Court File No. 32172

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

BETWEEN:

THE MINISTRY OF PUBLIC SAFETY AND SECURITY (formerly the SOLICITOR GENERAL) and THE ATTORNEY GENERAL OF ONTARIO

Appellants
(Respondents)

- and -

THE CRIMINAL LAWYERS' ASSOCIATION

Respondent
(Appellant)

- and –

ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF QUEBEC, THE ATTORNEY GENERAL OF NOVA SCOTIA, THE ATTORNEY GENERAL OF NEW BRUNSWICK, THE ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, THE ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR, TOM MITCHINSON, ASSISTANT COMMISSIONER, OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO, CANADIAN BAR ASSOCIATION, INFORMATION COMMISSIONER OF CANADA, FEDERATION OF LAW SOCIETIES OF CANADA, CANADIAN NEWSPAPER ASSOCIATION, AD IDEM/CANADIAN MEDIA LAWYERS' ASSOCIATION and CANADIAN ASSOCIATION OF JOURNALISTS and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

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PART I - STATEMENT OF FACTS

A. OVERVIEW

1. Section 2(b) of the *Charter* guarantees a right to open and transparent government, in addition to open courts. This Court has repeatedly described the "open court" principle guaranteed by s. 2(b) of the *Charter* as part of a broader right to receive information regarding the operation of public institutions. While it is not necessary in this appeal to determine the full scope of this right, the intervener the British Columbia Civil Liberties Association (the "BCCLA") submits that it at least extends to access to government information "where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the [statutory] exemption" from disclosure (Ontario *Freedom of Information and Protection of Privacy Act* ("FIPPA" or the "Act"), s. 23).

> *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11 ("*Charter*")
>
> *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31 ("FIPPA"), s. 23

2. Furthermore, there is no principled reason why the public interest override should not apply to the exemption in s. 19 of FIPPA, which includes, but is broader than, common law solicitor-client privilege. Public interest exceptions are already well-established in the common law. Recognition of at least the same exceptions within the freedom of information statutory scheme in Ontario would not weaken the privilege. Moreover, the rationale for limiting disclosure of privileged documents does not extend to the non-privileged documents that are exempt from disclosure under s. 19 of FIPPA.

B. FACTS

3. The BCCLA relies on the facts set out by the Respondent.

> Factum of the Respondent, at paras. 5-15

PART II - POINTS IN ISSUE

4. The BCCLA's submissions will focus upon the first constitutional question stated by the Chief Justice, whether s. 23 of FIPPA violates s. 2(b) of the *Charter* by failing to extend the

public interest override to the exemptions found at ss. 14 (law enforcement) and 19 (solicitor-client privilege) of the Act.

PART III - STATEMENT OF ARGUMENT

A. SECTION 2(B) OF THE *CHARTER* GUARANTEES A RIGHT TO INFORMATION ABOUT PUBLIC INSTITUTIONS

5. From the very earliest consideration of s. 2(b) of the *Charter*, this Court has held that the beneficiaries of the right to freedom of expression include those who receive information, as well as those who impart it. In *Ford*, which dealt with commercial speech, this Court held:

> Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy.

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712 at p. 767 [emphasis added], Book of Authorities of the Attorney General of British Columbia ("AGBC Authorities"), Tab 3

See also: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at p. 1339, Book of Authorities of the Respondent Criminal Lawyers' Association ("CLA Authorities), Vol. II, Tab 14

Canadian Broadcasting Corp. v. Lessard, [1991] 3 S.C.R. 421 at pp. 429-430, Book of Authorities of the Intervener Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario ("IPCO Authorities"), Vol. I, Tab 4

6. This purposive approach to freedom of expression is all the more crucial in the context of political expression. Political speech is not effective in enabling citizens to make informed democratic choices unless information about public institutions is accessible.

See e.g. *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at paras. 18 ("The freedom of individuals to discuss information about the institutions of government, their policies and practices, is crucial to any notion of democratic rule.") and 23 ("The full and fair discussion of public institutions, which is vital to any democracy, is the *raison d'être* of the s. 2(b) guarantee. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press. The public's entitlement to be informed imposes on the media the responsibility to inform fairly and accurately."), CLA Authorities, Vol. I, Tab 6

Edmonton Journal, supra at p. 1336 ("Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions."), CLA Authorities, Vol. II, Tab 14

7. Accordingly, in *Dagg v. Canada (Minister of Finance)*, this Court emphasized that access to government information is critical for the functioning of a democratic society:

> As society becomes more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them.
>
> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403 at paras. 60-61 [emphasis added, citations deleted] (*per* Justice La Forest, dissenting in the result, but writing for this Court on this issue), CLA Authorities, Vol. II, Tab 12

8. The right of access to information about governments is highly analogous to the well-established "open court" principle that has long been recognized to be guaranteed by s. 2(b) of the *Charter*. This principle includes not only a right to attend court, but also a right to information in court files. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, Justice La Forest described the purpose of this principle as follows: "[t]he principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings."

CBC v. New Brunswick, supra at para. 23 [emphasis added], CLA Authorities, Vol. I, Tab 6

See e.g. *Toronto Star Newspapers v. Ontario*, [2005] 2 S.C.R. 188, 2005 SCC 41, IPCO Authorities, Vol. I, Tab 29; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, IPCO Authorities, Vol. I, Tab 18; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41

9. The same rationale extends to access to government information. The ability to scrutinize and comment on government depends on access to information no less than the ability to scrutinize and comment on the courts.

Edmonton Journal, supra at p. 1336, CLA Authorities, Vol. II, Tab 14

> *International Fund for Animal Welfare, Inc. v. Canada* (1988), [1989] 1 F.C. 335 (C.A.) at 347 ("freedom of expression must include freedom of access to all information pertinent to the ideas or beliefs sought to be expressed")

10. Indeed, this Court has repeatedly indicated that the open court principle is one aspect of a broader right to receive information about all public institutions. In *Edmonton Journal*, Justice Cory stated unequivocally that "... members of the public have a right to information pertaining to public institutions and particularly the courts."

> *Edmonton Journal, supra* at p. 1339 [emphasis added], CLA Authorities, Vol. II, Tab 14

11. Similarly, in *Vancouver Sun (Re)*, Justices Iacobucci and Arbour, for a majority of this Court, held:

> 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. New Brunswick (Attorney General)*, *supra* at para. 17. 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.
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> > *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at para. 26 [emphasis added], IPCO Authorities, Vol. I, Tab 30
> >
> > See also: *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, 2007 SCC 43 at para. 33, Book of Authorities of the Appellants ("Appellants' Authorities"), Vol. II, Tab 26

12. The BCCLA notes that the law enforcement exemption at issue here is particularly broad. It extends to any "report prepared in the course of law enforcement inspections or investigations by an agency which has the function of enforcing and regulating compliance with the law." Unlike other law enforcement exemptions from the right of access to government information, under s. 14(2) of FIPPA such reports are exempt from disclosure even if their release will cause no harm to law enforcement. Some of these exempt reports will contain information in which there is a compelling public interest that overrides the purpose of the exemption. The omission of s. 14 from the public interest override in s. 23 of FIPPA permits the government to withhold these reports, despite the public interest in their disclosure.

FIPPA, s. 14(2)

Compare: *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 15

13. In contrast, this Court has held under the open court principle that a publication ban regarding controversial law enforcement tactics has substantial deleterious effects on freedom of expression and the press. In *R. v. Mentuck*, Justice Iacobucci stated on behalf of a unanimous Court:

> The deleterious effects, however, would be quite substantial. In the first place, the freedom of the press would be seriously curtailed in respect of an issue that may merit widespread public debate. A fundamental belief pervades our political and legal system that the police should remain under civilian control and supervision by our democratically elected officials; our country is not a police state. The tactics used by police, along with other aspects of their operations, is a matter that is presumptively of public concern. Restricting the freedom of the press to report on the details of undercover operations that utilize deception, and that encourage the suspect to confess to specific crimes with the prospect of financial and other rewards, prevents the public from being informed critics of what may be controversial police actions.
>
> As this Court recognized in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976, "participation in social and political decision-making is to be fostered and encouraged", a principle fundamental to a free and democratic society. See S*witzman v. Elbling*, [1957] S.C.R. 285; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. Such participation is an empty exercise without the information the press can provide about the practices of government, including the police. In my view, a publication ban that restricts the public's access to information about the one government body that publicly wields instruments of force and gathers evidence for the purpose of imprisoning suspected offenders would have a serious deleterious effect. There is no doubt as to how crucial the role of the police is to the maintenance of law and order and the security of Canadian society. But there has always been and will continue to be a concern about the limits of acceptable police action. The improper use of bans regarding police conduct, so as to insulate that conduct from public scrutiny, seriously deprives the Canadian public of its ability to know of and be able to respond to police practices that, left unchecked, could erode the fabric of Canadian society and democracy.

R. v. Mentuck [2001] 3 S.C.R. 442, 2001 SCC 76 at paras. 50-51 [emphasis added], IPCO Authorities, Vol. I, Tab 26

See also: *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 38.06 (Even information which a judge finds would, if disclosed, be injurious to international relations, national defence or national security may in fact be ordered disclosed if the

> public interest in disclosure outweighs in importance the public interest in non-disclosure.)

14. The ability of citizens to scrutinize publicly important law enforcement information should not depend on whether it happens to end up in a court file. The values that underlie the open court principle and the purposes it serves are equally applicable to information held by the government regarding questionable practices of its agencies, particularly the police.

15. The Appellants rely upon the distinction between positive and negative rights; however this Court has specifically addressed this issue in *Haig* and found that the distinction is not helpful in respect of access to information. Justice L'Heureux-Dubé wrote, for the majority of this Court:

> 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.
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> *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995 at p. 1039 [emphasis added], CLA Authorities, Vol. III, Tab 26

16. This Court has already recognized in the open courts cases that access to information about public institutions is essential to an effective right to freedom of expression. Unless Canadians know what is happening in their courts and in their government, they cannot form and express views about them. As Justice Cory noted in *Edmonton Journal*: "Discussion of court cases and criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court." Discussion and criticism of government is equally dependent upon receipt of information as to what is transpiring within government institutions.

> *Edmonton Journal, supra* at p. 1340 [emphasis added], CLA Authorities, Vol. II, Tab 14

17. Accordingly, if the *Dunmore/Baier* test applies here, the right to receive information about government institutions meets that test for the same reasons that the right to access information about courts meets it.

Dunmore v. Ontario (Attorney General), [2001] 2 S.C.R. 1016, 2001 SCC 94 at paras. 22-24, IPCO Authorities, Vol. I, Tab 8

Baier v. Alberta, [2007] 2 S.C.R. 673, 2007 SCC 31, CLA Authorities, Vol. I, Tab 3

B. THERE IS NO PRINCIPLED REASON WHY SECTION 23 SHOULD NOT APPLY TO SECTION 19

18. The BCCLA submits that there is no principled reason why the public interest override in s. 23 of FIPPA should not apply to s. 19 of the Act. Public interest exceptions already exist in the common law of solicitor-client privilege. Recognition of the same exceptions within the freedom of information statutory scheme in Ontario would not weaken the privilege.

19. While solicitor-client privilege is a foundational principle of Canada's legal system, it is not absolute. In particular, it has long been recognized that it must give way to compelling public interest. As this Court stated in *Smith v. Jones*, in the context of recognizing a public safety exception to solicitor-client privilege:

> ...even the fundamentally important right to confidentiality is not absolute in doctor-patient relationships, and it cannot be absolute in solicitor-client relationships: *Solosky, supra*. When the interest in the protection of the innocent accused and the safety of members of the public is engaged, the privilege will have to be balanced against these other compelling public needs. In rare circumstances, these public interests may be so compelling that the privilege must be displaced. Yet the right to privacy in a solicitor-client relationship is so fundamentally important that only a compelling public interest may justify setting aside solicitor-client privilege.

Smith v. Jones, [1999] 1 S.C.R. 455 at para. 74 [emphasis added], CLA Authorities, Vol. IX, Tab 85

20. Public interest exceptions to privilege are already well-established, and narrowly defined, by the common law. For example, in *Smith*, this Court recognized that solicitor-client privilege will give way to a public safety interest where three factors weigh in favour of disclosure: (i) clear risk to an identifiable person or group of people; (ii) risk of serious bodily harm or death; and (iii) imminent danger.

Smith, *supra* at para. 77, CLA Authorities, Vol. IX, Tab 85

See also: *R. v. McClure*, [2001] 1 S.C.R. 445, CLA Authorities, Vol. VII, Tab 64; *R. v. Brown*, [2002] 2 S.C.R. 185 at para. 4 (innocence at stake exception)

R. v. Solosky, [1980] 1 S.C.R. 821 at p. 835; *R. v. Campbell*, [1999] 1 S.C.R. 565 at paras. 55-63 (fraud exception)

Geffen v. Goodman Estate, [1991] 2 S.C.R 353 at 387 (exception to determine testator or deceased settlor's intentions "in the interests of justice")

Goodis v. Ontario (Ministry of Correctional Services), [2006] 2 S.C.R. 32 at para. 20 (records subject to a claim of solicitor-client privilege may be ordered disclosed where "absolutely necessary"), CLA Authorities, Vol. III, Tab 22

21. The common law exceptions to solicitor-client privilege are situations in which the privilege yields to the public interest. There is no principled reason why solicitor-client privilege should not be subject to at least the same limited public interest exceptions in the context of access to information legislation, particularly when the countervailing public interest involves a *Charter* right.

22. The Appellants now concede, as a result of the BCCLA's application for leave to intervene in this appeal, that the common law public interest exceptions to solicitor-client privilege override the solicitor-client exemption in FIPPA. However, the Appellants submit that these public interest exceptions are incorporated into s. 19, rather than s. 23, of FIPPA.

Submissions of the Attorney General of Ontario responding to the applications for leave to intervene, dated June 16, 2008

23. The BCCLA agrees that the common law exceptions to solicitor-client privilege should be incorporated into the s. 19 exemption itself, rather than requiring resort to the public interest override. However, confirmation from this Court is needed on this issue. Moreover, the Appellants' concession highlights the s. 2(b) *Charter* breach. If even solicitor-client privilege must yield to the public interest within FIPPA, the same must be true for other statutory exemptions from the right of access, such as law enforcement.

24. Furthermore, if the courts of Ontario are correct, the s. 19 exemption in FIPPA is significantly broader than common law privilege. For example, the Ontario Court of Appeal and Divisional Court have held that documents prepared prior to litigation that were gathered or copied for Crown counsel for purposes of litigation are exempt from disclosure under s. 19 even after the litigation ends – which would not be the case under common law privilege. The policy reasons for limiting exceptions to common law privilege do not apply to the records that would be exempt under s. 19 of FIPPA, but not under common law privilege. Accordingly, the

circumstances in which a compelling public interest would justify disclosure of such documents under the s. 23 override would be even broader than the circumstances in which truly privileged documents would be subject to disclosure through incorporation of the common law limits on the privilege within s. 19 of FIPPA.

> *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457 at paras. 35-38, 55-66 (Div. Ct.)
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> *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.), application for leave to appeal to S.C.C. dismissed [2003] S.C.C.A. No. 31 (QL)
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> *D.P. v. Wagg* (2004), 71 O.R. (3d) 229 (C.A.) at para. 26 ("while some of the documents in the Crown brief might be privileged, in the ordinary case most would not. … documents in a Crown brief are generally not subject to solicitor client or litigation privilege"), Book of Authorities of the Attorney General of Manitoba ("AGMB Authorities"), Tab 6
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> Contrast: *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319 (litigation privilege generally ends upon the termination of the litigation that gave rise to the privilege), Book of Authorities of the Attorney General of Quebec ("AGQC Authorities"), Tab 2

25. If this Court upholds the decision of the Ontario Court of Appeal, the content of s. 23 as it relates to s. 19 would be determined by the Information and Privacy Commissioner and the courts, who would be guided by the common law. Section 23 does not operate in a vacuum, and would be informed by the importance of the principle of solicitor-client privilege. Indeed, since the release of the Court of Appeal's decision in this case in May 2007, s. 19 (as well as s. 14) have been "read into" s. 23, but there has not been a single decision of the Information and Privacy Commissioner or the courts successfully applying the public interest override to s. 19. Such an application would be rare, yet it would (by definition) be in the public interest.

> See *Order 03-28, British Columbia (Ministry of Attorney General)*, [2003] B.C.I.P.C.D. No. 28 (Q.L.) at para. 28 ("The importance of solicitor-client privilege, generally and specifically in relation to the disputed records, is relevant in considering whether s. 25(1)(b) [the B.C. public interest override] requires disclosure.")

26. Contrary to the submissions of the Attorney General of Canada, this is not a situation like *Blood Tribe* in which an argument is being made that legislation can abrogate solicitor-client privilege through inference. In *Blood Tribe*, production of privileged information was sought regardless of whether it met the common law test for privilege (rather than merely being subject to a broader statutory exception) and regardless of whether a public interest exception to

privilege would apply, or was even claimed. Here, the argument advanced by the Respondent and supported by the BCCLA is that s. 2(b) of the *Charter* (not merely legislation) requires that privileged information, and other information that is exempt under s. 19 of the Act but not privileged, must be disclosed if the public interest requires it. As the Appellants admit, the public interest exceptions to privilege already limit its scope within s. 19 of FIPPA itself.

> Factum of the Attorney General of Canada, at para. 69
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> *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, AGBC Authorities, Tab 1

PART IV - SUBMISSIONS CONCERNING COSTS

27. The BCCLA does not seek costs and asks that no order of costs be made against it.

PART V - ORDER SOUGHT

28. The BCCLA asks that this appeal be dismissed and that the constitutional questions be answered in the manner requested by the Respondent. The BCCLA respectfully requests the opportunity to present at least 15 minutes of oral argument to the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of September, 2008.

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Catherine Beagan Flood

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Iris Fischer

Counsel for the Intervener, the
British Columbia Civil Liberties Association

PART VI - TABLE OF AUTHORITIES

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Court File No. 32172

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Ontario)

THE MINISTRY OF PUBLIC SAFETY AND SECURITY (formerly the Solicitor General) and THE ATTORNEY GENERAL OF ONTARIO

Appellants
(Respondents)

- and –

THE CRIMINAL LAWYERS' ASSOCIATION

Respondent
(Appellant)

- and –

ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF QUEBEC, THE ATTORNEY GENERAL OF NOVA SCOTIA, THE ATTORNEY GENERAL OF NEW BRUNSWICK, THE ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, THE ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR, TOM MITCHINSON, ASSISTANT COMMISSIONER, OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO, CANADIAN BAR ASSOCIATION, INFORMATION COMMISSIONER OF CANADA, FEDERATION OF LAW SOCIETIES OF CANADA, CANADIAN NEWSPAPER ASSOCIATION, AD IDEM/CANADIAN MEDIA LAWYERS' ASSOCIATION and CANADIAN ASSOCIATION OF JOURNALISTS and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

FACTUM OF THE INTERVENER, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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