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# *Criminal Lawyers' Assn. v. Ontario*: A Limited Right to Government Information under Section 2(b) of the Charter

**Daniel Guttman***

## I. INTRODUCTION AND OVERVIEW

Before the relatively recent development of federal and provincial access statutes, government information was not generally available to the public. While the emergence of access to information legislation in Canadian jurisdictions reflected important public policy decisions that providing access to information promotes good government, the courts had always recognized that there was no *constitutional* right to require the government to disclose information. That has now changed. In *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety and Security)*,[1] the Supreme Court of Canada unanimously reached the novel conclusion that the right to freedom of information protected by section 2(b) of the *Canadian Charter of Rights and Freedoms*[2] contained, in limited circumstances, a derivative right to government information. The new right to government information recognized by the Court is an extremely narrow right. The Court found that that limited right was not engaged on the facts of the *Criminal Lawyers* case and therefore overturned the majority decision of the Ontario Court of Appeal.[3] That majority had held that provisions of the *Freedom of Information and*

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1 [2010] S.C.J. No. 23, 2010 SCC 23 (S.C.C.) [hereinafter "*Criminal Lawyers*"].

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

3 [2007] O.J. No. 2038 (Ont. C.A.).

*Protection of Privacy Act*[4] which allowed the Ontario government the discretion to refuse to disclose a police report and two solicitor-client privileged documents to the Criminal Lawyers' Association ("CLA") infringed the CLA's freedom of expression.

This paper discusses the new right to government information recognized by the Supreme Court in the *Criminal Lawyers* case. The paper is broken down into seven parts. In Part II, I briefly summarize Ontario's statutory scheme governing access to government-held documents. In Part III, I set out the facts of the *Criminal Lawyers Assn. v. Ontario* appeal and set the framework for the discussion of the constitutional issue. In Part IV, I briefly describe the decisions of the courts below. In Part V, I provide short descriptions of the positions of the parties in the Supreme Court. In Part VI, I summarize the Supreme Court's decision. In Part VII, I discuss the new right to government information with a focus on the analysis that led to the development of the right as well as its practical significance.

## II. ONTARIO'S *FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

The guiding principles of *Freedom of Information and Protection of Privacy Act* are that government information should be available to the public and that necessary exemptions to this obligation should be limited and specific.[5] Thus FIPPA mandates that all government records must be disclosed unless the government can show that the records fall within an enumerated exclusion or exemption in the Act. FIPPA is remedial legislation that provides a right of access where none would otherwise exist. FIPPA creates the Information and Privacy Commission ("IPC") and authorizes it to oversee the information request process to ensure independent oversight of Ontario's response to information requests. The IPC has the authority to review government records (where the government claims they fall within an exemption) to determine whether the records do in fact fall within an exemption. The IPC can also order parts of a record to be disclosed when the full record is not covered by the exemptions.

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4 R.S.O. 1990, c. F.31 [hereinafter "FIPPA"].

5 *Id.*, s. 1.

Section 10 of FIPPA provides every person with a general "right of access to a record" or "a part of a record".[6] However, as indicated in its text, section 10 must be read in conjunction with sections 12 to 22, which provide specific exemptions to the general right of access.[7] The inclusion of these exemptions reflects a careful balancing by the legislature of competing interests (*i.e.*, giving access to government-held information while maintaining the ability to prevent harm from the disclosure of certain types of information). Some of the exemptions are mandatory while others provide the government with a discretion not to disclose.[8] The exemptions apply to Cabinet records; records that reveal the advice to government by a public servant; law enforcement records; records where disclosure would harm relations with other governments; defence records; records subject to solicitor-client privilege; records where disclosure would harm the economic interests of the government or of third parties or that could threaten the safety or health of someone; and records where disclosure would represent an unjustified invasion of personal privacy.[9]

Section 23 provides for a "public interest override" for some of the categories of exempted records. The public interest override is premised on a balancing test, whereby the government must determine whether there is a compelling public interest in disclosure that would outweigh the purpose of the exemption. Section 23 does not apply to the more sensitive types of government record, including law enforcement or solicitor-client privilege documents (the two exemptions at issue in *Criminal Lawyers*), or to Cabinet or defence records.[10]

As a final safeguard of access, section 11 of FIPPA requires that, despite any other provision in FIPPA, any record in the government's possession which reveals a grave environmental, health or safety hazard must be disclosed (assuming it is in the public interest to do so).[11]

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[6] Section 65 of FIPPA excludes certain records from the application of FIPPA and s. 67 retains the confidentiality provisions of certain other statutes.

[7] Section 10 states it does not apply if the record "falls within one of the exemptions under sections 12 to 22".

[8] Eleven of the 15 exemptions in FIPPA are discretionary exemptions.

[9] An opportunity is given to any person whose interests may be affected to make representations on disclosure. Section 28 sets out the procedure in detail. FIPPA, ss. 12-22.

[10] FIPPA, s. 23.

[11] FIPPA, s. 11.

### 1. The Solicitor-Client and Law Enforcement Exemptions at Issue in *Criminal Lawyers*

As set out above, the solicitor-client and law enforcement exemptions are discretionary provisions that are not subject to the section 23 public interest override. Under the law enforcement[12] exemption, the government may refuse to disclose a law enforcement record where *inter alia* the disclosure could reasonably be expected to interfere with law enforcement or an investigation, reveal investigative techniques or disclose a confidential source. In addition, section 14(2) of FIPPA allows the government to deny disclosure of a record "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". The solicitor-client exemption (section 19) allows the government to 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 for litigation.[13]

The police records and solicitor-client exemptions were included in FIPPA on the basis of the report of the Williams Commission,[14] which recognized that in order to ensure effective government, confidentiality in certain areas, including law enforcement and solicitor-client privilege, was required.

A proposal to make these exemptions subject to the public interest override (*i.e.*, section 23) was expressly considered and rejected by the legislature.[15] In speaking against the proposed amendment, Ian Scott (then Attorney General) described the two main reasons for excluding these exemptions from the public interest override as follows:

> (1) the Commissioner would not be aware of or able to take into account the complex consequences of releasing to the *public* a record that contains law enforcement information; and

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[12] "Law enforcement" is defined in s. 2 as policing or an investigation/inspection leading to a hearing with penalties.

[13] FIPPA, ss. 14, 19.

[14] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (Toronto: Queen's Printer, 1980) [hereinafter "Williams Commission"].

[15] Bill 34 (the bill that eventually became FIPPA) was introduced in the Legislature on July 12, 1985.

(2) solicitor-client privilege held by government should not be abrogated by the Commissioner.[16]

## III. THE CRIMINAL LAWYERS' ASSOCIATION'S REQUEST FOR INFORMATION

The case of *Criminal Lawyers* involved a request of information by the CLA for a report into the failed murder prosecution of Graham Court and Peter Monaghan. The prosecution was stayed in 1997 by Glithero J. primarily on the basis that adequate disclosure had not been provided and because the police had lost evidence.[17]

Not surprisingly, a great deal of media attention was given to the stay of this high-profile murder case. Justice Glithero's ruling led to an independent Ontario Provincial Police ("OPP") investigation into the conduct of the Hamilton police and the Crown attorneys involved in that prosecution. The OPP investigation concluded that although evidence had been lost and inadequate disclosure made, there was no basis to charge either the police or the Crown with obstructing justice. On April 3, 1998, the OPP briefly explained its conclusion in a short news release:

> The investigation into the missing audiotape found no evidence that the officers attempted to obstruct justice by destroying or withholding a vital piece of evidence. The investigation also found no evidence that information withheld from defence was done deliberately and with the intent to obstruct justice.

In a *Hamilton Spectator* article 10 days later, the Criminal Lawyers' Association set out their disagreement with the OPP's conclusion.

In an interview, Detective Inspector Mike Coughlin, the OPP probe's lead investigator, concurred with Glithero J.'s finding that the police officers and the Crown failed to provide all the evidence to the defence and that the real issue was the reason behind the non-disclosure. Nevertheless, Coughlin was of the view that although the non-disclosure could be due to a number of problems in police communication and procedure, there was no intention to pervert justice, nor was there any commission

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[16] Ontario, Legislative Assembly, Official Report of Debates (*Hansard*), 23 (June 8, 1987), at 1168 (Hon. Mr. Scott), 1169 (Hon. Mr. Scott & Mr. Sterling), 1171 (Hon. Mr. Scott). See also Ontario, Legislative Assembly, Standing Committee on the Legislative Assembly, M-67 (March 23, 1987) at M-9-M-10 (Hon. Mr. Scott), M-11 (Hon. Mr. Scott & Ms. Gigantes), M-20 (Hon. Mr. Scott & Ms. Gigantes); Williams Commission, *supra*, note 14, at 294-95, and 338-39.

[17] *R. v. Court*, [1997] O.J. No. 3450, 36 O.R. (3d) 263 (Ont. Gen. Div.).

of crime. More importantly, Coughlin questioned the appropriateness of Glithero J.'s use of 1990s disclosure law to decide a case that occurred in the 1980s when disclosure policies and practices were less stringent.[18]

Following the OPP press release, the CLA submitted an access to information request under the FIPPA, seeking access to the records underlying the OPP's investigation. In response to this request, the government identified a number of responsive documents. However, the government indicated, pursuant to the law enforcement (section 14), solicitor-client privilege (section 19) and personal privacy (section 21) exemptions, that it would not disclose a number of documents. These documents included the 318-page police report produced in the 1998 investigation,[19] a 1998 memorandum and a March 24, 1998 letter. In response, the CLA appealed to the IPC, arguing that sections 14 and 19 of FIPPA unjustifiably infringed the CLA's freedom of expression.

## IV. THE LOWER COURT DECISIONS

The CLA's appeal to the Assistant Information and Privacy Commissioner was dismissed. The Assistant Commissioner agreed that the records were exempt under sections 14, 19 and 21 and thus upheld the decision not to disclose. He applied section 23 and concluded that the public interest in disclosure outweighed the interest in non-disclosure under the personal privacy exception in section 21. However, since sections 14 and 19 were not subject to the section 23 "public interest override", he did not order disclosure of the records. He rejected the CLA's claim that the denial of access to the records in question violated section 2(b) of the Charter or the unwritten constitutional principle of democracy.[20]

The CLA applied to the Divisional Court for judicial review. The Divisional Court dismissed that application,[21] explaining that "stripped to its essentials", the applicant's position was that:

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[18] Nancy DeHart, "MP Wants Review of OPP Probe: Racco Inquiry Criticized", *Hamilton Spectator*, April 13, 1998, at A1.

[19] The bulk of the report contains transcripts of the interviews conducted with the six persons subject to the investigation and five witnesses. The investigation included a review of the files of the Police Services and Crown attorney at issue, and interviews with members of these police services and the Attorney General as to their roles and responsibilities in relation to the criminal proceeding.

[20] Order PO-1779 of the Assistant Information and Privacy Commissioner (May 5, 2000).

[21] *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety and Security)*, [2004] O.J. No. 1214, 70 O.R. (3d) 332 (Ont. Div. Ct.), affd [2007] O.J. No. 2038, 86 O.R. (3d) 259 (Ont. C.A.),

> … the public [has] a general constitutional right — founded upon the s. 2(b) freedom of expression and the unwritten constitutional 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.[22]

The Court considered the various strands of jurisprudence relied on by the CLA concerning (1) access to public facilities; (2) the "open courts" principle; and (3) freedom of expression under international legal instruments, and concluded that there was no constitutional right to government-held information. The CLA appealed to the Ontario Court of Appeal.

A majority of the Court of Appeal allowed the CLA's appeal from the Divisional Court. In a surprising decision, the majority concluded that the combined operation of sections 10, 14, 19 and 23 of FIPPA infringed section 2(b) and was not justified under section 1. The majority's holding was not made on any basis advanced by the CLA. Rather, the majority held that they did not need to decide whether section 2(b) includes a positive right to compel the disclosure of non-public government-held information because the Act provides a statutory right of access (section 10) and limits on that statutory right should be considered government interference with that right.[23]

Having concluded that it did not need to decide whether there is a positive right to compel government to disclose information, the majority went on to find that (1) the CLA's desire to comment on apparent discrepancies between Glithero J.'s decision and the OPP press release was "expressive activity" for the purposes of section 2(b); (2) sections 14 and 19 have as their purpose and effect "to directly restrict the public's ability to comment on those records"; and (3) the section 2(b) infringement was not justified under section 1. It held that there was no need to consider the CLA's other argument — that FIPPA infringed the constitutional principle of democracy — given its decision regarding section 2(b), and that in any event that analysis would be duplicative of the section 2(b) analysis. As a remedy, the majority read sections 14 and 19 into section 23, making those exemptions subject to the public interest override and

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revd [2010] S.C.J. No. 23, 2010 SCC 23. The Divisional Court bench was composed of Blair R.S.J. (as he then was), Gravely J. and Epstein J. (as she then was).

[22] *Id.*, at para. 32 (Div. Ct.).

[23] Court of Appeal, *supra*, note 3, at paras. 37-39.

sent the matter back to the IPC to consider whether section 23 applied in the circumstances of this case.[24]

Justice Juriansz dissented, concluding that there was no violation of section 2(b). He directly considered the CLA's assertion that section 2(b) included a positive right to compel government to disclose information in its possession, and concluded, after reviewing the applicable jurisprudence, that it did not. He also disagreed with the majority's conclusions that section 23 limits freedom of expression in purpose or effect.[25] In his view:

- The CLA was able to comment extensively on the OPP investigation. Its further "desire to comment", or its "potential comments" on the OPP report have not yet occurred and are not "expressive activity" within the meaning of section 2(b).
- Section 2(b) does not mandate positive action by government to provide information in its control to a person so as to ameliorate that person's ability to express themselves. Here, "the extent to which positive government action may, in exceptional cases, be required to secure freedom of expression falls well short of the bold contention … that the right to access government information is, structurally, a component of the s. 2(b) guarantee".
- Given the careful and consistent distinction the Charter makes between freedoms and rights, principles of constitutional interpretation cannot support a finding "that s. 2(b), which guarantees a freedom, has a right grafted onto it as an unexpressed component of that freedom". This is especially so given the history of the drafting of section 2(b). "It would be a "very big step" for the courts to interpret the Charter as guaranteeing a right of access to government information when such a right was proposed, considered and rejected by Canada's parliamentary representatives.
- While international law instruments can be considered in Charter interpretation, consideration of these documents does not require the court to read a right to access government information into section 2(b). "Neither it nor the decisions of courts and tribunals of other countries or international organizations can overcome the dominating weight of the other considerations reviewed above. Section 2(b) must

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[24] *Id.*, *per* LaForme J.A.'s majority decision at paras. 30, 49, 64, 97.

[25] *Id.*, dissent of Juriansz J.A., at paras. 106-122, 135, 137, 153 and 168-172.

be interpreted in the linguistic, philosophic and historical context of its adoption by Canada."

- The majority's argument fails to appreciate that the right to access information under FIPPA "is strictly a creation of legislation". "The legislature is free to dictate the conditions and limitations on that right, provided it does not do so in a discriminatory manner." The majority failed to read the Act as a whole and failed to recognize its different purposes. The majority's failure to properly interpret the statement of purpose in section 1 of the Act and the principle that there will be "necessary exemptions", which "should be limited and specific" led them to erroneously find that the only aim of the Act is to provide access to government information, and that any limits within the Act detract from the purpose. Thus, the majority's finding that section 23 restricts freedom of expression because it restricts the statutory right in section 10 is an error which goes to the core of its constitutional analysis — "it is not appropriate to pit one part of a statute against another, first to find an underlying statutory right and then to find the negation of that right".
- The majority's remedy is an inappropriate use of "reading in".[26]

## 1. Proceedings at the Supreme Court of Canada

Leave to appeal to the Supreme Court was granted on February 14, 2008. The Chief Justice of Canada stated the following constitutional questions:

> 1. Does s. 23 of [FIPPA] infringe s. 2(b) of [the Charter] by failing to extend the public interest override to the exemptions found in ss. 14 and 19 of the Act?
>
> 2. 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 Charter]?
>
> 3. Does s. 23 of [FIPPA] offend the constitutional principle of democracy? [27]

Oral arguments were heard in the Supreme Court of Canada, and judgment was reserved on December 11, 2008.

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[26] *Id.*, at para. 153.

[27] [2007] S.C.C.A. No. 382 (S.C.C.).

## V. POSITIONS OF THE PARTIES AT THE SUPREME COURT

### 1. Ontario's Position

As discussed above, a majority of the Court of Appeal found that the provisions of FIPPA giving the government discretion to refuse to disclose the police report and solicitor-client privileged documents violated the CLA's freedom of expression. In the Supreme Court, Ontario took the position that the majority's decision — in effect, that section 2(b) of the Charter includes a positive right to compel the disclosure of government-held documents that have traditionally been closed to the public (including documents that contain sensitive personal information, *e.g.*, health records) — represented a profound departure from the existing jurisprudence. Ontario argued, as Juriansz J.A. recognized in the Court of Appeal, that the majority's decision failed to accord any weight to "the distinction between a freedom and a right" made in section 2(b), which "remains a central feature of the *Charter*". Moreover, it ran counter to the Supreme Court's clear holding that restricted access to many aspects of government "is part of our history and our constitutional tradition" and "the Canadian *Charter* was not intended to turn this state of affairs on its head".[28]

Ontario also argued that the effective result of the Court of Appeal's interpretation of section 2(b) was to read into the Charter an entirely new and distinct right — a "right to government held information". This was despite the fact that the framers of the Charter expressly considered and rejected by formal vote the inclusion of a right to information in the Charter.[29]

Ontario further submitted that Juriansz J.A.'s dissent correctly identified the flaws in the majority's position; in particular, that:

> a) The majority's decision represented a significant and unwarranted expansion of s. 2(b) of the *Charter* by reading into it a new distinct right to government information, which would considerably alter the functioning of government.

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[28] *Id.*, at para. 112; *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141, at para. 79 (S.C.C.) [hereinafter "*City of Montreal*"].

[29] Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 43 (January 22, 1981), at 101 (Mr. McGrath), 101, 105-106, 116 (General Debate), ("Minutes of the Special Joint Committee on the Constitution").

> b) The fact that the legislature chose to enact positive measures providing access to certain information in *FIPPA* does *not* mean that limits on that statutory right are somehow transformed into a "gag" that engages s. 2(b) and therefore must be justified under s. 1 of the *Charter*.[30]

Ontario noted that after the Court of Appeal's decision was rendered, the Supreme Court reaffirmed its previous jurisprudence that it will only be in the rarest of circumstances that section 2(b) will support a claim for positive government action.[31] Ontario emphasized that the *Criminal Lawyers* case did not involve *any* impairment of the CLA's freedom of expression (let alone satisfying the "substantial impairment of a freedom" requirement set out by the court in *Dunmore v. Ontario*[32]) and was not, in any way, an exceptional case that would support a finding that section 2(b) required the positive government action requested by the CLA.

### 2. The CLA's Position

In the Supreme Court of Canada proceedings, the CLA relied little on the decision of the majority of the Court of Appeal. Rather, they argued the novel proposition that, contrary to Juriansz J.A.'s dissent, section 2(b) of the Charter includes a positive right to compel the disclosure of government-held documents that have traditionally been closed to the public.

## VI. THE DECISION OF THE SUPREME COURT OF CANADA

The Supreme Court of Canada's judgment was issued on June 17, 2010, 18 months after it was argued. The unanimous decision of the Court,[33] written by Chief Justice McLachlin and Justice Abella, allowed the appeal and affirmed the validity of section 23 of FIPPA.

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[30] FIPPA, *supra*, note 4, ss. 10, 14, 19, 23; Court of Appeal, *supra*, note 3, Juriansz J.A., in dissent, at paras. 117-119, 137.

[31] *Baier v. Alberta*, [2007] S.C.J. No. 31, [2007] 2 S.C.R. 673 (S.C.C.) [hereinafter "*Baier*"].

[32] [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 (S.C.C.) [hereinafter "*Dunmore*"].

[33] The panel consisted of seven judges as Bastarache J. had recently retired (Deschamps J. did not sit on the case).

## 1. Overview of the Decision

The Supreme Court reversed the majority of the Ontario Court of Appeal and upheld the constitutional validity of section 23 of FIPPA, finding that there was no breach of the CLA's section 2(b) right to freedom of expression. The Court went on to confirm that those documents sought by the CLA that fell under section 19 were exempted from disclosure. The claim for the 318-page police report was returned to the Information Commissioner for reconsideration on the question of whether the government properly exercised its discretion when it decided to refuse disclosure of the report.

## 2. Section 2(b) and the Right to Government Information

The Supreme Court accepted Ontario's argument that there was no general right under section 2(b) to obtain government documents. The court recognized that section 2(b) "guarantees freedom of expression, not access to information".[34] However, they found that "access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government".[35] Thus the Court created a new right, albeit an extremely narrow one, to government information under section 2(b). The Court found that section 2(b) "includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints".[36]

The Court came to this test by reformulating the three-step *Irwin Toy*[37]*/City of Montreal*[38] test for expressive activity to apply to a request for information. The three-step test for the new right to government information as developed by the Supreme Court is as follows:

(1) Is access necessary to permit meaningful discussion on a matter of public importance?

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[34] S.C.C. decision, *supra*, note 1, at para. 30.

[35] *Id.*, at para. 30.

[36] *Id.*, at para. 31.

[37] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.) [hereinafter "*Irwin Toy*"].

[38] *Supra*, note 28.

(2) If (1) is satisfied, is section 2(b) protection nevertheless removed because requiring access to the documents would impair a privilege or the functioning of the affected government institution?

(3) If (1) and (2) are satisfied, section 2(b) is engaged. However, section 2(b) is only breached if it can be shown that the state has infringed that protection.[39]

The first and third components are essentially the first and third components of the *Irwin Toy/City of Montreal* test. The second step of the new test is a specific application of the more general second step of *Irwin Toy/City of Montreal* test.[40]

### 3. Application of the New *Criminal Lawyers* test to the Court and Monaghan affair

Applying this test, the Court found that the new section 2(b) right to government information was not engaged or infringed on the facts of this case as none of the steps were satisfied. First, the Court concluded that the CLA had failed to establish that the information sought from the government was "necessary for meaningful public discussion of the problems in the administration of justice relating to the Racco murder", noting that already, "much is known about these events".[41] Second, the Court found that even if the documents were necessary for the CLA to express itself meaningfully on this issue, section 2(b) was not engaged as the CLA had not established that "access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the functioning of relevant government institutions".[42] Finally, the Court found that even if "s. 2(*b*) were engaged, it would not be breached" as the request of the CLA to have sections 14 and 19 read into section 23 would have little impact on the CLA's ability to comment further. The Court explained as follows:

> The ultimate answer to the CLA's claim is that the absence of the second-stage review, provided by the s. 23 override for documents within ss. 14 and 19, does not significantly impair any hypothetical right to access government documents, given that those sections,

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[39] *Supra*, note 1, at para. 33.

[40] The second step of the *Irwin Toy Ltd./City of Montreal* test asks whether there is something in the method or location of that expression that would remove the protection.

[41] S.C.C. decision, *supra*, note 1, at para. 59.

[42] *Id.*, at para. 60.

> properly interpreted, already incorporate consideration of the public interest. The CLA would not meet the test because it could not show that the state has infringed its rights to freedom of expression.[43]

## 4. The Court's Direction on the Exercise of Discretion under FIPPA

The Court confirmed that discretionary decisions made under FIPPA must conform to the well-accepted standard set out in *Baker v. Canada* — namely, that "discretion conferred by statute must be exercised consistently with the purposes underlying its grant".[44] Thus, in order to properly exercise disclosure, a Minister or a "head" must weigh the consideration for and against disclosure, including the public interest in disclosure. The Court specifically directed that the purpose of the exemption at issue and all other relevant interests should be considered when a "head" is deciding whether or not to exercise the discretion to disclose. By way of illustration, the Court offered specific direction to a head making a decision under section 14. Section 14 requires the head consider "whether a compelling public interest in disclosure outweighs the purpose of the exemption, to prevent interference with law enforcement".[45] Where a head finds that such an interest exists, the document should be disclosed.

The Court also confirmed that a discretionary decision to refuse to disclose a document is reviewable by the IPC and subsequently through judicial review of the IPC decision. While the IPC may not substitute its decision for the decision of the "head", it may ask the "head" or Minister to reconsider the decision where it appears to be exercised inappropriately (*e.g.*, where the decision appears to have been made in bad faith, "took into account irrelevant considerations; or, … failed to take into account relevant considerations").[46]

While the CLA had not challenged, at any level of court, the exercise of the Minister's discretion, the Court directed that the claim for the 318-page police report be returned to the Information Commissioner for reconsideration on the question of whether the government properly exercised its discretion when refusing to disclose the report. With respect to the documents sought by the CLA that fell under the solicitor-client

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[43] *Id.*, at para. 61.
[44] *Id.*, at para. 46.
[45] *Id.*, at para. 49.
[46] *Id.*, at para. 71.

exemption in section 19, the Court viewed the matter very differently, due to the categorical nature of solicitor-client privilege and the established case law affirming that solicitor-client privilege does not involve a balancing of interests on a case-by-case basis.[47]

### 5. The Unwritten Constitutional Principle of Democracy

Given its finding that section 2(b) contained a right to information, the Supreme Court did not consider the CLA's similar challenge based on the unwritten constitutional principle of democracy.

## VII. Analysis of the Supreme Court Decision

The decision in *Criminal Lawyers* is significant on many levels. The following looks at three important aspects of the decision:

(1) the rejection of the traditional view that there is no right to information in section 2(b) of the Charter;

(2) the strict limits set on the new right to government information; and

(3) two specific doctrinal contributions made by *Criminal Lawyers* to the section 2(b) jurisprudence, namely:

   (a) the Court's conclusion that the first prong of the *Irwin Toy* test could theoretically be met by a denial to disclose information; and

   (b) the decision of the Court that the framework for analysis for a request for information is not the *Dunmore/Baier* test for positive state action but the *Irwin Toy/City of Montreal* test.

### 1. The Rejection of the Traditional View that Section 2(b) Does Not Include Any Right to Government Information

At the Supreme Court, Ontario argued (ultimately without complete success) that the traditional view that there is no section 2(b) right to

[47] The Court chose not to comment on Ontario's submission that the IPC had found that the 318-page report fell not only into the law enforcement exemption but also into the solicitor-client privilege exemption.

compel government to disclose information is supported by a number of strong grounds, including:

(1) the "linguistic, philosophic and historical context of the adoption" of section 2(b), including its express exclusion from the Charter and the absence of its historical protection;

(2) the jurisprudence that recognizes that section 2(b) operates as a shield and not a sword except in very rare circumstances; and

(3) the jurisprudence that recognizes that maintaining privacy for many government functions is consistent with section 2(b).

In *Criminal Lawyers*, while the Court did not accept these grounds as a basis for rejecting a derivative right to information in section 2(b), the strict limits imposed on the right suggest that these grounds were taken into consideration by the Court. Each of these grounds is examined below.

### *(a) The Linguistic, Philosophic and Historical Context of the Adoption of Section 2(b)*

The bedrock principle of Charter interpretation is that each section of the Charter should be interpreted in its linguistic, philosophic and historical context. As examined below in detail, Ontario argued that after properly interpreting the freedom of expression protected by section 2(b) (by looking at its linguistic, philosophic and historical context), it is clear that that freedom did not include a right, no matter how limited, to freedom of information.

#### (i) Linguistic and Philosophic

The absence of language in the Charter providing a right to information was deliberate. The Special Committee of the House of Commons and Senate on the Constitution of Canada expressly considered and, in a formal vote, rejected a proposal to add a qualified "right to information" into the Charter.[48] The language of the proposed addition, which was to be incorporated as "new section 5" of the Charter, was as follows:

[48] Minutes of the Special Joint Committee on the Constitution, *supra*, note 29, at 101 (Mr. McGrath), 101, 105-106, 116 (General Debate).

*Right to information*

5. Everyone has the right to have reasonable access to information under the control of any institution of any government.

The federal government concluded that a statutory rather than constitutional right of access was preferable because information access raises complex questions involving competing interests:

> We think this is the proper approach to take … [governments] taking their responsibilities to establish proper rules and proper procedures for giving citizens access to information. Just to look at this [tabled federal access to information legislation], how complex and thick it is, illustrates the kind of problem that the proponents of this amendment would be giving to the courts of our country — a citizen, if we abandoned the legislative approach and turned to a judicial determination, a citizen would go to court wanting a document, say, that touches national security, and the judge on the bench would have either to write this book from scratch without the benefit of a committee like the Justice Committee which could call witnesses and hear evidence and hear from officials and come up with a decision which relates only to the document that he is being asked to give access to.[49]

The proposal to constitutionalize a right to information was subsequently expressly rejected in a formal vote. Ontario argued that significant weight should be accorded to that decision.[50] While the Supreme Court explicitly recognized the fact that a right to information was rejected by the founders, it placed little emphasis on that fact, and did not feel the need to explain how a right that had been rejected could be imputed into section 2(b) or to cite case law on this issue such as *Irwin Toy* or *R. v. Prosper*.

(ii) Historical

It is well accepted that the interpretation of a Charter right should take into account the "historical origins of the concepts enshrined". In

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[49] *Id.*, at 105.

[50] *R. v. Prosper*, [1994] S.C.J. No. 72, [1994] 3 S.C.R. 236, at 266-67 (S.C.C.); *Irwin Toy*, *supra*, note 37, at 1003; *R. v. Ferguson*, [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96, at paras. 63-66 (S.C.C.); *R. v. Blais*, [2003] S.C.J. No. 44, [2003] 2 S.C.R. 236, at paras. 39-41 (S.C.C.); *R. v. Hape*, [2007] S.C.J. No. 26, [2007] 2 S.C.R. 292, at para. 33 (S.C.C.); Court of Appeal, *supra*, note 3, dissent, at paras. 113-119.

this regard, Ontario argued that there is no historical legal right to information held by government either at common law or otherwise.

As La Forest J. recognized in 1997 in *Dagg v. Canada (Minister of Finance)*, the "idea that members of the public should have an enforceable right to gain access to government held information … is relatively novel". Similarly, in *Fineberg v. Ontario*, in which the Ontario Divisional Court rejected a section 2(b) challenge to FIPPA nearly identical to the one advanced in *Criminal Lawyers*, it was observed that "there is no history of unfettered public access to all information controlled by government akin to our almost unqualified tradition of open courts". As recognized by the dissent in the Ontario Court of Appeal in the *Criminal Lawyers* case, access to information enjoys no such historical position: "[It] is not part of the baseline. It is a right that did not exist until the Act was enacted." Ontario argued that while legislators have recognized the salutary policy objectives behind access to information legislation, the passage of such legislation is a matter of policy, not a reflection of any tradition of a fundamental right to be provided with government information.[51] Ontario argued that there being no historical right to compel the disclosure of government held information (outside of specific contexts such as litigation where the use that can be made of that information is limited by the implied undertaking rule), the only source of the right and the limits of its scope are statutory, not constitutional.[52]

Ontario also demonstrated that the lack of a historical right was not unique to Canada. The U.S. Supreme Court has repeatedly held that the First Amendment right to freedom of speech does not include a right to access government information outside of the courtroom. In 1978, in *Houchins v. KQED Inc.*, the majority of the Supreme Court rejected the argument that the First Amendment right to freedom of speech requires access by an individual to government information.[53] The majority held that refusing a broadcaster permission to inspect and photograph a county jail where a prisoner had committed suicide did not violate the First Amendment:

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[51] *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 343-44 (S.C.C.); *Dagg v. Canada (Minister of Finance)*, [1997] S.C.J. No. 63, [1997] 2 S.C.R. 403, at para. 59 (S.C.C.); *Ontario (Attorney General) v. Fineberg*, [1994] O.J. No. 1419, at 6-7 (Ont. Div. Ct.); *McAuliffe v. Metropolitan Toronto Board of Commissioners of Police*, [1975] O.J. No. 2432, 9 O.R. (2d) 583, at paras. 17-19 (Ont. C.A.); *Canadian Newspapers Co. v. Manitoba*, [1986] M.J. No. 101, at 4-5 (Man. C.A.).

[52] Williams Commission, *supra*, note 14, at para. 134; Court of Appeal, *supra*, note 3, dissent, at paras. 117-119; *Juman v. Doucette*, [2008] S.C.J. No. 8, [2008] 1 S.C.R. 157 (S.C.C.).

[53] *Houchins v. KQED Inc.*, 438 U.S. 1 (1978), at 14-15.

> The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act ... Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control.[54]

In 1999, in *Los Angeles Police Department v. United Reporting Publishing Corp.*, the U.S. Supreme Court again confirmed that the First Amendment does not protect a right to access government information outside the courtroom:

> This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses. See *Rubin v. Coors Brewing Co*., 514 U.S. 476 (1995). The California statute in question merely requires that if respondent wishes to obtain the addresses of arrestees it must qualify under the statute to do so. The Respondent did not attempt to qualify and was therefore denied access to the addresses. For purposes of assessing the propriety of a facial invalidation, *what we have before us is nothing more than a government denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment*. …[55]

### *(b) The Well-Established Principle that Section 2(b) Operates as a Shield and Not a Sword*

It is well accepted that section 2(b) "generally imposes a negative obligation on government rather than a positive obligation of protection or assistance". As stated colourfully in *Haig*: "The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(*b*) prohibits gags, but does not compel the distribution of megaphones."[56] Thus, absent "exceptional circumstances", these cases established that section 2 is restricted to protecting against government interference in the exercise of the section 2 freedoms.

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[54] In *Houchins*, *id.*, at 16, the concurring opinion of Stewart J. expressed the same position: The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by the government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.

[55] *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), *per* Rehnquist C.J., at 40, *per* Stevens and Kennedy JJ. (emphasis added).

[56] *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995, at 1035 (S.C.C.), *per* L'Heureux-Dubé J. [hereinafter "*Haig*"].

The Supreme Court developed this proposition in three important section 2(b) decisions. As examined briefly below, these cases make it clear that there is no general section 2 Charter right to compel the government to assist in making expression maximally effective. The cases reflect the sound reasons, including respecting the differing roles of courts and legislatures, for courts to refuse to constitutionally impose positive duties on government absent exceptional circumstances or express constitutional language imposing positive duties (*e.g.*, Charter, section 23).

In the first case, *Haig v. Canada*, the Supreme Court concluded that section 2(b) does not include a positive right to be provided access to a referendum as a means of expression, stating as follows:

> The Court is being asked to find that this statutorily created platform for expression has taken on constitutional status. In my view, though a referendum is undoubtedly a platform for expression, s. 2(b) of the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to anyone, let alone to everyone. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law.[57]

*Haig* was followed shortly after by *Native Women's Assn. of Canada v. Canada.* In that case the Supreme Court held that section 2(b) did not impose a positive duty on the government to provide funding to the Native Women's Association of Canada to enable it to participate in a constitutional conference organized by the government. The Court again explained that "[t]he 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."[58] In *Delisle v. Canada*, the Supreme Court held that section 2(b) did not require that the government provide Royal Canadian Mounted Police officers with access to union

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[57] *Id.*, at 1041.

[58] *Native Women's Assn. of Canada v. Canada*, [1994] S.C.J. No. 93, [1994] 3 S.C.R. 627, at 663 (S.C.C.). Justice McLachlin (as she then was) wrote a one-paragraph concurring judgment in which she dismissed the challenge on the basis that neither s. 2 nor the Charter in general required the government to consult with anyone in developing policy.

membership to facilitate expression.[59] The Court explained that "[i]t is because of the very nature of freedom that s. 2 generally imposes a negative obligation on the government and not a positive obligation of protection or assistance."[60] The Court stated that it would require "exceptional circumstances" to depart from the ordinary rule that "freedom of expression imposes only an obligation that Parliament not interfere".[61]

### *(c) The Charter Must Be Read to Respect the Fact that Many Government Functions Require Privacy*

Ontario also relied on the important principle that many government functions require privacy, a principle which was highlighted in 2005 in the Supreme Court decision of *City of Montreal.* In that case, the Supreme Court made clear that section 2(b) does not mandate that every government-owned space is available to be used for purposes of expression. Rather, in determining whether there is Charter protection in a particular case, the court must consider the historical or actual function of a place, and whether the space requires privacy and limited access:

> Many government functions, from cabinet meetings to minor clerical functions, require privacy. To extend a right of free expression to such venues might well undermine democracy and efficient governance.[62]

The Supreme Court went on to adopt a test that recognized "the reality that some places must remain outside the protected sphere of s. 2(b)":

> People must know where they can and cannot express themselves and *governments should not be required to justify every exclusion or regulation of expression under s. 1.* As six of seven judges of this Court agreed in *Committee for the Commonwealth of Canada*, the test must provide a preliminary screening process. Otherwise, uncertainty will prevail and governments will be continually forced to justify restrictions which, viewed from the perspective of history and common sense, are entirely appropriate. *Restricted access to many government-owned venues is part of our history and our constitutional tradition.*

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[59] *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989 (S.C.C.). The main challenge was based on s. 2(d).

[60] *Id.*, at para. 26.

[61] *Id.*, at para. 38.

[62] *City of Montreal*, *supra*, note 28, at paras. 71 and 76.

> *The Canadian Charter was not intended to turn this state of affairs on its head*.[63]

The "open courts" cases also indicate that the scope of section 2(b) should be defined in a manner consistent with the reality that some government functions must remain private. Thus, while finding that the public has a right to receive information about the courts (places that have always been open to the public) the Supreme Court has expressly limited its findings to this context:

> To this I would add a further caveat. I do not accept that the necessary consequence of recognizing the importance of public access to the courts is the recognition of public access to all facets of public institutions. The Intervener, Attorney General for Saskatchewan argues that if an open court system is to be protected under s. 2(b) of the *Charter* on the basis that the public has an entitlement to information about proceedings in the criminal courts, then all venues within which the criminal law is administered will have to be accessible to the public, including jury rooms, a trial judge's chambers and the conference rooms of appellate courts. *The fallacy with this argument is that it ignores the fundamental distinction between the criminal courts, the subject of this appeal, and the other venues mentioned by the Intervener. Courts are and have, since time immemorial, been public arenas. The same cannot be said of these other venues. Thus, to argue that constitutional protection should be extended to public access to these private places, on the basis that public access to the courts is constitutionally protected, is untenable*.[64]

### *(d) Conclusion on a Right to Information and Section 2(b) of the Charter*

Ontario's arguments that section 2(b) did not support a finding that it included *any* right to information were rejected by the Court without much analysis. That being said, many of those arguments seem to have informed the strict test developed by the Court for the new limited right to government information.[65] As examined below, as the test is currently constituted, the right to information in section 2(b) is very narrow, thus raising questions as to the practical significance of the newly created right.

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[63] *Id.*, at para. 79 (emphasis added).

[64] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 38, [1996] 3 S.C.R. 480, at para. 28 (S.C.C.) (emphasis added).

[65] For example, Ontario's argument that a right to information would affect the effective operation of government institutions by removing privacy seems to have found a place in the countervailing interest part of the new test.

## 2. The Practical Significance of the Newly Created Right to Government Information

The decision in *Criminal Lawyers* is an important one as it establishes a new right to government information located in section 2(b) of the Charter. However, on a practical level, the new right may not have much application. As examined below, the right to government information established by the Court in section 2(b) is an extremely narrow one. This lies in contrast to the general approach in section 2(b) cases, where claimants often sail through section 2(b) and the real battle is the question of whether the section 2(b) infringement is satisfied under Charter section 1.

The test to determine whether section 2(b) is engaged by a denial of access to government information has two components. First, a claimant has the burden of demonstrating that access to information is necessary in order for the claimant to meaningfully comment on an issue of public importance. Second, even where a *prima facie* case is made out, the claimant must also demonstrate that there is no "countervailing interest" — specifically that access to the information sought would not impinge on a privilege or impair the proper functioning of government institutions.

In my view, this test will seldom be met. First, in many cases, like the *Criminal Lawyers* case itself, the claimant will be unable to demonstrate that without the information there cannot be meaningful expression. In *Criminal Lawyers*, the CLA argued that it could not meaningfully comment on whether there was a cover-up of the botched murder investigation and trial without seeing the report investigating the police and attorneys involved in that trial. It is difficult to see how another claimant could demonstrate that this step of the test is satisfied in his or her case when the CLA was unsuccessful in doing so in this case.

Second, the "countervailing interests" test is very broad, and will in many cases dictate that a failure to disclose results in no infringement regardless of whether the information is necessary for meaningful comment. The "countervailing interests" test can be invoked to justify the non-disclosure of any document covered by "privilege". Moreover, any claimant who can satisfy the test for a *prima facie* case and survives the privilege test will also have to pass the second part of the countervailing interest test — the "government function" test.

The exemption for privileged documents is a broad one. In explaining why this component of the test was included, the Court stated as follows:

> Privileges are recognized as appropriate derogations from the scope of the protection offered by s. 2(*b*) of the *Charter*. The common law privileges, like solicitor-client privilege, generally represent situations where the public interest in confidentiality outweighs the interests served by disclosure. This is also the rationale behind common law privileges that have been cast in statutory form, like the privilege relating to confidences of the Queen's Privy Council under s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.[66]

Commonly accepted privileges include solicitor-client privilege and litigation privilege (both found in section 19 of FIPPA) as well as cabinet privilege (section 12 of FIPPA). The scope of the word "privilege" as used in the new test to access information is certainly wider than the above three privileges. For example, the Court's judgment expressly recognizes a "law enforcement privilege" set out in section 14.[67]

Given the court's decision on the facts of *Criminal Lawyers* and, in particular, its recognition that privileges may be in statutory form, arguably the denial of access to any document on the basis that it is covered by one of the exemptions in FIPPA (sections 12 to 22) would take that denial out of the scope of section 2(b). Interestingly, the Court went on to say that direct challenges to a statutory provision allowing for the non-disclosure of documents, while of course possible, would rarely be successful as the presence of a privilege would likely be found to remove section 2(b) protection. The Court stated that while "assertions of particular categories of privilege are in principle open to constitutional challenge", "in practice, the outlines of these privileges are likely to be well-settled, providing predictability and certainty to what must be produced and what remains protected". Governments responding to section 2(b) challenges to privileges in statutory form will be able to rely on this particular passage from the Court.

The final component of the countervailing interest test — the "government function exclusion" — is also potentially very broad. The Court pointed to two examples where this exemption could be relied on to illustrate that the disclosure of some types of information, such as judicial notes or Cabinet confidences, will obviously interfere with the effective functioning of a government institution. In other cases where it is not immediately obvious, the historic functioning of a place should be

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[66] *Supra*, note 1, at para. 39.

[67] For example see *id.*, at para. 29. The French version of the judgment also suggests that the term "privilege" ("privilège" in French) includes statutory exemptions like the law enforcement privilege.

looked at to see if disclosure would interfere with the effective operation of the institution.[68]

Finally, as in the *Criminal Lawyers* case itself, even where there is a *prima facie* case that is not caught by the countervailing interest test, it is open to the government to argue that the claimant has not demonstrated that it is the state that has infringed the section 2(b) protection. In *Criminal Lawyers* the Court found that, properly interpreted, sections 14 and 19 already required the government to consider the public interest when exercising its discretion under these sections. Thus, on a practical level, the remedy sought by the CLA — reading sections 14 and 19 into section 23 — would have little effect on the ability of the CLA to obtain documents.

In sum, the limits on the new right to government held information are strict. In my opinion, it will only be the rarest of cases where a claimant can demonstrate that the denial of a request for information will infringe section 2(b) of the Charter.

## 3. The *Irwin Toy/City of Montreal* Test under Section 2(b) of the Charter

The *Criminal Lawyers* decision is important not simply because the Court recognized a new right to information in section 2(b) of the Charter but also because of the way it went about doing so. Below, I examine two aspects of that process. First, the Court was able to locate a right to government information in section 2(b) because it was able to find, contrary to the submissions of Ontario, that the first step of *Irwin Toy* was not a theoretical bar to a successful claim for information under section 2(b). Second, in recognizing a limited right to information, the Court imposed a positive obligation on government without applying the *Dunmore/Baier*

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[68] The Court stated, *id.*, at para. 40:

> It may also be that a particular government function is incompatible with access to certain documents. For example, it might be argued that while the open court principle requires that court hearings and judgments be open and available for public scrutiny and comment, memos and notes leading to a judicial decision are not subject to public access. This would impair the proper functioning of the court by preventing full and frank deliberation and discussion at the pre-judgment stage. The principle of Cabinet confidence for internal government discussions offers another example. The historic function of a particular institution may assist in determining the bounds of institutional confidentiality, as discussed in *Montréal (City)*, at para. 22. In that case, this Court acknowledged that certain government functions and activities require privacy (para. 76). This applies to demands for access to information in government hands. Certain types of documents may remain exempt from disclosure because disclosure would impact the proper functioning of affected institutions.

test previously developed for such claims. Both of these decisions bear comment.

### *(a) The Application of the First Step of* Irwin Toy *to a Request for Government-Held Information*

Ontario argued at the Supreme Court of Canada that regardless of whether the Court found that the *Dunmore/Baier* test applied to a denial of a request for information, there was no section 2(b) breach because the first step of *Irwin Toy* had not been satisfied. That initial question requires the claimant to demonstrate that the activity it is engaged in is an "expressive activity". Ontario argued that that step was not satisfied where the impugned state action was a denial of a request for information because a request for government held information was not an "expressive activity". Any comments the CLA made regarding the discrepancy between the findings of Glithero J. and the OPP investigation, its request for access to information, and its complaints about the government's refusal to disclose that information would be expressive activity. However, there was no suggestion that the government has done anything to restrict that expressive activity. While everyone, including the CLA, has a protected right to speak to government (including the right to request information), there is no correlative Charter right to an answer from government, or to be provided with material on which to comment.

In making that submission, Ontario acknowledged that the protection given by section 2(b) — the freedom of expression — which includes the right to "express thoughts into words" or other means of expression, guarantees the right to be free to express "information already in the possession of the person seeking to express it" and also guarantees a listener's right to hear words spoken freely. However, Ontario argued that the freedom of expression does not guarantee the right to a dialogue, or the right to force others to provide the content for expression.

In response, the CLA's position was that it had satisfied the first step of *Irwin Toy*. It argued that the comments it would make if it had access to the requested information constitute its expressive activity. This argument was successful at the Divisional Court, which found that the expressive activity at issue is the CLA's "desire to comment publicly" on the discrepancy between Glithero J.'s findings and the OPP's conclusion.[69]

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[69] *Supra*, note 21, at para. 55.

The CLA argument was also successful at the Court of Appeal. The majority of the Court of Appeal characterized the expressive activity in issue as "the potential comments the CLA would make should it receive the requested information".[70] However, the dissent, in careful reasons, found that the first step of *Irwin Toy* had not been met. While expressly stating that "one should take an expansive view of what is 'expressive activity'",[71] Juriansz J.A. concluded that "in this case there is no expressive activity at issue. The CLA cannot escape the fact that its real complaint is that the government failed to disclose information to it to facilitate its proposed expression."[72] Justice Juriansz's decision is important because as explored below, he found that to find there was expressive activity in this case would do damage to the integrity of the *Irwin Toy* framework.

Justice Juriansz's decision began by considering the purpose of the two-stage test developed in *Irwin Toy*. He began by describing the importance of keeping the two steps of the *Irwin Toy* test distinct, stating as follows:

> The two steps of *Irwin Toy* are analytically distinct. Each step serves a different purpose and each has its own distinct focus. The first step focuses on the person claiming the protection of s. 2(b). It examines a person's activity in order to determine whether that activity *prima facie* falls within the scope of guaranteed free expression. At step one, the challenged government action is not relevant. The second step focuses on the challenged government action in order to determine whether its purpose or effect is to restrict freedom of expression.[73]

Justice Juriansz concluded that "the situation the CLA finds itself in — having the 'desire to comment' and having 'potential comments' — is not, in my view, expressive activity. It is, rather, the *effect* of the government's refusal to disclose information".[74] Importantly, he noted that the effect of the government's action was not relevant at step one of the *Irwin Toy* analysis because "that focuses on the activity of the claimant. The effect of the government's refusal does not come into play until step two of the *Irwin Toy* analysis is reached".[75]

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70 *Supra*, note 3, at para. 30.
71 *Id.*, at para. 151.
72 *Id.*
73 *Id.*, at para. 146.
74 *Id.*, at para. 148 (emphasis in original).
75 *Id.*

Justice Juriansz's decision recognizes that the CLA did not engage in expressive activity upon receiving notice of the government's refusal to disclose the requested information. Rather, receipt of the requested information was a necessary but not sufficient *precondition* for the CLA's potential expressive activity. As he stated, "without it, there is no expressive activity".[76] Similarly, even with the report, there could be no expressive activity as it was possible that the CLA might decide not to make any comment on the report. In Juriansz J.A.'s words, "the government's act of refusing to disclose the information cannot, following the *Irwin Toy* analysis, create expressive activity where none existed".[77]

In its factum and oral argument, Ontario relied heavily on Juriansz J.A.'s dissent to argue that no right of information could be found in section 2(b) because the first step of *Irwin Toy* had not been satisfied. In Ontario's view, this was a significant issue in the case, because if Ontario's position was accepted, it would have completely closed the door to any section 2(b) infringement for a request of information. Unfortunately, the Supreme Court did not engage in any analysis of this issue. In one sentence, it came to the conclusion that whether the denial of a request for information was an expressive activity could only be answered on a case-by-case basis, after consideration of all of the circumstances of the case:

> To demonstrate that there is expressive content [*i.e.*, to show that the first step of *Irwin Toy* is satisfied] in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary.[78]

With respect, the Supreme Court's conclusion is open to the criticism that it fails to keep the steps of the *Irwin Toy* test distinct. As had been eloquently reasoned by Juriansz J.A. in his dissent in the court below:

> To use the effect of the government's decision to characterize the CLA's situation as "expressive activity" is to conflate steps one and two of the *Irwin Toy* analysis. If the restrictive effect of the government's refusal is the basis for recognizing the CLA's "potential comments" or "desire to comment" as expressive activity at step one, then the same refusal will, by definition, have the effect of restricting expression at [the final] step … The same question will have been

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[76] *Id.*, at para. 149.
[77] *Id.*
[78] *Supra*, note 1, at para. 33.

> asked and answered at both steps. Clearly, there is a problem with the way the CLA advocates applying the *Irwin Toy* analysis.[79]

In my view, the Supreme Court's decision to dismiss Ontario's argument without analysis was an unfortunate one. It is clear from the Court's decision on this issue that it was not prepared to hold that the Charter does not protect any right to government held information.

That being said, the Court seems to have taken Ontario's submission to heart (albeit not in the form requested by Ontario). By requiring a claimant to demonstrate a *prima facie* case (*i.e.*, that the denial of access in their particular case precludes meaningful expression), the Court has recognized that the denial of most requests for information will not "preclude meaningful commentary" on issues of public importance. Thus, the vast majority of requests will be filtered out under the first step of the test created by the Court because a claimant will not be able to demonstrate that its request for information amounts to an "expressive activity" (*i.e.*, will fail to show that denying access precludes meaningful commentary). While not the complete bar argued for by Ontario, the combination of the requirements of the *prima facie* case and the "countervailing interests" test, will make it difficult for a claimant to establish that a denial of information engages section 2(b) of the Charter.

### *(b) The Decision of the Court Not to Apply the* Dunmore/Baier *Test*

In *Criminal Lawyers*, the Supreme Court placed a constitutional burden on government to act proactively (*e.g.*, by requiring the government to disclose information, albeit in limited circumstances) without having applied the *Dunmore/Baier* analysis.[80] The implications of the decision of the Court to impose a positive obligation by reformulating the *Irwin Toy* test rather than applying the *Dunmore* test is explored below.

#### (i) The *Dunmore/Baier* Test

In *Baier*, the Supreme Court reaffirmed that it would require exceptional circumstances for section 2(b) of the Charter to require positive

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[79] *Supra*, note 3, at para. 149.

[80] At the Supreme Court, Ontario argued *inter alia* that the government's refusal to disclose a police report and solicitor-client privileged information did not infringe freedom of expression because s. 2(b) of the Charter does not generally impose a positive obligation on government and the facts of *Criminal Lawyers* did not meet the stringent test for an exception to that general rule, laid out in *Dunmore* and *Baier*.

government action. In that case, the Court rejected the claimant's argument that section 2(b) includes a positive right to the statutory platform of school trusteeship to assist expression.[81] The Supreme Court reaffirmed that to depart from the general rule that section 2 imposes only negative obligations on government, would require exceptional circumstances that meet the three factors identified previously by the Court in *Dunmore*. The Court explained: "In cases where a government defending a *Charter* challenge alleges, or the *Charter* claimant concedes, that a positive rights claim is being made under s. 2(b), a court must proceed in the following way":

> *First* it must consider whether the activity for which the claimant seeks s. 2(b) protection is a form of expression. If so, then *second*, the court must determine if the claimant claims a positive entitlement to government action, or simply the right to be free from government interference. If it is a positive rights claim, then *third*, the three *Dunmore* factors must be considered.[82]

The Court went on to summarize the three *Dunmore* factors that must be met before a positive rights claim under section 2(b) can succeed:

> … these three factors are (1) that the claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime; (2) that the claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s. 2(b) freedom of expression, or has the purpose of infringing freedom of expression under s. 2(b); and (3) that the government is responsible for the inability to exercise the fundamental freedom. If the claimant cannot satisfy these criteria then the s. 2(b) claim will fail. If the three factors are satisfied then s. 2(b) has been infringed and the analysis will shift to s. 1.[83]

### (ii) The Relevance of the *Dunmore/Baier* Test to a Right to Government-Held Information

At the Supreme Court, Ontario argued that the *Dunmore/Baier* analysis applied because the claimants sought a positive entitlement to government action rather than the right to be free from government interference (*i.e.*, the claimants seek a positive right to compel the disclosure of government held information rather than freedom from any prohibi-

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[81] *Baier*, *supra*, note 31, at paras. 25-26, 61.
[82] *Id.*, at para. 30 (emphasis added).
[83] *Id.*

tion on their own conduct). The CLA argued it was seeking only a negative right to be free from government interference with expression and therefore that the *Dunmore/Baier* test did not apply. The majority of the Court of Appeal never considered this argument.[84] The dissent carefully considered the issue and found that indeed what was being sought was a positive right and not to be free from negative interference. Somewhat surprisingly, the Supreme Court did not answer this fundamental issue in any detail. It simply stated the following:

> Determining whether s. 2(*b*) of the *Charter* requires access to documents in government hands in a particular case is essentially a question of how far s. 2(*b*) protection extends. A question arises as to how the issue should be approached. The courts below were divided on whether the analysis should follow the model adopted in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016. In their argument before this Court, [Ontario] placed reliance on *Dunmore* and on this Court's subsequent decision in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673. *In our view, nothing would be gained by furthering this debate. Rather, it is our view that the question of access to government information is best approached by building on the methodology set in Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 967-68, and in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141). The main question in this case is whether s. 2(*b*) is engaged at all. We conclude that the scope of the s. 2(*b*) protection includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints.[85]

The Court's decision to impose a duty on government to disclose information, albeit in limited circumstances, without finding the *Dunmore/Baier* test was satisfied, and with little explanation, is very

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[84] In *Baier*, the Supreme Court rejected the argument that what was being requested was not a positive entitlement to government action and specifically recognized that using a statute as the foundation against which to find "government interference" conflates statutory and constitutional rights, with the effect of constitutionalizing a statutory regime. See *Baier*, *supra*, note 31, at paras. 35-42. The relevant question is whether the claimant seeks a Charter entitlement to positive government action rather than a right to be free from government interference. Thus, that FIPPA may establish statutory rights is irrelevant to the positive nature of CLA's claim that s. 2(b) requires the government to take the positive step of providing records.

[85] *Supra*, note 1, at para. 31 (emphasis added).

peculiar.[86] Ontario argued that *Dunmore/Baier* applied and that in particular, the first *Dunmore* factor would preclude a request for information ever satisfying the test to require positive government action.[87] That is because, as argued by Ontario, a claim for information is a claim to access a statutory regime and is not grounded in freedom of expression. In my view, this argument would have been very strong. Perhaps the decision not to apply *Dunmore/Baier* can be explained as follows: not wanting to shut the door completely on a right to government information, and not wanting to dilute the *Dunmore/Baier* framework for future "positive rights" cases, the Supreme Court was forced to come up with an alternative framework for analysis.

In my view, it is unlikely that the Supreme Court's decision not to apply the *Dunmore/Baier* test in *Criminal Lawyers* will impact future challenges which seek to impose positive obligations on the state. In this regard, the *Criminal Lawyers* case will not be viewed in future cases as a "platform" case by the Supreme Court but as a case that is *sui generis* in nature. The case can be distinguished from *Haig*, *NWAC*, *Delisle* and *Baier* on the basis that what was sought in *Criminal Lawyers* was government information, which cannot (according to the Court) be equated to the access to platforms for expression sought in the other four cases. Thus in my view, the *Criminal Lawyers* case does not change the analytical framework in cases where what is sought is positive government action. Indeed, the Court's choice of language in deciding not to turn to the *Dunmore/Baier* framework does not indicate a repudiation of the test in the context of a claim to positive state action. Where what is sought is access to a statutory platform for expression (or access to a statutory labour relations regime in the context of section 2(d) cases) *Dunmore/Baier* will continue to apply.

## VIII. CONCLUSION

For the first time, the Supreme Court has held that section 2(b) of the Charter includes a right to government-held information, albeit in limited circumstances. The Court found that section 2(b) includes a right to access to documents "where access is necessary to permit meaningful

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[86] Compare with the considered analysis of this issue in *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, [2009] S.C.J. No. 31, 2009 SCC 31, [2009] 2 S.C.R. 295, at paras. 25-36 (S.C.C.).

[87] Ontario also argued (a) that it would be a rare denial of information that would satisfy the second *Dunmore* factor or "substantial impairment" test; and (b) that the third *Dunmore* factor was not met because it was not the state that was the source of the infringement.

discussion on a matter of public importance, subject to privileges and functional constraints".[88]

It remains to be seen how the test established by the Supreme Court will be applied by lower courts. As discussed in this paper, it is my opinion that it will be a rare denial of a request for information that will satisfy the *Criminal Lawyers* test for a section 2(b) infringement. In addition, in the rare case where a claimant is able to demonstrate a *prima facie* case and establish that disclosure would not impair a privilege or the effective operation of a government institution, the government may be able to invoke section 1 to justify non-disclosure.

While the CLA and media and other interveners would like to have seen a more robust right, the gains made in the *Criminal Lawyers* case are not insubstantial. The fact remains that it is now theoretically possible to use section 2(b) of the Charter to require government to disclose information. The recognition of a new Charter right to information will cause all governments to carefully consider the constitutional validity of the provisions of their existing access legislation and proceed cautiously with any amendments that reduce access.

Finally, the emphasis in the *Criminal Lawyers* decision on the importance of the proper exercise of discretion is important. In my view, the Court's focus on the proper exercise of discretion is a signal to government that discretionary decisions refusing to disclose information will be carefully reviewed by information commissioners and courts on administrative law grounds. Paramount in the exercise of the discretion is whether the public interest outweighs the purpose of an exemption, and a government that fails to provide adequate reasons for non-disclosure can expect to be asked to justify the exercise of discretion upon judicial review. The Court's direction on this issue is entirely consistent with Ontario's main purpose in enacting FIPPA: that government information should be available to the public except where a countervailing interest justifies a decision to resist disclosure for the greater public good.

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[88] *Supra*, note 1, at para. 31.