Provisions

6 Section 193 of the *Criminal Code*, R.S.C. 1985, c. C-46, states:

193. (1) Where a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, willfully

(*a*) uses or discloses the private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(*b*) discloses the existence thereof,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

...

(*b*) in the course of or for the purpose of any criminal investigation if the private communication was lawfully intercepted;

...

(*e*) where disclosure is made to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences and is intended to be in the interests of the administration of justice in Canada or elsewhere; or

...

7 Section 8 of the *Privacy Act*, R.S.C. 1985, c. P-21, states:

8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.

> (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
>
> ...
>
> (*b*) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;
>
> ...
>
> (*f*) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the council of the Westbank First Nation, the council of a participating First Nation -- as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act* --, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;
>
> ...

8 Finally, ss. 7 and 8 of the *Charter* state:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **8.** Everyone has the right to be secure against unreasonable search or seizure.

IV. Judicial History

A. *Supreme Court of British Columbia, 2011 BCSC 165, 268 C.C.C. (3d) 295 (Ross J.)*

9 At his extradition hearing, Mr. Wakeling restricted his constitutional challenge to s. 193(2)(*e*) of the *Criminal Code* and s. 8(2)(*f*) of the *Privacy Act*. He made a variety of broad and sweeping submissions in support of his contention that the impugned provisions do not pass constitutional muster.

10 Mr. Wakeling submitted that transparency, accountability and the rule of law are principles of fundamental justice under s. 7 of the *Charter* and that the provisions in question are unconstitutional because the disclosure they authorize does not comply with these principles (trial judgment, at para. 42). He also argued that both provisions breach s. 7 of the *Charter* because they are vague and

overbroad. With respect to s. 193(2)(*e*), he submitted that it "provides virtually unlimited discretion to law enforcement" to disclose wiretap communications and he criticized the subjective nature of the test it employs (*ibid.*, at para. 99). He further submitted that the phrase "the interests of the administration of justice ... elsewhere" is "incapable of framing legal debate within Canada" and that it does not have a "constant and settled meaning" (*ibid.*). In his view, the effect of these uncertainties is that decision-makers are given "unrestricted latitude ... to disclose intercepted private communications or the substance of the communications, and to be exempt from the application of the offence provisions of Part VI" (*ibid.*).

11 With respect to s. 8 of the *Charter*, Mr. Wakeling submitted that the Impugned Disclosure re-engaged s. 8 such that a *second* judicial authorization was needed before the disclosure could occur. In this regard, he submitted that his privacy interests at the disclosure stage were the same as those he enjoyed at the interception stage and deserved the same protection (trial judgment, at para. 68). Hence, he argued that a second judicial authorization should be required prior to disclosure, and that the provisions in question are unreasonable because they do not provide for this. He also submitted that the provisions are unreasonable because they do not contain sufficient accountability mechanisms such as a police record-keeping requirement, a requirement to report to Parliament about the disclosures, or an obligation to provide notice of the disclosure to the person whose communications were intercepted. Finally, he took issue with the fact that Canadian authorities have little control over the subsequent use of the disclosed information (para. 116).

12 The extradition judge considered and rejected all of Mr. Wakeling's arguments. In her view, the constitutionality of s. 8(2)(*f*) of the *Privacy Act* did not need to be considered because s. 193(2)(*e*) of the *Criminal Code* "expressly governs disclosure of private communications intercepted under Part VI of the *Criminal Code* to foreign law enforcement authorities" and "[t]he more general information sharing rules in the *Privacy Act* are subject to the specific provisions of [the *Criminal Code*]" (para. 21).

13 Turning to Mr. Wakeling's constitutional arguments, the extradition judge concluded that the Impugned Disclosure did not re-engage s. 8 of the *Charter*, as the Impugned Disclosure was "not conduct that interferes with a reasonable expectation of privacy in the circumstances" (para. 75). Thus, the disclosure did not amount to "a search or seizure that engages s. 8 of the *Charter*" (*ibid.*). In the alternative, she reasoned that *if* the Impugned Disclosure engaged s. 8, s. 193(2)(*e*) is a reasonable law.

14 The extradition judge also rejected Mr. Wakeling's submission that transparency and accountability are principles of fundamental justice that apply to s. 193(2)(*e*). In her view, "[e]ven if these concepts could be characterized as principles of fundamental justice in some contexts, they could not realistically be applied to the manner in which police investigate criminal activity" (para. 48).

15 The extradition judge similarly rejected Mr. Wakeling's submission that s. 193(2)(*e*) is vague

and overbroad, noting that

> ... in making the arguments on vagueness and overbreadth that he does, the applicant demands a level of drafting precision from Parliament that is neither constitutionally mandated, nor realistic. By necessity, the wording of s. 193(2)(e) had to be kept fairly broad to capture the myriad of ways in which a need to disclose "in the interests of the administration of justice" might arise. The law must retain flexibility since laws must of necessity govern a variety of different circumstances and situations. [para. 108]

16 Lastly, the extradition judge rejected Mr. Wakeling's rule of law argument. Relying on this Court's decision in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, she found Mr. Wakeling's submissions to be "circular, since the measures are themselves embodied in the law" (para. 53).

17 Having rejected Mr. Wakeling's legal arguments, the extradition judge considered the evidence and found that it was sufficient to warrant his committal.

B. *British Columbia Court of Appeal (Low, Groberman and MacKenzie JJ.A), 2012 BCCA 397, 328 B.C.A.C. 174*

18 On appeal, Mr. Wakeling reiterated his challenge to the constitutionality of s. 193(2)(*e*) of the *Criminal Code* and s. 8(2)(*f*) of the *Privacy Act*. The B.C. Court of Appeal, *per* Low J.A., agreed with the extradition judge that s. 193(2)(*e*) was the governing provision for the specific disclosure at issue. Hence, the court found it unnecessary to consider the constitutionality of s. 8(2)(*f*) of the *Privacy Act*.

19 In addressing Mr. Wakeling's s. 8 claim, Low J.A. concluded that the state conduct did not interfere with any reasonable privacy expectation to which Mr. Wakeling could lay claim. The court thus rejected Mr. Wakeling's s. 8 argument. As the Impugned Disclosure did not re-engage s. 8 of the *Charter*, no second judicial authorization was needed.

20 Low J.A. similarly concluded that Mr. Wakeling's fundamental justice submissions pertaining to transparency and accountability were without merit:

> The impugned provision does not have to be transparent by requiring prior notice and there is no need for a reporting requirement of some sort after the fact. The information gathered by lawful electronic interception becomes law enforcement intelligence. In my opinion, it is no different than information obtained from a police informer or information contained in documents that lawfully come into the hands of the police. If disclosure is in the interests of the administration of justice, there is no need for prior judicial approval or for notice or for reporting. Such requirements would formalize and hamper the inter-jurisdictional

> investigation of crime and sometimes the prevention of crime. Control of the use of lawfully-gathered police intelligence by foreign authorities is not practical and would be presumptuous. What is practical and necessary for both crime detection and crime prevention is the ability of police officers to lawfully inform their counterparts in other jurisdictions about impending criminal activity, as occurred in the present case, or past criminal activity. [para. 43]

21 Finally, the court rejected Mr. Wakeling's vagueness and overbreadth arguments, noting that "[t]he administration of justice is a concept that is well understood and needs no clarification or narrowing". (para. 44). In the result, the court dismissed the appeal.

C. *Issues*

22 On appeal to this Court, Mr. Wakeling renews his constitutional attack on s. 193(2)(*e*) of the *Criminal Code* and s. 8(2)(*f*) of the *Privacy Act*, relying on the same arguments he made below. He also raises for the first time, with leave of the Court, the constitutionality of s. 193(2)(*b*) of the *Code*. He maintains that all of these provisions infringe his rights under ss. 7 and 8 of the *Charter*, and that the infringements are not justified under s. 1.

V. Analysis

23 I propose initially to explain why this appeal turns on the constitutionality of s. 193(2)(*e*) of the *Criminal Code* and not s. 193(2)(*b*) of the *Code* or s. 8(2)(*f*) of the *Privacy Act*. I will then address Mr. Wakeling's *Charter* arguments as they relate to s. 193(2)(*e*).

A. *The Privacy Act Does Not Apply*

24 The Privacy Commissioner of Canada, an intervener, submits that contrary to the lower court decisions, the RCMP must comply with *both* the *Criminal Code* and the *Privacy Act* when disclosing intercepted private communications to a foreign state, as "[n]othing in the *Criminal Code* relieves the RCMP from their duty to comply with the *Privacy Act*" (factum, at para. 13). According to the Privacy Commissioner, s. 193(2)(*e*) of the *Criminal Code* "limits the breadth of the criminal prohibition" set out in s. 193, "[b]ut this exemption neither authorizes a disclosure under the *Privacy Act* nor is itself a source of police power" (para. 14).

25 With respect, I do not agree. The federal *Privacy Act* is a statute of general application. Section 8(2) of the Act sets out the circumstances in which personal information under the control of a government institution may be disclosed. That section explicitly states that it is "[s]ubject to any other Act of Parliament". Therefore, prior to considering the disclosure contemplated by s. 8(2), it must first be determined whether another Act of Parliament addresses the particular disclosure in issue. In this case, the Impugned Disclosure (involving lawfully intercepted private communications) *is* specifically addressed by another Act of Parliament -- the *Criminal Code*.

26 Part VI of the *Criminal Code* represents a comprehensive scheme dealing with the interception of private communications. The individual right to privacy stands in tension with our collective need for effective law enforcement, and the safeguards layered into the wiretap provisions show Parliament's efforts to "reconcile these competing interests" (*R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 45). As noted by the extradition judge,

> Part VI ... creates a specific regime for the protection of privacy interests in relation to intercepted communications by creating specific offences, setting out procedures for authorized interception of private communications in the investigation of specific crimes, and delineating the circumstances under which intercepted communications may be disclosed. [para. 22]

This level of detail and specificity in Part VI indicates that Parliament intended this framework to be the exclusive regime governing the interception and use of private communications for law enforcement purposes.[1]

27 Section 193(2)(*e*) deals directly with the issue at hand -- namely, the cross-border disclosure of wiretap information. Admittedly, s. 193(2) is not structured as an explicit authorizing provision. Rather, it takes the form of a series of exemptions to the criminal offence identified in s. 193(1). Nonetheless, I am satisfied that it represents Parliament's attempt to regulate the disclosure of intercepted communications and specify the circumstances in which such disclosures may lawfully be made. Succinctly put, s. 193(2)(*e*) implicitly authorizes the disclosure of wiretap information in accordance with the conditions prescribed therein.

28 For these reasons, s. 193(2)(*e*) of the *Criminal Code*, and not s. 8(2)(*f*) of the *Privacy Act*, is the governing provision in this case. Accordingly, I need not consider the constitutionality of s. 8(2)(*f*).

29 In concluding that s. 193(2)(*e*) is an authorizing provision, I do not quarrel with the Chief Justice that, in general, the police may look to the common law for authority to use the fruits of a lawful search for legitimate law enforcement purposes, including disclosures to foreign law enforcement agencies. However, adopting this analysis in the wiretap context poses a problem. Finding that s. 193(2)(*e*) is *not* an authorizing provision, but merely an exception to a criminal offence, implies that *none* of the subparts of s. 193(2) are authorizing provisions, and that authorization for all of the listed disclosures must come from some other source. This, however, does not accord with the Court's recent decision in *Imperial Oil v. Jacques*, 2014 SCC 66, in which the majority held that the exemptions in s. 193(2) "give a person the right to disclose recordings that otherwise could not be disclosed" (para. 43).[2] Therefore, in my view, s. 193(2)(*e*) is properly read as an authorizing provision.

B. *Section 193(2)(b) Need Not Be Considered*

30 As noted, Mr. Wakeling was granted leave to challenge the constitutionality of s. 193(2)(*b*) of

the *Criminal Code* before this Court. In contrast to s. 193(2)(*e*), which addresses the *cross-border* disclosure of wiretap communications, s. 193(2)(*b*) authorizes the disclosure of wiretap communications "in the course of or for the purpose of any criminal investigation".

31 Mr. Wakeling made only cursory mention of s. 193(2)(*b*) in argument. As his complaint is specific to the issue of international, cross-border sharing of wiretap information for criminal law purposes, it is properly considered under s. 193(2)(*e*). For that reason -- and the fact that Mr. Wakeling did not press s. 193(2)(*b*) in written or oral argument -- I see no need to address its constitutionality.

C. *Does the Impugned Disclosure Violate Section 8 of the Charter?*

(1) Is Section 8 Engaged?

32 Section 8 is typically invoked where police perform a search or seizure and thereby infringe upon an individual's reasonable expectation of privacy. It is quite evident that the interception of wiretap communications constitutes a search. However, the disclosure of previously intercepted communications -- which is what s. 193(2)(*e*) implicitly authorizes -- is not, in my view, a "search" within the meaning of s. 8. Therefore, as a preliminary matter, it is important to clarify precisely how s. 8 is engaged in the present case. I now turn to that issue.

33 Mr. Wakeling submits that s. 8 is engaged because the disclosure of his intercepted communications pursuant to s. 193(2)(*e*) amounted to a second search, such that a second judicial authorization was necessary prior to the Impugned Disclosure. Absent such authorization, he argues that the police violated his s. 8 rights.

34 With respect, I disagree. As the intervener the British Columbia Civil Liberties Association ("BCCLA") observes, the plain meaning of "search" does not include the disclosure of information by the state. A disclosure is simply the communication to a third party of previously acquired information.

35 In sum, there was only one search that engaged s. 8 of the *Charter* on the facts of this case -- the original lawful interception of Mr. Wakeling's private communications. For this reason, to invoke s. 8, the appellant must rely on some other analytical approach.

36 The BCCLA frames the s. 8 analysis in a different way. It submits that to the extent s. 193(2)(*e*) permits disclosure of the fruits of a search, it forms "part of the context in which courts must assess the reasonableness of the law authorizing the search" (factum, at para. 3).

37 This submission warrants brief elaboration. According to the BCCLA, s. 193(2)(*e*) is an integral part of a search regime for wiretap interceptions set out in Part VI of the *Criminal Code*. Like all laws authorizing searches, that regime -- including any integral part of that regime -- must

be reasonable in order to comply with s. 8 of the *Charter*. Therefore, if s. 193(2)(*e*) is held to be unreasonable, this would taint the overall regime for s. 8 purposes and render it unconstitutional.

38 While I see some merit in the analytical approach proposed by the BCCLA, my conclusion that s. 8 protects targets at both the interception *and* disclosure stages under Part VI is more a function of the special dangers associated with wiretaps. Parliament has recognized that wiretaps pose heightened privacy concerns beyond those inherent in other searches and seizures. Justice Karakatsanis describes (at para. 116) the serious privacy implications of electronic surveillance, citing this Court's caution that "one can scarcely imagine a state activity more dangerous to individual privacy" (*Duarte*, at p. 43). Given these implications, the protections that Parliament has seen fit to fold into the wiretap regime include s. 193 which provides that, other than for one of the delineated purposes, the disclosure of wiretap information is not only unauthorized, it is criminal.

39 The highly intrusive nature of electronic surveillance and the statutory limits on the disclosure of its fruits suggest a heightened reasonable expectation of privacy in the wiretap context. Once a lawful interception has taken place and the intercepted communications are in the possession of law enforcement, that expectation is diminished but not extinguished. This heightened and continuing expectation of privacy in the wiretap context is further indication that s. 8 ought to apply to disclosures under Part VI.

40 In sum, while I acknowledge the Chief Justice's concern that s. 193(2)(*e*) does not engage s. 8 simply by virtue of its integral place in the search regime of Part VI, that is not the *sole* reason -- or indeed the main one -- why I conclude that s. 8 is engaged in this context. As I have emphasized, Parliament has recognized that wiretap interceptions are an exceptional and invasive form of search, and it is therefore perfectly appropriate, in my view, that s. 8 protections should extend to wiretap disclosures by law enforcement. Furthermore, there is a residual and continuing expectation of privacy in wiretap information that persists *even after it has been lawfully collected*. Indeed, the Chief Justice agrees that "residual privacy interests" remain at the time of disclosure and that s. 8 protects against unreasonable uses of the information by law enforcement (para. 95). I am therefore satisfied that s. 8 is properly engaged.

(2) The Analytical Framework Under Section 8 of the *Charter*

41 In order for a search to be reasonable under s. 8 of the *Charter*, "[i]t must be authorized by law, the law itself must be reasonable, and the search must be carried out in a reasonable manner" (*R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 10; see also *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278). I reiterate that a disclosure is not, standing alone, a "search" within the meaning of the *Charter*. However, for the reasons outlined above, s. 8 is engaged. Therefore, in my view, the s. 8 framework applies, *mutatis mutandis*, to disclosures made by law enforcement pursuant to s. 193(2)(*e*) of the *Criminal Code*.

42 Following the approach outlined above, I will address each step of the s. 8 framework independently: (1) whether the Impugned Disclosure was authorized by law; (2) whether the law

authorizing the Impugned Disclosure is reasonable; and (3) whether the Impugned Disclosure was carried out in a reasonable manner.

(3) Was the Impugned Disclosure Authorized by Law?

43 For ease of reference, I repeat s. 193(2)(*e*):

> (2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication
>
> ...
>
> (*e*) where disclosure is made to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences and is intended to be in the interests of the administration of justice in Canada or elsewhere[.]

44 A disclosure will be authorized by law where it is "carried out in accordance with the procedural and substantive requirements the law provides" (*Caslake*, at para. 12). Section 193(2)(*e*) imposes two essential requirements. First, with respect to cross-border disclosures, the recipient must be "a person or authority with responsibility in a foreign state for the investigation or prosecution of offences". Second, the disclosure must be "intended to be in the interests of the administration of justice in Canada or elsewhere".

45 Under the second requirement, the relevant intention is that of the disclosing party. For the disclosure to be authorized by law, that party must subjectively believe that the disclosure will advance the interests of the administration of justice in Canada and/or the foreign state. The belief must be honestly and genuinely held. The credibility of the disclosing party's expressed intent can be tested against objective facts.

46 The disclosure in this case was authorized by law. No one contends otherwise. The intercepted communications were provided to U.S. authorities for the purpose of foiling a cross-border drug smuggling operation. When Canadian authorities shared information about the operation with their American counterparts, they intended to advance the administration of justice in Canada and the United States. The requirements under s. 193(2)(*e*) were therefore satisfied.

(4) Is Section 193(2)(*e*) a Reasonable Law?

47 The parties' submissions focus on the second step of the s. 8 framework, that is the reasonableness of s. 193(2)(*e*). They argue, and Justice Karakatsanis agrees, that this provision is constitutionally deficient. I do not share that view. As I will explain, s. 193(2)(*e*) is a reasonable law.

(a) *Overview of the Parties' Charter Challenges*

48 Mr. Wakeling and the BCCLA raise a host of *Charter* arguments challenging the constitutionality of s. 193(2)(*e*). For the sake of clarity, these arguments can be broken down into three distinct (though somewhat overlapping) categories: (1) s. 193(2)(*e*) is unconstitutionally overbroad; (2) s. 193(2)(*e*) is unconstitutionally vague; and (3) s. 193(2)(*e*) is unconstitutional because it lacks accountability mechanisms. Viewed individually and collectively, these arguments challenge the reasonableness of the law authorizing the Impugned Disclosure. As such, they are properly considered under the second step of the s. 8 framework.

(i) Overbreadth

49 The BCCLA's main line of attack on s. 193(2)(*e*) is that it creates an almost "limitless" scope for disclosure of private intercepted communications. In failing to place reasonable, or indeed any limits on disclosure, the provision effectively grants police untrammeled discretion and is ripe for abuse by both domestic and foreign authorities. This argument strikes me as very similar to Mr. Wakeling's submission that s. 193(2)(*e*) is unconstitutionally overbroad and thus contravenes the principles of fundamental justice in violation of s. 7 of the *Charter*. I am of the view that both of these arguments can be dealt with together under the reasonableness framework of s. 8. To put it simply, a law that suffers from overbreadth will necessarily be unreasonable.

(ii) Vagueness

50 Mr. Wakeling argues that the language of s. 193(2)(*e*) is so vague as to be unworkable. He makes this argument under s. 7 of the *Charter*, asserting that the phrase "in the interests of the administration of justice" does not have a constant and settled meaning. Like the argument on overbreadth, I believe that this argument can be disposed of under s. 8. A provision that is unconstitutionally vague will necessarily be unreasonable.

(iii) Accountability Mechanisms

51 Mr. Wakeling and the BCCLA submit that s. 193(2)(*e*) is unconstitutional since it is devoid of mechanisms to hold authorities accountable for their disclosures of intercepted communications. In particular, they are concerned that the provision lacks sufficient safeguards, including judicial pre-authorization, notice and record-keeping requirements, Parliamentary reporting, as well as international protocols and caveats limiting the use of disclosed information.

52 Mr. Wakeling's accountability argument goes somewhat further than that of the BCCLA. He claims that accountability -- and the related value of transparency -- are principles of fundamental justice under s. 7. I find it unnecessary to finally decide that issue. The accountability concerns identified by Mr. Wakeling and the BCCLA are best dealt with under s. 8. As this Court's decision in *R. v. Tse*, 2012 SCC 16, [2002] 1 S.C.R. 531, notes, accountability forms part of the reasonableness analysis under s. 8.

53 Having outlined the three categories of objections to s. 193(2)(*e*), I will now address each of them in greater depth.

(b) *Is the Scope of Disclosure Authorized by Section 193(2)* (e) *Unconstitutionally Overbroad?*

54 Both Mr. Wakeling and the BCCLA take issue with the extent of disclosure that s. 193(2)(*e*) authorizes for substantially similar reasons. Both submit that s. 193(2)(*e*) permits "near-limitless disclosure of private communications intercepted by wiretap" (BCCLA factum, at para. 3; see also A.F., at paras. 129-30).

55 With respect, I believe that Mr. Wakeling and the BCCLA overstate the nature and extent of the disclosure contemplated by s. 193(2)(*e*). A law may be broad without suffering from overbreadth. While the provision authorizes a wide scope of disclosure, it does not permit "near-limitless" disclosure of lawfully intercepted communications. On the contrary, it limits the type of information that may be disclosed, the purpose for which it may be disclosed, and the persons to whom it may be disclosed.

56 Second, the BCCLA notes that the provision allows disclosure where it is intended to be "in the interests of the administration of justice in Canada or elsewhere" and submits that the use of the word "or" means that disclosure could be in the *sole* interests of the foreign state, and not Canada's. According to the BCCLA, "it is never reasonable to disclose an intercepted private communication to a foreign state when to do so is only in the foreign state's interests and not Canada's" (factum, at para. 33).

57 With respect, I reject this line of thinking. Multi-jurisdictional cooperation between law enforcement authorities furthers the administration of justice in *all* of the jurisdictions involved. It must not be forgotten that Canada is often on the *receiving* end of valuable information from foreign law enforcement authorities. The language of s. 193(2)(*e*) appropriately captures the reciprocity inherent in this practice.

58 Third, the BCCLA submits that "on its face, s. 193(2)(*e*) permits disclosure even to support torture, or to prosecute an offence in a foreign state that violates Canadian constitutional norms or international law, provided only that *someone* intends that disclosure be in the interests of the administration of justice *somewhere*" (factum, at para. 10 (emphasis in original)). It also contends that s. 193(2)(*e*) "opens the door to disclosures to foreign states that are motivated by Canadian authorities' political, financial, personal, or other interests, as long as the *foreign state*'s intention relates to the interests of *its* administration of justice" (para. 13 (emphasis in original)).

59 Once again, I disagree. Under s. 193(2)(*e*), it is the *disclosing party*'s intention that matters. The provision requires that the disclosing party must subjectively believe that disclosure will further the interests of justice in Canada and/or the foreign state. The belief must be an honest one, genuinely held. If the disclosing party's subjective belief is challenged, the reviewing judge may

look at objective indicators in deciding whether the disclosing party is to be believed. Measuring the stated belief against objective facts is an accepted way of separating beliefs that are honestly and genuinely held from those that are not.

60 A disclosing party who knows little or nothing about the justice system in the foreign state or who does not know how or for what purpose the foreign state intends to use the information will have a hard time satisfying a court that he or she genuinely believed that disclosure would further the interests of the administration of justice. The same holds true for a disclosing party who knows or has reason to believe that the information will be used to commit torture or other human rights violations, or for someone who has sent the information for personal or partisan reasons. That a disclosing party may have his or her credibility tested against objective indicators incentivizes that person to proceed cautiously when disclosing information to a foreign state. Given these limitations inherent in s. 193(2)(*e*), I am not persuaded that the provision grants police a "limitless" power to disclose.

(c) *Is Section 193(2)(e) Unconstitutionally Vague?*

61 I will now address Mr. Wakeling's objection that s. 193(2)(*e*) is unconstitutionally vague. He contends that the phrase "where disclosure ... is intended to be in the interests of the administration of justice in Canada or elsewhere" is "unworkable" because "the decision maker would be required to have a full appreciation and understanding of the laws of the country which will receive the disclosure" (A.F., at para. 126). He also argues that "the administration of justice" does not have a constant and settled meaning (para. 129).

62 Like the extradition judge and the Court of Appeal, I would not give effect to these submissions. This Court in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, stated that "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate" (p. 643). Section 193(2)(*e*) does not offend in this regard. It sets out *who* must intend that the disclosure be in the interests of the administration of justice (the person disclosing the information) and *to whom* the information may be disclosed (to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences). Moreover, while "the administration of justice" is a broad concept, it is not one that so lacks in precision as to give insufficient guidance for legal debate. As Borins Co. Ct. J. in *R. v. Samson* (1982), 37 O.R. (2d) 237, explained:

> "[A]dministration of justice", with particular reference to the criminal law, is a compendious term that stands for all the complexes of activity that operate to bring the substantive law of crime to bear, or to keep it from coming to bear, on persons who are suspected of having committed crimes. It refers to the rules of law that govern the detection, investigation, apprehension, interviewing and trial of persons suspected of crime and those persons whose responsibility it is to work within these rules. The administration of justice is not confined to the

> courts; it encompasses officers of the law and others whose duties are necessary to ensure that the courts function effectively. The concern of the administration of justice is the fair, just and impartial upholding of rights, and punishment of wrongs, according to the rule of law. [pp. 246-47]

In the context of s. 193(2)(*e*), the phrase "the administration of justice" means that disclosure must be for a legitimate law enforcement purpose, such as the prevention of cross-border drug trafficking. It is not unconstitutionally vague.

(d) *Is Section 193(2)(e) Unconstitutional for Lack of Accountability Mechanisms?*

63 Mr. Wakeling and the BCCLA also make a variety of submissions pertaining to accountability and the related value of transparency. They take issue with the fact that s. 193(2)(*e*) contains no record-keeping requirement, nor any requirement that would "attempt to constrain the foreign state's use and dissemination of the communications" (BCCLA factum, at para. 2). The essence of these arguments is that s. 193(2)(*e*) inadequately protects the privacy interests at stake and that, absent procedural requirements such as notice to the target of the disclosure, protocols or international agreements, police record keeping, and Parliamentary reporting, s. 193(2)(*e*) is unconstitutional.

64 In making these arguments, Mr. Wakeling and the BCCLA rely on *Tse*, where the constitutionality of s. 184.4 of the *Criminal Code* was in issue. That provision permitted peace officers to intercept certain private communications without judicial authorization if an officer believed, on reasonable grounds, that the interception was immediately necessary to prevent an unlawful act that would cause serious harm. In striking it down, this Court held that "s. 184.4 falls down on the matter of accountability because the legislative scheme does not provide any mechanism to permit oversight of the police use of this power" (para 11 (emphasis added)).

65 In my opinion, *Tse* is distinguishable from the present case. First, the statutory scheme at issue in *Tse* contained *no* accountability measures. As I will explain, that is not the case with s. 193(2)(*e*).

66 Second, the impugned provision in *Tse* involved *warrantless* searches and seizures. Accountability measures, including after-the-fact notice and reporting requirements, are of particular importance in that context. The emergency wiretap provision, by its very nature, allows the police to conduct a warrantless search in exigent circumstances. No balancing of interests before a judge occurs. In contrast, Mr. Wakeling's private communications were intercepted pursuant to a judicial authorization. Issuing the authorization required the judge to balance Mr. Wakeling's privacy interests with the interests of law enforcement. A variety of procedural safeguards were adhered to. Unlike an emergency wiretap situation, Mr. Wakeling's privacy interests were afforded significant protection at the interception stage.

67 Section 193(2)(*e*) must be considered in context. In my view, it is inappropriate "to seize upon individual sections of [the wiretap scheme] and to see if those sections, viewed in isolation,

contravene the provisions of the *Charter*" (*R. v. Finlay* (1985), 52 O.R. (2d) 632 (C.A.), at p. 653). Rather, the proper approach is to consider the "provisions and the safeguards contained therein in their entirety" (*ibid.*). Section 193(2)(*e*) is part of a unique statutory scheme that contains numerous privacy safeguards, including notice and reporting requirements. Pursuant to s. 196(1) of the *Criminal Code*, an individual who has been wiretapped must be provided with written notification within three months of the time the authorization was given or renewed, subject to judicially authorized extensions. These extensions may be authorized, for instance, where providing notice to the suspect would derail an ongoing police investigation.

68 While Parliament could perhaps, as a matter of policy, require a *second* notice relating specifically to a s. 193(2)(*e*) disclosure, there are inherent difficulties with such a requirement. In order to decide whether to apply for an extension of time in providing notice of disclosure, Canadian authorities would have to keep abreast of all foreign investigations involving the disclosed information. Without such knowledge, it would be impossible for them to know whether providing notice of the disclosure to the suspect would derail or otherwise compromise a foreign investigation.

69 To require Canadian authorities to stay on top of all foreign investigations that involve the disclosed information is surely unreasonable. It would be highly burdensome, if not entirely impractical. In my view, the absence of a requirement to provide a second notice does not render the wiretap regime unconstitutional.

70 As noted, the existing notice requirements contained in Part VI of the *Criminal Code* ensure that all individuals who have been wiretapped are provided with notice of this fact. Once notified, individuals may wish to know whether their intercepted communications have been disclosed to a foreign authority. An individual may make a request pursuant to the applicable access to information statute in an effort to obtain this information. Justice Karakatsanis correctly notes that such efforts may not always be successful, depending on the details of the applicable access to information regime and the individual's circumstances. I express no view on whether a guaranteed right of access to this information would be advisable -- only that it is not constitutionally required.

71 As for Parliamentary reporting, the Minister of Public Safety and Emergency Preparedness must prepare an annual report to Parliament on the use of electronic surveillance pursuant to s. 195 of the *Criminal Code*. Once again, Parliament could require that disclosures made under s. 193(2)(*e*) be included in an annual report. But that is a policy decision, and it is important that this Court separate policy matters from constitutional imperatives -- especially in this context where international relations are involved. As this Court stated in *Tse*, a reporting requirement to Parliament is not a constitutional imperative (para. 89).

72 Contrary to the submissions of Mr. Wakeling and the BCCLA, s. 193(2)(*e*) is not devoid of accountability measures. Rather, accountability has been built into the scheme for the disclosure of wiretap communications. Section 193(1) provides a powerful incentive for Canadian authorities to comply with the dictates of s. 193(2)(*e*). The failure to do so can lead to criminal charges against the

disclosing party or result in the exclusion of the improperly disclosed evidence at a subsequent proceeding in Canada. The possibility of criminal sanction or the loss of important evidence creates an incentive to maintain records about what information was disclosed, to whom, and for what purpose. Indeed, according to the evidence of the Deputy Commissioner of Canada West, Gary David Bass, who testified with respect to certain RCMP practices and procedures, the RCMP have a number of internal record-keeping policies that apply to the cross-border sharing of information.

73 While police record keeping is not, in my view, constitutionally required for disclosures made under s. 193(2)(*e*), I should not be taken as discouraging the practice. Likewise, these reasons are not intended to discourage Parliament from instituting reporting requirements or establishing international agreements between Canada and foreign states to address cross-border disclosure of wiretap communications. The record at hand indicates that many agreements are in place between law enforcement agencies. The record also shows that information is often disclosed with caveats as to its subsequent use.

74 Although not constitutionally mandated, adherence to international protocols and the use of caveats or information-sharing agreements may be highly relevant in determining whether a given disclosure was authorized by law under s. 193(2)(*e*). These objective indicators may assist a court in assessing whether disclosure was genuinely intended to advance the interests of the administration of justice. Moreover, as I discuss below in reference to the third step of the s. 8 framework, they will also impact on whether the manner of disclosure is found to be reasonable.

75 In considering the possible accountability and transparency mechanisms that Parliament could enact, certain realities cannot be ignored. Even where the information is disclosed to a foreign state with a legal system much like our own, once the information is in the hands of the foreign state, its use will, for the most part, be beyond our purview. Such is a defining feature of state sovereignty. Caveats on disclosure and information-sharing protocols may be desirable, and they may be relevant to evaluating whether a disclosure is intended to be in the interest of the administration of justice (as required at the first step of the s. 8 analysis) or is carried out reasonably (as required at the third step). However, they are not constitutionally required in every case, nor would they be a panacea if they were -- certainly not standard-form agreements or caveats accompanying every disclosure, as Justice Karakatsanis's proposal would likely generate. There is *always* a risk that a foreign law enforcement agency may misuse the information disclosed to it under s. 193(2)(*e*). This risk can never be entirely eliminated, regardless of the nature and extent of the procedural safeguards in place in Canada, and it must not be allowed to undermine the vital interests served by the detection and prosecution of multi-jurisdictional crime. In this regard, I re-emphasize that Canada is frequently on the *receiving* end of such disclosures -- and Canadians are safer for it.

76 I do not gainsay the possibility that a foreign law enforcement agency could misuse the information provided to it by Canadian authorities. In such cases, there are certain avenues Canada may pursue where the subsequent use of information disclosed to a foreign state offends our own notions of justice. For example, where the disclosed information is being used to seek the

extradition of an individual who faces a realistic prospect of torture or other human rights violations in a foreign country, Canada can refuse the extradition request to avoid a manifest violation of the *Charter*. Likewise, if the information in question is found to have been unlawfully obtained, its use in an extradition proceeding -- or in any other legal venue -- could be challenged. In other contexts, Canada could exert pressure through diplomatic channels. There are various ways that Canada pursues its objectives on the international stage -- founded on the principles of comity and state sovereignty -- which may have application in a particular case.

77 It bears emphasizing that this Court's task is not to determine whether there may be better or additional accountability measures or stricter language that could be put in place with respect to the cross-border disclosure of wiretap communications. Any attempt to micromanage Parliament in this context must be approached with great care. The task at hand is to determine whether s. 193(2)(*e*) passes constitutional muster. As discussed, there are a number of accountability measures contained within Part VI and within s. 193(2)(*e*) itself, and the scope of the disclosure contemplated by s. 193(2)(*e*) is, in my view, entirely reasonable. For these reasons, I conclude that the impugned legislation does not fall short of the constitutional standards mandated by s. 8 of the *Charter*.

(5) Was the Impugned Disclosure Carried Out in a Reasonable Manner?

78 Having determined that s. 193(2)(*e*) is a reasonable law and that it was complied with in this case, the remaining inquiry is whether the *manner* of the Impugned Disclosure was unreasonable, and therefore violates s. 8 of the *Charter*. Nothing in the record suggests that the police acted unreasonably in disclosing Mr. Wakeling's intercepted communications to U.S. authorities. Neither the Chief Justice nor Justice Karakatsanis suggest otherwise. Common sense would suggest that similarly unremarkable and entirely reasonable instances of law enforcement cooperation to combat cross-border criminal activity occur on a daily basis between Canadian and U.S. authorities. Saddling police with the obligation of imposing boilerplate caveats on even the most routine disclosures poses an unnecessary burden. It would do little to safeguard the interests protected by s. 8 while impeding legitimate law enforcement operations.

79 Nothing further is needed to dispose of the instant case. However, in different factual contexts, there may be significant potential dangers posed by the disclosure of intercepted communications to foreign authorities. Given these dangers, a broader discussion of the third step of the s. 8 framework is warranted.

80 Where a disclosing party knows or should have known that the information could be used in unfair trials, to facilitate discrimination or political intimidation, or to commit torture or other human rights violations -- concerns rightly expressed by Justice Karakatsanis -- s. 8 requires that the disclosure, if permissible at all, be carried out in a reasonable manner. In the most serious examples, where there are no steps that could be taken to mitigate the danger, s. 8 forbids disclosure entirely. I should emphasize that this inquiry as to the manner of disclosure is distinct from whether disclosure would be authorized by law pursuant to s. 193(2)(*e*) -- although, as a practical matter, the two

inquiries may overlap. For example, where the risks are so great that there is *no* manner of disclosure that would be objectively reasonable, a disclosing party would find it difficult to prove that he or she believed that the disclosure was "in the interests of the administration of justice" under any plausible meaning of that term.

81 In other cases, a disclosure could be reasonably carried out where the use of information-sharing protocols or the imposition of caveats would sufficiently mitigate the risks. An example may be useful to illustrate this point. Suppose that Canadian authorities know or ought to know that a foreign government, to which they are contemplating a disclosure, may pass on the information to a third country that could exploit it to harm a Canadian citizen. In that context, the failure to include a caveat limiting subsequent use of the disclosed information, even where the disclosing party intended to further the administration of justice, might render the disclosure unreasonable under s. 8. In such cases, therefore, the existence of appropriate safeguards will play a crucial role in determining the constitutionality of a challenged disclosure. It is by mandating appropriate safeguards on a case-by-case basis, rather than inflexibly requiring them in all situations, that a proper balance is struck between protecting against unreasonable disclosures of private communications and facilitating the effective investigation of domestic and multi-jurisdictional crime.

VI. Conclusion

82 Inter-agency cooperation is critical to the prevention, detection, and punishment of cross-border crime. Recognizing this, Parliament has authorized the cross-border sharing of wiretap communications under s. 193(2)(*e*) of the *Criminal Code*. The disclosure in this case was lawfully authorized by that provision, and the legislation, taken as a whole, does not violate s. 8 of the *Charter*. Furthermore, there is no evidence that the manner of disclosure was unreasonable. Accordingly, I would dismiss the appeal.

The following are the reasons delivered by

83 McLACHLIN C.J. (concurring):-- I have read the reasons of my colleagues Moldaver J. and Karakatsanis J., who come to different conclusions about the constitutionality of s. 193(2)(*e*) of the *Criminal Code*, R.S.C. 1985, c. C-46, and the measures that should be in place to govern sharing information obtained under warrant with law enforcement agencies in other countries.

84 I approach the matter differently. In my view, the question on this appeal is whether Mr. Wakeling's rights under s. 8 of the *Canadian Charter of Rights and Freedoms* were violated. The constitutionality of s. 193(2)(*e*) becomes an issue only if Mr. Wakeling can show that s. 193(2)(*e*) infringed his s. 8 rights. In my view, he has not shown this. Accordingly, I would dismiss the appeal.

I. Background

85 Moldaver J. has set out the facts and judicial history of the case. Briefly put, Mr. Wakeling was the subject of a Canadian drug investigation. In the course of the investigation, the RCMP obtained a warrant to monitor communications between Mr. Wakeling and others. The communications revealed a plot to transport drugs across the Canada-U.S. border. The RCMP shared information obtained from the communications with U.S. authorities, who used it to intercept and seize 46,000 ecstasy pills at the International Falls, Minnesota border crossing.

86 The U.S. sought Mr. Wakeling's extradition from Canada to face charges arising from the seizure of the ecstasy pills. At the hearing, Mr. Wakeling argued that the RCMP's disclosure of the information obtained from the intercepted communications violated his rights under s. 8 of the *Charter* and that the evidence should not be admitted against him.

87 The extradition judge held that there was no violation of Mr. Wakeling's s. 8 rights, admitted the evidence, and issued a committal order for extradition. The British Columbia Court of Appeal dismissed Mr. Wakeling's appeal.

II. The Issue

88 The main -- and in my view the only -- issue on this appeal is whether the RCMP's disclosure of the intercepted communications to U.S. authorities violated Mr. Wakeling's s. 8 rights and, if so, whether the evidence should have been excluded under s. 24(2) of the *Charter.*

89 In my view, it is not necessary to consider the constitutionality of s. 193(2)(*e*) of the *Criminal Code* to answer that question. I agree with my colleagues that it is unnecessary to consider the *Privacy Act*, R.S.C. 1985, c. P-21, or s. 193(2)(*b*) of the *Criminal Code.*

III. Analysis

90 Section 8 of the *Charter* protects individuals against unreasonable search and seizure. It provides:

> Everyone has the right to be secure against unreasonable search or seizure.

91 Section 8 protects the individual's privacy interest against unreasonable state intrusion. Here, Mr. Wakeling has a reasonable expectation of privacy in his communications with others. In order to obtain private information by intercepting communications, the state must obtain a judicial warrant, which requires the state to demonstrate that there are reasonable grounds to believe the interception will show evidence of a crime. (Circumstances where the state can intercept *without* a warrant are not relevant here, e.g., s. 184.4 of the *Criminal Code*.) Where such grounds exist, the individual's privacy interest in the intercepted communication gives way to the state's interest in law enforcement.

92 The warrant allows the police to obtain the information and to use it for purposes of law

enforcement. The individual whose communications are lawfully intercepted under a valid warrant cannot complain that this unreasonably breaches his privacy. To put it metaphorically, a valid warrant sanitizes the state intrusion on privacy, as long as the execution of the warrant is reasonable and the information is used for purposes of law enforcement.

93 It has never been suggested that this principle is confined to the use of information in Canada. The reality is that crime does not stop at national borders, and police routinely share information that they have lawfully obtained under warrant with their counterparts in other countries. Provided information is shared for purposes of law enforcement, the individual cannot complain that the sharing violates his s. 8 right to privacy.

94 This Court has found that s. 8 is violated in cases where the information was seized in a context *outside* law enforcement and then passed along for the purpose of law enforcement: *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227; and *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34. In those cases, the "sanitizing" effect of the warrant (or similar authorization process) was absent; the individual's privacy interest had not been balanced against the state's interest in law enforcement through judicial pre-authorization. Where, as here, that process has taken place, disclosure for law enforcement purposes does not violate s. 8.

95 Once information is obtained under warrant, s. 8 protects against unreasonable uses of that information. For example, information obtained under warrant cannot be used for rendition to a foreign country (the Maher Arar case discussed by Karakatsanis J.) or public titillation. Section 7 of the *Charter* may also be engaged where disclosure gives rise to a concern that the recipient country will use the information to kill, torture or mistreat the target. These concerns do not arise on the facts of this case. Where these residual privacy interests are infringed, remedies may include prosecution of the disclosing officer under s. 193(1) of the *Criminal Code* and remedies under s. 24(1) of the *Charter*.

96 It follows that sharing information obtained under warrant for law enforcement purposes with foreign law officers does not violate s. 8, absent the residual concerns just discussed. Here, the information was disclosed to the U.S. authorities for law enforcement purposes, and none of the residual concerns arise. It follows that Mr. Wakeling's rights were not violated, and his appeal must fail.

97 The question is whether s. 193(2)(*e*) of the *Criminal Code* changes this. I do not think it does. As I state in *Imperial Oil v. Jacques*, 2014 SCC 66, at para. 89, I am of the view that s. 193(2) is not an authorizing provision. Section 193(2)(*e*) does not confer a power on Canadian authorities to share information obtained under warrant with foreign counterparts. Rather, it operates by exempting officers from prosecution where they disclose intercepted private communications under their common law powers. Section 193(1), the offence provision, is intended to guard against the disclosure of intercepted private communications by making it an offence to do so without the consent of the individual concerned. Section 193(2) then lists a number of exemptions from what

otherwise would be an offence by virtue of s. 193(1). The exception in s. 193(2)(*e*) demonstrates that the common law power to use information obtained under warrant for law enforcement purposes is one of the categories of disclosure protected from liability as an offence under s. 193(1). I agree with my colleague Moldaver J. when he says that "the administration of justice" in s. 193(2)(*e*) refers only to use for legitimate law enforcement purposes. The provision therefore preserves the common law power of law enforcement authorities to share lawfully obtained information for purposes of law enforcement both domestically and abroad. In a nutshell, the exception prevents law enforcement officers from being convicted for doing their job -- using information obtained under warrant for purposes of law enforcement.

98 It is therefore unnecessary to opine on the constitutionality of s. 193(2)(*e*) of the *Criminal Code*. To do so invites speculation, as the eloquent reasons of my colleagues demonstrate: one says the current legislative scheme provision is unconstitutional, the other says it is eminently reasonable. We should not send Parliament back to the legislative drawing board on the basis of hypothetical speculation, where it is not established that the law infringes anyone's s. 8 rights.

99 For the same reasons, I find it unnecessary to consider the constitutionality of the *Privacy Act*. Assuming without deciding that the *Privacy Act* applies, it permits the disclosure of personal information for the purposes of law enforcement. It is specifically permitted under s. 8(2)(*f*)[3] and more generally as a use consistent with the purpose for which the information was obtained under s. 8(2)(*a*).[4] As discussed, this alone does not violate ss. 7 or 8.

100 Much is made of the need -- or the absence of need -- for measures to address the risk that information shared with law enforcement agencies in other countries will be abused. Mr. Wakeling and supporting interveners argue that the exclusion in s. 193(2)(*e*) from the offence for improper disclosure is too broad to provide adequate protection. The Crown and supporting Attorneys General, on the other hand, emphasize the risks associated with bureaucratic restrictions on the international sharing of information and argue that it would be unrealistic and unworkable in today's interconnected world. These are difficult questions more redolent of policy than of law. Parliament has considered them and answered with the offence provisions and exemptions of s. 193. In the absence of a demonstrated breach of s. 8 rights flowing from those provisions, Parliament's choice must be allowed to stand, in my respectful opinion.

IV. Conclusion

101 I would dismiss the appeal and confirm the order for committal of Mr. Wakeling.

The reasons of Abella, Cromwell and Karakatsanis JJ. were delivered by

102 KARAKATSANIS J. (dissenting):-- Does the legislation permitting Canadian law enforcement agencies to disclose wiretapped information to foreign law enforcement officials violate s. 8 of the *Canadian Charter of Rights and Freedoms*? I conclude that it does.

103 When police intercept an individual's private communications without consent, the information they obtain is of an extremely private and personal nature. Officers must obtain prior judicial authorization before conducting these intrusive searches, except in exigent circumstances: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 184.2, 185, 186 and 487.01(5); *R. v. Duarte*, [1990] 1 S.C.R. 30. Once the information is obtained, there are strict limits on how officers can use the information and to which Canadian officials it may be disclosed.

104 By contrast, s. 193(2)(*e*) of the *Criminal Code* permits Canadian law enforcement officers to disclose wiretapped information to foreign law enforcement officials without any restrictions on how the information may be used and without any measures to permit oversight of when and how this broad state power is used. Nothing in the provision restrains recipients from using the information outside Canada in unfair trials or in ways that violate human rights norms. Similarly, recipient officials are not prevented from publicly disseminating the information or sharing it with officials in other states, many of which do not share our legal and democratic values. The torture of Maher Arar in Syria provides a particularly chilling example of the dangers of unconditional information sharing.

105 I would hold that the wiretap scheme set out in Part VI of the *Criminal Code* violates the *Charter* "right to be secure against unreasonable search or seizure" because s. 193(2)(*e*) permits the sharing of intercepted information with foreign officials without meaningful safeguards. To render the scheme constitutional, Parliament must require the disclosing party to impose conditions on how foreign officials can use the information they receive, and must implement accountability measures to deter inappropriate disclosure and permit oversight.

I. The Legislation

106 Part VI of the *Criminal Code* is the legislative scheme that governs wiretap interceptions and the use of intercepted information. In recognition of the profound invasion of privacy associated with the interception of private communications, Part VI imposes strict preconditions on such interceptions. With narrow exceptions for exigent circumstances (ss. 184.1 and 184.4), law enforcement officers may generally only use wiretaps in the course of investigating enumerated crimes (s. 183), must obtain prior judicial authorization (ss. 184(2)(b) and 184.2), and must comply with notice and reporting requirements (ss. 195 and 196). A number of the safeguards contained in Part VI have been added to ensure the constitutionality of this wiretapping regime: *An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40; *Response to the Supreme Court of Canada Decision in R. v. Tse Act*, S.C. 2013, c. 8.

107 While the basic scheme of Part VI has been found to strike the balance between privacy and law enforcement interests required under s. 8 of the *Charter* (*Duarte*, at p. 45), this is the first time that this Court has considered the effect of the disclosure provisions on its constitutionality. Section 193 of the *Criminal Code* makes it an indictable offence to disclose intercepted information without consent, except where the disclosure falls into a permitted category such as disclosure for the

purpose of a criminal investigation. Since 1988, the *Criminal Code* has permitted disclosure

> (*e*) where disclosure is made to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences and is intended to be in the interests of the administration of justice in Canada or elsewhere;

(*Criminal Code*, s. 193(2)(*e*))

II. Section 8 of the *Charter*

108 Section 8 of the *Charter* protects against "unreasonable search or seizure". A search or seizure is reasonable "if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable" (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278). In this case, the interception of the appellant's communications was a search authorized by law. A warrant was obtained authorizing the wiretap. The communications were shared with U.S. police pursuant to s. 193(2)(*e*) without any conditions or written record.

109 I agree with my colleague Moldaver J. that we need not consider the constitutionality of s. 8(2)(*f*) of the *Privacy Act*, R.S.C. 1985, c. P-21. For the reasons set out by my colleague, I also find it unnecessary to address the arguments with respect to s. 7 of the *Charter*. The issue in this case is whether the foreign disclosure contemplated by s. 193(2)(*e*) of the *Criminal Code* is reasonable. In particular, does s. 193(2)(*e*) render the wiretap scheme set out in Part VI unreasonable by permitting essentially unrestricted and unsupervised disclosure of the fruits of wiretap interceptions to foreign law enforcement officials?

110 Whether a law provides reasonable authority for a search is a contextual inquiry: *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 26. The question here is whether the wiretap provisions "strik[e] an appropriate balance" between the state's interest in the search and the public interest in protecting privacy: *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 10.

111 The assessment of this balance must be connected to the underlying purposes of s. 8 itself. Just as the expectation of privacy analysis asks what we, as a society, should be able to expect will be kept private (*R. v. Quesnelle*, 2014 SCC 46, at para. 44), the assessment of whether a law provides reasonable authority for a search involves asking what level of privacy protection we are entitled to expect, given the state's objective in seeking the information.

112 In order to determine whether s. 193(2)(*e*) of Part VI of the *Criminal Code* permits an "unreasonable search or seizure", it is first necessary to consider the interests that the disclosure regime was meant to serve and its impact on the privacy rights of affected persons. With those interests in mind, I will then turn to the particular aspects of s. 193(2)(*e*) that, in my view, render Part VI unconstitutional.

III. The Interests at Stake

113 There is no question that international cooperation and information sharing are essential to law enforcement: *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292. Crime does not stop at state borders, nor should efforts to combat it. Just as electronic surveillance "plays an indispensable role in the detection of sophisticated criminal enterprises" (*Duarte*, at p. 44), international dissemination of the fruits of that surveillance is increasingly important for law enforcement.

114 When Canadian officials share information with foreign officials, the foreign state is not the only beneficiary; the importance of comity cannot be ignored. Canadian interests are served when our law enforcement agencies build appropriate information-sharing relationships with law enforcement officials in other jurisdictions, and the disclosure of wiretapped information in individual cases contributes to these relationships. Further, timely disclosure will often be critical in the investigation of serious transnational crimes such as drug smuggling, human trafficking and terrorism. Often, the circumstances will require immediate police action to protect public safety and prevent crimes. This case is one such example.

115 The state's interest in law enforcement and comity must be balanced against the significant privacy and other interests engaged by disclosure. Wiretap interceptions gather private information that is likely "to reveal intimate details of the lifestyle and personal choices of the individual" (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; and *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 25). This can include information about an individual's political and religious affiliations, personal finances, intimate relationships, family problems, physical and mental health, substance use, and encounters with police.

116 This Court recognized the invasiveness of wiretapping in *Duarte*, where La Forest J. stated that "one can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance" (p. 43). He warned that

> [i]f the state may arbitrarily record and transmit our private communications, it is no longer possible to strike an appropriate balance between the right of the individual to be left alone and the right of the state to intrude on privacy in the furtherance of its goals, notably the need to investigate and combat crime. [p. 44]

117 Law enforcement officers in Canada are therefore subject to strict limits on the use of wiretapped information. Section 193 of the *Criminal Code* makes it an indictable offence to disclose intercepted information, subject to limited exceptions such as giving evidence in civil or criminal proceedings (s. 193(2)(*a*)) or disclosing information for the purpose of a criminal investigation (s. 193(2)(*b*)). By contrast, courts have held that information obtained by the state in other kinds of searches and seizures may be shared with regulatory agencies for purposes outside of criminal investigations and existing proceedings (see, for example, *Brown v. The Queen*, 2013 FCA 111, 2013 D.T.C. 5094).

118 When information is shared across jurisdictional lines, the safeguards that apply in domestic investigations lose their force. This can create serious risks to individual privacy, liberty and security of the person interests. As Commissioner O'Connor observed, when information is shared with foreign authorities, "respect for human rights cannot always be taken for granted": Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006) ("O'Connor Report"), at p. 321.

119 Wiretap information that is shared with foreign officials may ultimately be used in unfair trials or to prosecute offences that are not crimes in Canada. Information obtained from wiretaps can lead to discrimination on the basis of political or religious affiliation. In the wrong hands, wiretap information may even be used to intimidate or smear political figures and members of civil society: see, e.g., B. A. Franklin, "Wiretaps reveal Dr. King feared rebuff on nonviolence", *The New York Times*, September 15, 1985; J. Sanchez, "Wiretapping's true danger", *Los Angeles Times*, March 16, 2008. Further, s. 193(2)(*e*) permits the disclosure to foreign officials of both intercepted personal information that may be completely unrelated to the criminal investigation or to its target and information resulting from wiretaps that are later found to be unlawful.

120 Professor Kent Roach writes that the expansion in international information sharing since 2001 has exacerbated a number of problems:

> ... law enforcement agencies are now more likely to undertake enforcement actions based on shared information that is unreliable, and there is now a greater risk that information shared by intelligence services will be disclosed in subsequent legal proceedings. Individuals are also at greater risk of having their rights, especially their right to privacy, infringed. Individuals will rarely have the opportunity to challenge the accuracy of shared information because they will often be unaware that information about them has been shared and will not have access to the shared information.

(K. Roach, "Overseeing Information Sharing", in H. Born and A. Wills, eds., *Overseeing Intelligence Services: A Toolkit* (2012), 129, at p. 131)

121 The respondent the Attorney General of Canada submits that the expectation of privacy in communications is diminished after they have been lawfully intercepted. Indeed, people should expect that police will "share lawfully gathered information with other law enforcement officials, provided the use is consistent with the purposes for which it was gathered" (*Quesnelle*, 2014 SCC 46, at para. 39).

122 However, that does not mean that there is *no* privacy interest in wiretap information; to the contrary, people have the right to expect that such information will only be disclosed appropriately. In a well-known passage in *R. v. Mills*, [1999] 3 S.C.R. 668, Iacobucci and McLachlin JJ. stated:

> Privacy is not an all or nothing right. It does not follow from the fact that the Crown has possession of the records that any reasonable expectation of privacy disappears. Privacy interests in modern society include the reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged. [para. 108]

123 This Court, *per* Charron J., also confirmed in *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, that "any number of persons and entities may have a residual privacy interest in material gathered in the course of a criminal investigation" (at para. 19; see also paras. 12 and 39). The "protective mantle of s. 8" shields information seized by the state "so long as the seizure continues" (*R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 63).

124 Nor is the privacy interest in wiretap information reduced simply because a subject of a wiretap might anticipate that law enforcement agencies may share it pursuant to s. 193 of the *Criminal Code*. A focus on subjective expectations, which Professor L. M. Austin has described as the "what did you expect" approach to privacy, would protect "an interest in being unfairly surprised by state intrusions", but would fail to guard against "expected, though nonetheless problematic, invasions of privacy" ("Information Sharing and the 'Reasonable' Ambiguities of Section 8 of the Charter" (2007), 57 U.T.L.J. 499, at p. 507 (emphasis added)). As this Court held in *Tessling*, a diminished subjective expectation of privacy does not necessarily result in reduced constitutional protections: the "[e]xpectation of privacy is a normative rather than a descriptive standard" (para. 42).

125 In light of the intrusive nature of wiretapping, the highly personal nature of the information in question, and the very real risks that may be created by disclosure to foreign officials, it is clear that a substantial privacy interest remains in wiretapped information. This restricts how the information may be divulged and used.

IV. Challenges to Section 193(2)(*e*)

126 The appellant and interveners challenge a number of aspects of s. 193(2)(*e*), including the breadth, alleged vagueness and subjective nature of the test for disclosure. They also point to a number of deficiencies: of a warrant requirement for the disclosure; of restrictions on how information may be used once it is shared; and of accountability mechanisms such as record-keeping and notice or reporting requirements. I agree with my colleague Justice Moldaver's rejection of many of these challenges. However, in my view, the last two objections -- concerning the lack of restrictions on disclosed information and the absence of any accountability measures -- each identify serious constitutional problems. For the reasons set out below, I conclude that to the extent s. 193(2)(*e*) permits disclosure of wiretap information to foreign authorities without restrictions on recipients' use and without accountability measures, it is unreasonable and contrary to s. 8 of the *Charter*.

A. *Limits on Use of Disclosed Information*

127 The first failure is that s. 193(2)(*e*) does not impose any limits on how the shared information will be used or further disclosed. It simply permits disclosure of wiretapped information as long as the disclosure "is intended to be in the interests of the administration of justice in Canada or elsewhere". In my view, it is not an answer to say that because police officers can only share information that they genuinely believe would further the interests of the administration of justice, in the context of law enforcement, it is unlikely that s. 193(2)(*e*) would result in sharing with foreign states that engage in torture or other human rights violations. While Canadian law enforcement officials are constrained in their use of wiretapped information by the *Charter* and s. 193 of the *Criminal Code*, these restrictions do not apply to foreign officials.

128 Of course, many foreign jurisdictions impose some form of legal oversight on the use of wiretapped information or criminal intelligence generally. But s. 193(2)(*e*) itself does nothing to prevent those who receive the information from using it in proceedings which fail to respect due process and human rights, which may involve unjustified detention or torture, or in which the accused has no access to counsel. Even if the direct recipients of the information respect human and fair trial rights, s. 193(2)(*e*) does not stop them from disclosing the information to others who do not. As my colleague LeBel J. has observed, "[i]f the process is irretrievably flawed, no amount of trust in the future good behaviour and restraint of prosecutors and police will save it": *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 69 (dissenting in part).

129 One need only look to the case of Maher Arar to understand what is at stake. Although in that case the information provided was not obtained by way of wiretap, Commissioner O'Connor found that "[t]he fact that [the RCMP] did not attach written caveats to the information about Mr. Arar provided to American agencies increased the risk that those agencies would use the information for purposes unacceptable to the RCMP, such as removing him to Syria" (O'Connor Report, at p. 23). Although disclosure by the state that compromises an individual's life, liberty or security of the person interests may well give rise to a remedy under s. 7 of the *Charter*, s. 8 must be construed to prevent unreasonable intrusions on privacy and their potential consequences before they occur: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 160.

130 The failure to require any caveats on the use of disclosed information is, in my view, unreasonable. To the extent that s. 193(2)(*e*) permits law enforcement officers to intercept private communications and then share the results with foreign officials without any restrictions on what they may do with them, Part VI does not achieve the balancing of interests required to satisfy the demands of s. 8 of the *Charter*.

131 Further, the requirement of prior judicial authorization for the wiretap itself does not provide sufficient protection against inappropriate future disclosure of the information. Authorizations to intercept communications are granted with respect to specified times, places and persons in the context of Canadian laws and protections. At the time an authorization is granted, the judge generally does not weigh the targeted individual's privacy interests (let alone those of third parties

whose communications are also intercepted) against a future hypothetical state interest in disclosing the information to foreign law enforcement officials. Restrictions on the use of disclosed material would provide some protection of individuals' privacy and security interests.

132 Imposing restrictions on foreign use of Canadian wiretap information would not undermine the objectives of the wiretap scheme. Caveats on information sharing are commonplace in international law enforcement and intelligence cooperation: O'Connor Report, at p. 150; U.K. Intelligence and Security Committee, *Rendition* (2007), at p. 53. Indeed, according to the affidavit of RCMP Deputy Commissioner of Canada West, Gary David Bass, such caveats are "normally" attached to wiretap disclosures as a matter of course. Further, the need for written caveats need not hinder timely information sharing. For example, police forces could have standing agreements with certain foreign forces with whom they regularly cooperate, or they could complete a standardized form each time information is shared.

133 I do not propose any particular form for such caveats or agreements. The key is that a wiretap scheme which authorizes deep intrusions on privacy with potentially life-changing consequences cannot permit the unconditional disclosure of information to foreign authorities. Written caveats must provide some assurance to our law enforcement agencies that disclosed information will only be used to advance legitimate law enforcement objectives, in accordance with respect for due process and human rights and will not be shared further except as agreed to by the disclosing party.

134 My colleague Justice Moldaver suggests that where a particular disclosure is challenged (as here, in an extradition proceeding), the existence of caveats or protocols may be relevant to determining the disclosing officer's subjective intent -- whether the disclosing officer intended that the disclosure be "in the interests of the administration of justice in Canada or elsewhere". Thus, he says, caveats and protocols may be relevant to whether the disclosure was authorized by s. 193(2)(*e*) or whether the disclosure is carried out in a reasonable manner. This, of course, rests upon the uncertain assumption that an individual would have knowledge of the disclosure and the opportunity to challenge it in a Canadian proceeding. Further, such an approach leaves the assessment and balancing of interests in the hands of the disclosing officer. Given the significant risks involved in the international dissemination of such information, and the limited ability of an individual whose rights have been violated to seek redress, such an approach does not provide sufficient protections for the important privacy interests engaged. As noted above, for s. 193(2)(*e*) to be reasonable, the law itself must strike the appropriate balance of interests.

B. *Oversight and Accountability*

135 In addition, for a law to provide reasonable authority for a search or seizure, it must include some mechanism to permit oversight of state use of the power: see *Tse*, at paras. 11 and 82. In my view, this need for accountability applies not only to the search itself but also to the subsequent use of the resulting information. Written caveats alone generally do not provide sufficient protection. Without some accountability mechanism, no information is available on what is being shared, with

whom, for what purpose and what subsequent use is made of the information. The need for such accountability is made even greater where information is being shared across borders, putting it beyond the reach of Canadian legal protections.

136 The purpose of accountability mechanisms is to deter and identify inappropriate intrusions on privacy. None of the safeguards included in the broader Part VI wiretap regime, such as judicial pre-authorization, after-the-fact notification, record-keeping or reporting requirements, apply to the disclosure of wiretap information to foreign officials. Ensuring that the wiretapping itself is appropriate does not guarantee that subsequent disclosures will be.

137 Justice Moldaver finds that because s. 193(2)(*e*) is an exemption to the criminal offence set out at s. 193(1), law enforcement officers will have ample incentive to comply with the terms of the exemption in order to avoid criminal liability. With respect, I am not convinced that the presence of the criminal offence is -- on its own -- an adequate accountability mechanism. My chief concern is not that Canadian officers will intentionally disclose the information for purposes unrelated to "the interests of the administration of justice in Canada or elsewhere". Rather, it is the potential use by foreign officials -- who do not face the risk of prosecution under s. 193(1) -- that raises concerns about *Charter* interests.

138 Canadian law enforcement officers may subjectively intend to serve justice by sharing information. However, improper or hazardous sharing is unlikely to come to light without record-keeping, reporting or notice obligations. Moreover, accountability is not only about fostering compliance with the letter of the law; it is about giving oversight bodies, legislators and the public the information that they need to ensure that statutory powers are necessary and are used appropriately.

139 Justice Moldaver's suggestion that individuals subject to disclosure of wiretapped information might find out through an access to information request is far from adequate in achieving accountability, particularly since the various privacy laws governing law enforcement across Canada generally include an exception for records relating to law enforcement matters: see, for example, *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 8(1). Without any requirement that law enforcement agencies maintain records, even a successful applicant may find there is little or no record to obtain.

140 The case before us was likely an appropriate sharing of information. It related to drug crimes that spanned the Canada-United States border, was shared with U.S. law enforcement, and was used to stop such a crime and to apprehend the offender. However, given the breadth of s. 193(2)(*e*) and of the personal information that may be contained in a wiretap, it is not difficult to imagine situations where disclosure would be inappropriate, even if it was subjectively "intended to be in the interests of the administration of justice", as required by s. 193(2)(*e*). Accountability mechanisms are required to safeguard against disclosure in such cases.

141 Just as the reasonableness of a search power depends on context (*Rodgers*), the exact

accountability mechanism that will be required varies with the circumstances. In general, serious intrusions on a reasonable expectation of privacy -- such as a search of a dwelling or interception of private communications -- require prior judicial authorization: *R. v. Thompson*, [1990] 2 S.C.R. 1111. In emergencies, after-the-fact notice can serve as a substitute: *Tse*. Some kinds of searches, like searches incident to arrest, may be immediately apparent to their targets, such that no formal notice mechanism is required.

142 Notice of cross-border disclosure would permit individuals -- or the executive branch of government -- to know which countries have information and perhaps how it may be used. After-the-fact reporting to the legislature would create transparency, telling Canadians how often information is disclosed to identified foreign law enforcement officials and for what purposes. I recognize that these choices involve practical and policy considerations. It is for Parliament to decide what measures are most appropriate and how they should be implemented. The *Charter* does not mandate a specific protocol; it requires only that the legislation authorizing a search be reasonable. Reasonableness, in this case, demands accountability mechanisms that ensure an appropriate balance between privacy and the state interest in the search. At a minimum, the disclosing party should be required to create a written record of what information is shared with whom, with some obligation to make the sharing ultimately known to the target or to government.

143 To conclude, while the sharing of wiretapped information is an important tool for law enforcement agencies, it must nonetheless be balanced against adequate protections for the privacy interests at stake in order to pass *Charter* muster. This balance requires that the disclosing party obtain assurances that information will not be improperly used by foreign officials. It also requires the implementation of accountability measures to facilitate oversight and to deter inappropriate disclosures. Absent such protections, I find that s. 193(2)(*e*) is contrary to s. 8 of the *Charter*.

V. Section 1

144 In my view, s. 193(2)(*e*) infringes s. 8 of the *Charter* in a manner that is not justified under s. 1.

145 To be upheld under s. 1, legislation that limits a *Charter* right must meet the criteria set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. First, the legislation must serve a pressing and substantial objective. Second, the means chosen must be proportionate: there must be a rational connection between the legislation and the objective, the legislation must limit the right as little as possible, and there must be proportionality between the effects of the *Charter* limitation and its objectives.

146 In this case, the objective of international cooperation in law enforcement is pressing and substantial, and disclosure of wiretap information is rationally connected to that objective. However, s. 193(2)(*e*) as it is presently drafted interferes with privacy to a greater extent than necessary. The inclusion of accountability mechanisms and limits on subsequent use would cure the constitutional deficiencies without undermining Parliament's goals. Accordingly, I conclude that the disclosure to foreign officials permitted without safeguards under s. 193(2)(*e*) renders the Part VI

regime unconstitutional.

VI. Conclusion

147 Section 8 requires that when a law authorizes intrusions on privacy, it must do so in a manner that is reasonable. A reasonable law must have adequate safeguards to prevent abuse. It must avoid intruding farther than necessary. It must strike an appropriate balance between privacy and other public interests. I conclude that s. 193(2)(*e*) falls short on all three counts.

148 In my view, the appropriate remedy in this case is to strike the words "or to a person or authority with responsibility in a foreign state" from s. 193(2)(*e*) of the *Criminal Code*. Such a remedy respects Parliament's intention to allow law enforcement officials to collaborate within Canada, while invalidating those aspects of the legislation that are inconsistent with the *Charter*. Severing the unconstitutional elements of this provision is also consistent with this Court's view that "when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared": *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 696. I would suspend the effect of this order for 12 months to allow Parliament to amend Part VI to comply with the *Charter*.

149 The Crown submitted that if this Court were to suspend a declaration of invalidity, a new hearing should be ordered at which the admissibility of the evidence under s. 24(2) of the *Charter* can be addressed. This Court has recognized that, where a suspended declaration of invalidity is ordered, a constitutional exemption may be awarded "to relieve the claimant of the continued burden of the unconstitutional law during the period that the striking out remedy is suspended": *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 46; see also *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 22. I would accordingly exempt the appellant from the suspension of the declaration of invalidity.

150 I would answer the relevant constitutional questions as follows:

> Does s. 193(2)(*e*) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 8 of the *Canadian Charter of Rights and Freedoms*?
>
> Answer: Yes.
>
> If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
>
> Answer: No.

151 Thus, in the circumstances of this case, I would allow the appeal and order a new hearing.

Appeal dismissed, ABELLA, CROMWELL *and* KARAKATSANIS JJ. *dissenting.*

Solicitors:

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1 Even if Part VI was not intended by Parliament to be the exclusive regime governing wiretaps, the *Privacy Act* would still have no application here. Section 8(2)(*b*) of the Act permits disclosure of personal information "for any purpose in accordance with any Act of Parliament ... that authorizes its disclosure". Given my conclusion that the *Criminal Code* implicitly authorizes the Impugned Disclosure, even under the terms of the *Privacy Act*, the *Code* is the applicable statute in this case.

2 As observed by LeBel and Wagner JJ. in *Imperial Oil*, s. 193(2) merely authorizes the *disclosure* of intercepted communications in a number of prescribed circumstances. It does not create a right of access to intercepted communications, nor a procedure for seeking and

obtaining disclosure of such communications by persons who are not otherwise in lawful possession of the information.

3 "... under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the council of the Westbank First Nation, the council of a participating First Nation - as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act* -, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation".

4 "... for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose".