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

FINAL ORDER PO-2092-F

Appeal PA-000370-3

Ministry of the Solicitor General

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This final order disposes of all remaining issues in Appeal PA-000370-3. It follows from my previous decisions in Interim Order PO-2033-I, issued August 9, 2002, Interim Order PO-2056-I, issued October 24, 2002, and Reconsideration Order PO-2063-R, issued November 6, 2002, in which I reconsidered part of Order PO-2033-I.

NATURE OF THE APPEAL:

The Ministry of the Solicitor General (now the Ministry of Public Safety and Security, referred to in this order as "the Ministry") received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a member of the media, for access to "all video footage recorded by the Ontario Provincial Police (OPP) at Ipperwash Provincial Park (Ipperwash) from September 5-7, 1995" and "all photos taken by the OPP at Ipperwash Provincial Park from September 5-7, 1995."

After claiming a time extension, the Ministry issued a decision letter to the appellant, denying access to all videotapes and photographs it had identified as being responsive to the request. The Ministry relied on the exemptions relating to law enforcement (section 14) and invasion of privacy (section 21). The Ministry also advised the appellant that, pursuant to sections 14(3) and 21(5) of the *Act*, it would neither confirm nor deny the existence of any further responsive records.

The appellant appealed this decision.

During mediation, the Ministry conducted a further search and located additional responsive records. The Ministry continued to rely on sections 14 and/or 21 as the basis for denying access to all records, but withdrew its "refuse to confirm or deny" exemption claims in sections 14(3) and 21(5).

Mediation did not resolve this appeal, so it was transferred to the adjudication stage of the appeal process. After conducting an inquiry, which included submissions and exchange of representations between the parties, I issued Interim Order PO-2033-I. It referred to four categories of records, three of which have been fully addressed by the previous orders in this appeal. This final order concerns what the Ministry has described as "a potential fourth category [of records], videotaped surveillance records obtained under Parts VI (wiretap) and XV of the *Criminal Code*." The Ministry claims that such records, if they exist, are excluded from the scope of the *Act*. This argument is based on the doctrine of federal legislative paramountcy, as addressed in Orders P-344 and P-625. Its effect, if accepted, would be to exclude this potential category of records, if they exist, from the scope of the *Act*.

In Order PO-2033-I, I determined that, although I had received representations on this issue and had shared parts of them in accordance with Practice Direction 7 of this office's *Code of Procedure*, I could not address this issue without a Notice of Constitutional Question (NCQ). I stated:

> In my view, section 109 of the *Courts of Justice Act* requires that notice of this constitutional question be given to the Attorneys General of Canada and Ontario. This section states, in part, as follows:

> (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:
>
> 1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question …
>
> (2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.
>
> (2.1) The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.
>
> (6) This section applies to proceedings before boards and tribunals as well as to court proceedings.

Although the usual practice would be for the party raising the constitutional issue to notify the Attorneys General, as set out in section 109, I have decided that, in the circumstances of this appeal, it is appropriate for me to provide this notice, and I have done so.

Accordingly, I have decided to defer my decision on any Category 4 records, if they exist, in order to provide time for responses in relation to the constitutional question.

The NCQ was served on the Attorneys General of Ontario and Canada, as well as the appellant and the Ministry. I received representations on the paramountcy issue from the appellant and the Ministry of the Attorney General's Constitutional Law Branch (the Attorney General). I also received notice from the federal Department of Justice, on behalf of the Attorney General of Canada, that it would not be participating in this inquiry. I provided the appellant's submissions to the Attorney General, and the non-confidential portions of the Attorney General's submissions to the appellant. Both the appellant and the Attorney General also submitted reply representations.

PRELIMINARY ISSUES:

The Commissioner's Notice of Constitutional Question

Section 109(2) of the *Courts of Justice Act* states that "… if a **party** fails to give notice in accordance with this section, the Act … shall not be adjudged to be invalid or inapplicable, or

the remedy shall not be granted, as the case may be" (emphasis added). The appellant submits that:

> Instead of following s. 109(2), the Assistant Commissioner decided to issue a NCQ himself.…
>
> The [appellant] submits that the *Courts of Justice Act* does not grant the Assistant Commissioner discretion to proceed in this manner. Rather, the Assistant Commissioner has a statutory duty under s. 109(2) … to adjudicate this appeal as if there were no allegation that the [*Act*] is constitutionally inapplicable by reason of federal paramountcy. Given that the Ministry has not raised any other argument with respect to the Category 4 records, this means that the records must be disclosed.

In support of this argument, the appellant cites *R. v. Briggs* (2001), 55 O.R. (3d) 417 (C.A.) at para. 43 (p. 439):

> In the absence of the constitutionality of the legislation being raised in the appropriate manner, this court has no authority to do so. A party intending to challenge the constitutional validity of legislation is required to provide notice of a constitutional question to the Attorney General of the Province and Canada. Absent such notice, the court is barred from considering this issue.

The appellant goes on to submit:

> If the Assistant Commissioner does not meet his obligations under s. 109(2) of the *Courts of Justice Act*, counsel for the [appellant] intend to seek instructions to bring an application for *mandamus* ordering the Assistant Commissioner to comply with the statute.

No application for *mandamus* has been served on this office.

The Attorney General submits that the *Briggs* case is not determinative of the issue:

> The Court in *Briggs* found that where notice of a constitutional question was not given until after the appeal was filed and where the Court did not have the benefit of an examination of the constitutional issues in the court of first instance, the Court of Appeal was barred from considering the issue. This case does not, however, decide that courts of first instance or tribunal adjudicators are barred from issuing a Notice of Constitutional Question to alert the Attorneys General to a constitutional issue.

I agree with the Attorney General. The *Briggs* case was not dealing with an alternative form of notice, but with notice that had not been given at all during the original adjudication. The approach taken in *Briggs* is consistent with a growing body of case law to the effect that the requirement to notify the provincial and federal Attorneys General of a constitutional question, as contemplated in section 109 of the *Courts of Justice Act*, is mandatory. As Justice Laskin

notes in *Paluska, Jr. v. Cava* (2002), 59 O.R. (3d) 469 (C.A.) at 470, "… notice to the Attorney General is mandatory … and the absence of notice renders the decision invalid."

The Attorney General also cites the Supreme Court of Canada's decision in *Eaton v. Brant County Board of Education* (1997), 142 D.L.R. (4th) 385 (S.C.C.), in which Justice Sopinka, writing for the majority, states (at 400):

> The purpose of s. 109 is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. … Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.

The Attorney General submits that this passage indicates a twofold purpose for section 109:

> … [F]irst, it ensures that the courts do not exercise their power to declare a law invalid or inapplicable "except after the fullest opportunity has been accorded to the government to support its validity", and second, to ensure that the courts have an adequate evidentiary record in constitutional cases on appeal.

This interpretation of *Eaton* is echoed by Justice Laskin in *Paluska, Jr.* (at 474):

> The notice requirement has two related purposes: to ensure that governments have a full opportunity to support the constitutional validity of their legislation or to defend their action or inaction; and to ensure that courts have an adequate evidentiary record in constitutional cases.

The Attorney General further submits:

> In the present case, although notice to the Attorney General of Ontario was not provided by a party, the Notice of Constitutional Question served by the Assistant Commissioner served the same ends. The Assistant Commissioner's Notice of Constitutional Question was the equivalent of notice from a party in that it afforded the Attorney General of Ontario a full opportunity to address the constitutional applicability of the province's legislation in written submissions that will provide an appellate court with a complete record should an appeal arise.
>
> The Supreme Court of Canada has recognized that something other than notice in the manner prescribed by section 109 may be sufficient:
>
> > There is, of course, room for interpretation of s. 109 and there may be cases in which the failure to serve a written notice is not fatal

> either because the Attorney General consents to the issue's being dealt with or there has been a de facto notice which is the equivalent of a written notice. (*Eaton*, para. 54, p. 402.)

The issue of *de facto* notice was not actually before the Court in *Eaton*. It was also not an issue directly raised by *Paluska, Jr.*, but I note that the Ontario Court of Appeal acknowledged the possibility of *de facto* notice in its decision in that matter (at 469):

> Admittedly, as Sopinka J. recognized at para. 54 [of *Eaton*], cases might arise where the failure to serve a written notice may not be fatal "either because the Attorney General consents to the issue's [*sic*] being dealt with or there has been a de facto notice which is the equivalent of a written notice."

The Court of Appeal at page 475 of *Paluska, Jr.* also noted that in *Eaton*, Justice Sopinka "… favoured the view that notice is mandatory and the failure to give it invalidates the decision whether or not the government shows prejudice." The Court in *Paluska, Jr* stated that "… because it was unnecessary to do so in [*Eaton*], Sopinka J. declined to express a final conclusion about whether the absence of notice made the decision invalid only on a showing of prejudice." Justice Sopinka's reasons in *Eaton* did, however, refer to his view that "…the absence of notice [to the Attorneys General] is in itself prejudicial to the public interest."

In this case, written notice has in fact been served, but not by one of the parties as contemplated in section 109(2) of the *Courts of Justice Act*. The NCQ provided formal written notice of the constitutional question to the Attorneys General of Canada and Ontario and, pursuant to section 109(2.1), was "substantially similar" to prescribed Form 4F of the *Rules of Civil Procedure*. As contemplated by Form 4F, the NCQ was also served on all other parties to the appeal. As noted, both the appellant and the Attorney General of Ontario responded with written representations and, after an exchange of representations, both also made reply representations. These representations, as well as the letter from the federal Department of Justice acknowledging the notice and declining to provide representations, will form part of the record of proceedings for any court that may be called upon to review this decision.

Therefore, the NCQ in this case met the purposes for notification identified by the Supreme Court of Canada, while avoiding the lack of notice to the Attorneys General described by Justice Sopinka as "in itself prejudicial to the public interest". Moreover, this method of providing notice avoided another type of prejudice to the parties to this appeal, particularly the appellant, namely the additional delay that would have ensued if I had required the Ministry to prepare and serve it. This method of providing notice also comports with the unique nature of the inquiry process under the *Act*, in which the Commissioner is empowered to decide what testimony and documentary evidence are required, and to compel production and/or the attendance of witnesses (sections 52(4) and (8) of the *Act*), and to receive evidence in the absence of other parties (sections 52(2), (3) and (13)). It also allowed me to ensure that all parties were aware of the precise nature of the constitutional issues to be decided.

In my view, the NCQ incorporated all elements required by section 109 of the *Courts of Justice Act*, and met all its objectives, and was therefore more than sufficient to qualify as "*de facto*" notice.

I also reject the appellant's contention that in the absence of an NCQ, an order for disclosure would be required. In cases where an institution has argued that records are not subject to the *Act*, and the Commissioner's order concludes that they are, the Commissioner usually orders the institution to make an access decision under the *Act*. It would be unfair to do otherwise, where an institution proceeded on the basis that the *Act* was not applicable, and moreover, it would risk the disclosure of records that may be subject to mandatory exemptions in the *Act*.

The Appellant's Natural Justice Objection

The appellant also submits that "the manner in which this aspect of the inquiry [i.e. the potential application of the *Criminal Code*] has been handled is in breach of natural justice." In her first set of representations in this appeal, prior to the issuance of Order PO-2033-I, the appellant stated that "[t]he Notice of Inquiry provided to the [appellant] does not disclose the essence or substance of the case to be met with respect to the *Criminal Code*. The requester has not even been told which of the hundreds of provisions in parts VI and XV of the *Code* are alleged to apply." Nevertheless, in her initial representations the appellant identified the correct provisions and made submissions on them.

I subsequently issued the NCQ, which described the constitutional issue in considerable detail. The appellant submitted initial and reply representations in response to the NCQ. In her reply representations, the appellant returns to the issue of natural justice, stating:

> The appellant has never been provided with the submissions of the Ministry of Public Safety and Security … on the constitutional issue, and has not been given an opportunity to reply to them. If the Attorney General of Canada has made submissions in response to the Notice of Constitutional Question, they have also not been provided to the appellant.
>
> Moreover, although the Notice of Constitutional Question indicated, for the first time, that the paramountcy issue raised by the Ministry is based on s. 193(1) of the *Criminal Code*, the Appellant was not told which provision of the [*Act*] is said to conflict with the *Criminal Code*. The Attorney General of Ontario has relied only on s. 52(4) of [the *Act*], and accordingly, these submissions will address only that provision. If any other section of [the *Act*] is relied upon by the Ministry or the Attorney General of Canada, the appellant requests notice and an opportunity to make submissions regarding the alleged conflict.

I have followed the process for the sharing of representations in *Practice Direction 7* of the Commissioner's *Code of Procedure* throughout this inquiry. *Practice Direction 7* states that "[t]he Adjudicator may provide representations received from a party to the other party or parties, unless the Adjudicator decides that some or all of the representations should be withheld." The *Practice Direction* goes on to specify criteria for withholding representations, including where disclosure of the information would reveal the substance of a record claimed to be exempt, or would reveal information that would be exempt if contained in a record, or where other confidentiality criteria would apply. This process has resulted in considerable disclosure to the appellant, including most of the Attorney General's initial submissions in response to the

NCQ. The appellant submitted representations after receiving the NCQ, and later submitted reply representations after receiving the non-confidential portions of the Attorney General's submissions in response to the NCQ. The Ministry itself did not respond to the NCQ, and as noted previously, the federal Department of Justice indicated that it would not submit representations.

Section 52(13) of the *Act* specifically addresses the issue of access to representations by the parties to an appeal. It states:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is *entitled* to be present during, to have access to or to comment on representations made to the Commissioner by any other person. [my emphasis]

Processing an appeal under the *Act* raises unique confidentiality concerns, such as ensuring that the contents of a record at issue are not disclosed. These concerns form the underlying policy basis for section 52(13), and the process outlined in *Practice Direction 7*, particularly its confidentiality criteria, were drafted to ensure that these unique confidentiality considerations are addressed in any decision by the Commissioner to share the representations of one party with another.

The Divisional Court considered the Commissioner's exchange of representations process in *Toronto District School Board v. Ontario (Information and Privacy Commissioner),* [2002] O.J. No. 4631 (Div. Ct.), stating:

> While s. 41(13) [the equivalent of section 52(13) in the *Municipal Freedom of Information and Protection of Privacy Act*], properly interpreted, provides a discretion to the Commissioner to disclose representations, a proper interpretation necessarily imposes limitations on its exercise which are consonant with the purposes of the Act. In our view, those limitations are appropriately contained in the guidelines developed by the Commissioner….

In view of the considerable disclosure that has been provided to the appellant through the Notice of Inquiry and the NCQ, and through an exchange of representations in which the only withheld information met the confidentiality criteria in *Practice Direction 7*, and given the detailed representations that the appellant has in fact provided, I have concluded that the appellant has not been denied natural justice because she did not receive the other parties' representations in their entirety.

As regards the appellant's natural justice concerns about disclosure of the particular sections of the *Act* alleged to conflict with the *Criminal Code*, the NCQ summarized the issue of potential conflict as follows:

> The Ministry's argument that potential video surveillance records are excluded from the scope of the *Act* is based on the provisions of Part VI of the *Code* as applied to that type of record by section 487.01(5).

The NCQ then invited representations on the broadly framed issue of "…whether potential video surveillance records, if they exist, are constitutionally excluded from the scope of the *Act*, including whether the provisions of the *Code* in relation to potential video surveillance records are 'operationally incompatible' with the *Act* such that records of this nature are excluded from the scope of the *Act*." The NCQ also quoted extensively from Order P-344, which found such "operational inconsistency" between the *Criminal Code*, as it existed at that time, and the *Act*.

In my view, the information provided to the appellant gives a sufficient description of the issue to permit the appellant to make effective submissions.

DISCUSSION:

Existence of Category 4 Records

The Ministry's references to the "potential fourth category [of records], videotaped surveillance records obtained under Parts VI (wiretap) and XV of the *Criminal Code*" in this appeal have taken different forms. In its initial decision letter dated December 6, 2000, the Ministry identified the existence of 27 videotapes and 185 photographs, but also stated that "the existence of any further information cannot be confirmed or denied in accordance with section 14(3) and 21(5) of the *Act*." These two sections allow the Ministry to refuse to confirm or deny the existence of records where the law enforcement or personal privacy exemptions at sections 14 and 21 of the *Act*, respectively, would apply.

In an amended decision letter issued on January 23, 2001 during the mediation stage of this appeal, the Ministry indicated that it had conducted further searches and located additional records. The Ministry advised the appellant that it now had identified 32 videos and 189 photographs, and stated that it was withdrawing its reliance on sections 14(3) and 21(5). The Ministry stated that it was claiming sections 14 or 21 as the basis for denying access to all of the records.

In a further decision letter issued during mediation, dated May 24, 2001, the Ministry referred to the request for "videotapes and photographs". This letter advised the appellant that the Ministry was withdrawing its reliance on one of the previously claimed clauses in section 14, that it had decided to grant access to two aerial videos and 62 photographs, and that the "remaining exemptions still apply to the balance of responsive records." The Ministry went on to advise the appellant, with a copy to this office, that:

> The Ministry will, however, advance an argument, in that VI and XV of the *Criminal Code* speak to the issue of the release of 19 tapes and 39 photographs.

In other words, the Ministry, in its letter of May 24, 2001, disclosed the existence of the records that would eventually be described as falling within "Category 4" to the appellant, and to this office. It also disclosed how many of these records had been located, and their nature. As a result, my initial Notice of Inquiry in this matter referred to the Ministry's statement that parts VI and XV of the *Criminal Code* applied to 19 of the videos and 39 photographs. Under Issue D,

the Notice of Inquiry asked "[w]hether Parts VI and XV of the *Criminal Code* apply to the records at issue". It went on to refer to the Ministry's claim regarding the 19 videotapes and 39 photographs, asking the Ministry how these parts of the *Criminal Code* apply and which videotapes and photographs are covered by these parts.

After this point, the Ministry's manner of referring to these videotapes and photographs changed. In its submissions responding to the first Notice of Inquiry, the Ministry identified four categories of responsive records, which I have adopted in my orders in this appeal. As regards records that might be subject to Parts VI and XV of the *Criminal Code*, the Ministry stated:

> The appellant's request is sufficiently broad to include a potential fourth category, videotaped surveillance records obtained under parts VI (wiretap) and XV of the *Criminal Code*. The Ministry finds itself in a position where it cannot confirm or deny whether record(s) were gathered under that authority because to do so would constitute a criminal offence. The Ministry submits that any request for records obtained pursuant to the combined operation of the wiretap and video surveillance warrant provisions of the *Code* are excluded from the scope of the *Act*.

The Ministry asked that its representations regarding the Category 4 records not be shared with the appellant, and I decided to keep them confidential at that time. However, for reasons that will be outlined below, it is no longer necessary to withhold information about the existence or non-existence of the Category 4 records, and I am revealing this submission, and later in the order will reveal other submissions by the Ministry and the Attorney General, in order to articulate my reasons.

In her initial representations in response to the NCQ, the appellant stated:

> In this case, the Ministry withdrew its reliance on ss. 14(3) and 21(5) of [the *Act*] (refusal to confirm or deny the existence of a record) on January 23, 2001. The Ministry has disclosed the existence of the records and the number of such records to the Commissioner. The existence and number of "Category 4" records has also been disclosed to the [appellant]. (The [appellant] notes that these disclosures confirm that the Ministry's reliance on s. 193(1) is not genuine. If the records truly fell within s. 193, the Ministry would be breaching the section in confirming the existence of surveillance records.)

In its reply representations, the Attorney General states:

> Contrary to the Appellant's allegations, the Attorney General submits that [the Ministry] did not violate section 193 of the *Criminal Code*. Submissions by [the Ministry] in respect of Parts VI and XV of the *Criminal Code* were framed hypothetically and contained a clear statement that [the Ministry] would not confirm or deny whether any of the records identified in response to the Appellant's broadly worded request had been created pursuant to a Part VI authorization, because to do so would contravene the *Criminal Code*.
>
> …

> The Appellant notes that her conclusions in respect to the nature of the information contained in the potential "Category 4" records arose from the Notice of Constitutional Question authored by the Information and Privacy Commissioner. The Appellant commented at page 3 of her Submission:
>
> > During the initial inquiry stage of this proceeding, the [appellant] was informed only that "[t]he Ministry claims that parts VI and XV apply to the issue of releasing 19 of the videotapes and 39 photographs".] She was not told which of the many sections in parts VI and XV were relevant or given any indication of the Ministry's argument. The Ministry's submissions regarding the Category 4 documents were not disclosed to her.
> >
> > The Notice of Constitutional Question has finally disclosed to the Requester that the section relied on by the Ministry is section 193 of the *Criminal Code*.

In fact, the appellant did not allege that the Ministry had contravened section 193 of the *Criminal Code*; she merely suggested that the Ministry's reliance on section 193 was "not genuine". Moreover, in view of the history of this matter, as outlined above, it is not credible for the Attorney General to suggest that it was this office that disclosed to the appellant the existence of the 19 videotapes and 39 records that the Ministry claims are excluded from the scope of the *Act* by virtue of Parts VI and XV of the *Criminal Code*. This disclosure was in fact made by the Ministry in its decision letter of May 24, 2001 to the appellant, quoted above, in which the Ministry stated that it would "…advance an argument, in that VI and XV of the *Criminal Code* speak to the issue of the release of 19 tapes and 39 photographs". This took place well before I issued the first Notice of Inquiry or the NCQ in this appeal.

The Ministry's approach to the existence of the Category 4 records subsequent to the Notice of Inquiry, as outlined above, and particularly the comments I have just quoted, are premised on the Ministry's view that disclosure of the existence or contents of video surveillance records to me during this appeal, or subsequent disclosures by me or the Ministry, would constitute offences under section 193(1) of the *Criminal Code*. This issue is pivotal to the whole paramountcy question, which I will discuss in detail below. For the purposes of the present discussion, however, it is sufficient for me to indicate that I do not agree that section 193(1) would apply to disclosures to or by me in this appeal.

To summarize:

- The Ministry has abandoned the provisions in the *Act* (sections 14(3) and 21(5)) that contemplate refusals to confirm or deny the existence of requested records.

- The Ministry's decision letter of May 24, 2001 disclosed not only the existence of the Category 4 records but also that they consisted of videotapes and photographs and the number of each, to both the appellant and this office.

- I am not satisfied that disclosure of this information to or by me contravenes section 193(1) of the *Criminal Code*.

In my view, therefore, no purpose is served by continuing to discuss the records as though their existence were hypothetical. As the appellant is already well aware, there are 39 photographs and 19 videotapes in Category 4. However, I will provide this order to the Ministry fourteen days before it is provided to the appellant and the Attorneys General of Ontario and Canada, to permit the Ministry to seek judicial review of this aspect of my order, should it choose to do so, without the issue becoming moot.

FEDERAL LEGISLATIVE PARAMOUNTCY

Introduction

I discussed the doctrine of federal legislative paramountcy in Order P-344, as follows:

> The constitutional doctrine of federal legislative paramountcy can be stated as follows: where valid federal legislation is inconsistent with or conflicts with valid provincial legislation, the federal legislation prevails to the extent of the inconsistency or conflict. For the doctrine to apply, the courts have held that the inconsistency or conflict must amount to an "express contradiction". As Professor Peter Hogg states at page 355 of his book *Constitutional Law of Canada*, (2d ed., 1985):
>
> > The only clear case of inconsistency, which I call express contradiction, occurs when one law expressly contradicts the other. For laws which directly regulate conduct, an express contradiction occurs when it is impossible for a person to obey both laws; or as Martland J. put it in *Smith v. The Queen* [1960] S.C.R. 776, 800, "compliance with one law involves breach of the other".
>
> In the case of *Multiple Access Ltd. v. McCutcheon et al.* [1982] 2 S.C.R. 161, (1982) 138 D.L.R. (3d) 1, the Supreme Court of Canada set out a frequently quoted test for what constitutes "express contradiction" at page 23-4:
>
> > In principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; the same citizens are being told to do inconsistent things; compliance with one is defiance of the other.
>
> The doctrine was also considered in the case of *R. v. Chiasson* (1982) 135 D.L.R. (3d) 499, 66 C.C.C. (2d) 195, [adopted by the Supreme Court of Canada in *Chiasson v. The Queen* (1984) 8 D.L.R. (4th) 767 (S.C.C.)], where the New Brunswick Court of Appeal stated at page 508:

> There may be cases where the continued operation of the provincial legislation would genuinely interfere with the operation of a federal statute. Apart from this, Parliament in legislating respecting a matter should be given scope to decide the ambit of its policies.

The case law appears to establish that "express contradiction" includes both an express conflict in the wording of a federal and provincial statute, as well as a conflict in the operation of the two legislative schemes in a way which interferes with the functioning of the federal scheme.

Citing a more recent edition of Peter Hogg's *Constitutional Law of Canada*, as well as the *Multiple Access* case, the Attorney General submits that:

> [t]he test for determining whether federal legislation is paramount is that of impossibility of dual compliance or express contradiction. As Dean Hogg has stated in his text, "an express contradiction occurs when it is impossible for a person to obey both laws; or as Martland J. stated in *Smith v. The Queen*, "compliance with one law involves breach of the other."

The Attorney General also refers to *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, 176 D.L.R. (4th) 585, which it describes as the Supreme Court of Canada's "most recent decision concerning paramountcy". The Court summarizes the paramountcy doctrine as follows:

> Crucial to the argument is the scope and application of the federal [legislation]. Once that is determined, the provisions of the provincial Act must be examined to see whether "there would be an actual conflict in operation" when the two statutes purport to function side by side. [citation omitted.] In the event of an express contradiction, the federal enactment prevails to the extent of the inconsistency. (at 595, D.L.R.)
>
> . . .
>
> In *Crown Grain Co., Ltd. v. Day*, [1908] A.C. 504, the Privy Council was called upon to consider a comparable issue, namely an alleged operational incompatibility between the federal *Supreme Court Act*, R.S.C. 1906, c. 139, and a provincial *Mechanics' and Wage Earners' Lien Act*, R.S.M. 1902, c. 110. The federal statute provided that an appeal lay to the Supreme Court of Canada "from any final judgment of the highest Court of final resort now or hereafter established in any province of Canada". The provincial statute, on the other hand, purported to make the judgment of the Manitoba Court of Appeal "final and binding" in cases relating to liens. The Privy Council found that the two statutes were in conflict and therefore, through the application of the paramountcy doctrine, that the federal statute must prevail to the extent of the inconsistency. While the reasoning of Lord Robertson in that case is somewhat succinct, it has

been helpfully (and I believe correctly) rationalized by Professor P. Hogg in *Constitutional Law of Canada*, 4th ed. (1997), as follows, at pp. 428-29:

> . . . on a superficial analysis, the dual compliance test is not satisfied: the two laws imposed no duties on the parties to litigation, and both laws could be complied with by the losing litigant in a mechanics lien case not taking an appeal to the Supreme Court. But if the laws are recast as directives to a court that has to determine whether or not an appeal to the Supreme Court is available, the contradiction emerges. A court cannot decide that there is a right of appeal (as directed by federal law) and that there is not a right of appeal (as directed by provincial law). For the court, there is an impossibility of dual compliance and therefore an express contradiction. (at 604 D.L.R.)

In assessing the paramountcy issue in this appeal, I will follow the Supreme Court's approach in determining whether there is an express contradiction or actual conflict in operation between the relevant provisions of the *Criminal Code* and the *Act*.

Is there an "express contradiction" or "actual conflict in operation" between the *Act* and the *Criminal Code* in the circumstances of this appeal?

In Order P-344, I found that the paramountcy doctrine did apply because of an express contradiction between the *Act* and the wiretap provisions in Part VI of the *Criminal Code* as they existed at that time. I stated:

> Section 187 of the *Code* requires that applications and authorizations for wiretap records must be kept confidential, and the application records are sealed by the court. Section 193 provides that disclosure of the existence or the content of a wiretap record is an offence. In my view, there appears to be a conflict between these provisions of the *Code* and provisions of the *Act*. On the one hand, the *Act* includes the principle that decisions of the provincial government regarding access to information should be reviewed independently of government, and section 52(4) of the *Act* authorizes the Information and Privacy Commissioner to require the production of any record in order to carry out this review function "despite any Act or privilege". On the other hand, the *Code* appears to preclude the Commissioner from requiring production of a wiretap application record, and also appears to remove the discretion provided to the head under section 14(3) of the *Act* to confirm the existence of a record where one does exist, and perhaps even where a record does not exist.
>
> In my view, where a request is made for a wiretap application record, and the record exists, there is an express contradiction between the *Act* and the *Code*; to comply with an order for production or to inform the Commissioner of the existence of a wiretap application record, or to do anything other than refuse to confirm or deny the existence of the record to the requester would, in my view, involve a breach of the *Code*. Therefore, applying the doctrine of federal

> legislative paramountcy, the *Code* prevails over the *Act* in situations where a wiretap application record exists.
>
> The situation is more difficult when a record does not exist. The *Code* does not explicitly address the situation where no application for a wiretap authorization has been made, no authorization has been granted, and no interception has been made. In fact, the various provisions of Part VI appear to be based on the assumption that a record does exist.
>
> The institution addressed this situation in its representations, arguing that it is not possible to confirm the non-existence of records in certain cases without creating a situation which would imply the existence of records in other cases. In the institution's view, if it refused to confirm or deny the existence of records in situations where a record does exist, and acknowledged that a record does not exist in certain cases when it doesn't, the pattern of responses provided by the institution would permit accurate inferences to be drawn as to the existence of records, thereby offending the disclosure provisions of the *Code*.
>
> In my view, there is an operational conflict between the *Act* and the *Code* in responding to requests for access to wiretap application records in situations where a record does not exist, and this is sufficient to invoke the doctrine of paramountcy. In reaching this decision I take some comfort from the fact that Part VI of the *Code* does, in effect, provide a disclosure scheme covering situations where wiretap application records both exist and do not exist. Where they exist, section 196 of the *Code* requires the Attorney General of the province in which the application for authorization was made to notify the person who is the subject of the wiretap; where no records exist, the fact that no notification has been received tells the person that records do not exist. Although this is clearly less than an ideal disclosure scheme for situations where records do not exist, in my view, providing a separate disclosure scheme in the *Act* would be operationally incompatible with Part VI of the *Code*. It should also be noted that, according to the institution, it is possible for an individual to apply to a judge of the Ontario Court of Justice (General Division) for a declaratory judgment as to whether any wiretap application records exist.

The Attorney General's submissions in response to the NCQ focus on an alleged conflict between section 193(1) of the *Criminal Code* and the *Act*, particularly the provisions that permit the Commissioner to require production of documents (section 52(4)), and to order institutions to disclose them (section 54). Section 193(1) of the *Criminal Code* creates an offence for the disclosure of the content or existence of an intercepted private communication, which would include records obtained by means of a wiretap. It states:

> Where a private communication has been intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the

> originator thereof or of the person intended by the originator thereof to receive it, wilfully
>
> (a) uses or discloses the private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or
>
> (b) discloses the existence thereof,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Section 193 of the *Criminal Code* was amended after Order P-344 was issued. In particular, the exception at section 193(2)(a) was amended to state:

> Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or any part thereof or who discloses the existence of a private communication in the course of or for the purpose of giving evidence in any civil or criminal proceedings **or in any other proceedings in which the person may be required to give evidence on oath**" (my emphasis).

Section 193(3) also creates an exception to the offence created by section 193(1). It states:

> Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication where that which is disclosed by him was, prior to the disclosure, lawfully disclosed in the course of or for the purpose of giving evidence in proceedings referred to in paragraph 2(a).

By amendments passed in 1993 and 1997, the federal government added section 487.01 to Part XV of the *Criminal Code* to deal with warrants for video surveillance and other investigative methods not contemplated in Part VI. For the purposes of this discussion, it is important to note that section 193, among other provisions within Part VI, applies to video surveillance records by virtue of section 487.01(5), which states:

> The definition "offence" in section 183 and sections 183.1, 184.2, 184.3 and 185 to 188.2, subsection 189(5), and sections 190, 193 and 194 to 196 apply, with such modifications as the circumstances require, to a warrant referred to in subsection (4) as though references in those provisions to interceptions of private communications were read as references to observations by peace officers by means of television cameras or similar electronic devices of activities in circumstances in which persons had reasonable expectations of privacy.

Section 52(8) of the *Act* provides that, in conducting an inquiry under the *Act*, "[t]he Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry, and for that purpose the Commissioner

may administer an oath." This suggests that the exception at section 193(2) of the *Criminal Code* would now apply to a person who discloses the existence or content of video surveillance records in the course of, or for the purpose of giving evidence in, an inquiry before the Commissioner.

This interpretation was not possible when I issued Order P-344 because at that time, the exception provided by section 193(2) to the offence created by section 193(1) was only available "in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which he may be required to give evidence on oath **where the private communication is admissible as evidence under section 189 or would be admissible under that section if it applied in respect of proceedings**" (my emphasis). Section 189(4), since repealed, stated that "[a] private communication that has been intercepted and that is admissible as evidence may be admitted in any criminal proceeding or in any civil proceeding **or other matter whatsoever respecting which Parliament has jurisdiction**, whether or not the criminal proceeding or other matter relates to the offence specified in the authorization pursuant to which the communication was intercepted" (my emphasis). Clearly, an inquiry before the Commissioner is not an "other matter respecting which Parliament has jurisdiction", and therefore information about an intercepted communication would not have been "admissible as evidence under section 189" at that time.

In its representations in response to the original Notice of Inquiry in this appeal, the Ministry submitted that the conclusion reached in Order P-344 should apply to video surveillance records because they fall within Part VI of the *Code* and are subject to the same confidentiality and secrecy requirements that form part of the wiretap authorization scheme.

As noted previously, the Ministry did not provide representations in response to the NCQ. However, the Attorney General did. With respect to the offence at section 193 of the *Criminal Code*, the Attorney General submits:

> … the exception to the offence of disclosure created by s. 193(2) of the Code does not apply to the conduct of an inquiry in respect of video surveillance records under [the *Act*]. Subsection 193(2) appears, on its face to allow for disclosure by an institution to the Commissioner in the course of an inquiry, a 'proceeding' in which evidence may be required to be given under oath. This exception however, does not extend to a subsequent order by the Commissioner for disclosure to the person who has requested access to the records. Disclosure by an institution pursuant to an order of the Commissioner plainly does not qualify as giving evidence in a proceeding under oath and would therefore amount to a breach of the *Code*. …
>
> The exception to the disclosure offence under s. 193(1) of the *Code* has only been applied to allow the limited release of records in proceedings where the subject communications were relevant to an issue (other than the issue of disclosure *per se*) in the proceedings themselves. In contrast, the sole reason for the release of videotape records to the Commissioner would be for a determination on the issue of public disclosure, which is plainly prohibited by s. 193(1).

The Attorney General apparently concedes that section 193(2) would permit the existence and content of wiretap and video surveillance records to be disclosed to the Commissioner during an inquiry. Its argument hinges on the view that any further disclosure would be prohibited. In this regard, the Attorney General fails to address the further exception at section 193(3), which I referred to in the NCQ. This section, reproduced above, permits the disclosure of wiretap or video surveillance information that has been "lawfully disclosed in the course of or for the purpose of giving evidence in proceedings referred to in paragraph 2(a)".

The appellant submits that section 193(1) cannot apply for several reasons. First, she suggests that a videotape of participants in a lawful public protest is not an "intercepted private communication". In this regard, she relies on the definition of "private communication" in section 183 of the *Criminal Code*, and argues that any videotape that did not record oral communications, or any derivative photograph, does not qualify. In my view, this argument cannot succeed because section 487.05(5) applies the offence at section 193, with necessary modifications, to a warrant that authorizes video surveillance "as though references in [section 193] to interceptions of private communications were read as references to observations by peace officers by means of television cameras or similar electronic devices of activities in circumstances in which individuals had reasonable expectations of privacy." In my view, the wording of this provision is sufficiently broad to include video footage and derivative photographs whether or not any oral information was captured.

Even if there was an intercepted private communication, the appellant submits that the "originators" of the communication are the protesters, most of whom have consented to disclosure. In Order PO-2033-I, I found that the public interest override at section 23 of the *Act* applied to a number of records, and in reaching that conclusion, I found that consent to disclosure by a number of the protesters "… significantly reduces the seriousness and significance of the privacy issues as they relate to the various individuals who occupied Ipperwash". However, in order to conclude that the consent-based exception to the offence at section 193(1) is established, I would have to be persuaded that **all** individuals depicted had actually consented, either expressly or by implication. In my view, the evidence before me is not sufficient to support such a conclusion and I am therefore not able to rely on this exception to section 193(1)

Referring to section 487.01(5), the appellant also cites authorities to support her position that protesters in a public place have no "reasonable expectation of privacy" as required for a warrant under section 487.01(4). In my view, that is an issue for the court to decide on an application for a section 487.01(4) warrant, and if a warrant was in fact issued, the judge who issued it must have decided that there was a reasonable expectation of privacy.

However, the appellant also submits that "[t]he *Criminal Code* now permits the disclosure of the existence and content of private communications in the course of a proceeding in which a person may be required to give evidence on oath, which would include proceedings before the Assistant Commissioner". She also submits that "after disclosure to the Assistant Commissioner in these proceedings", section 193(3) would apply to permit further disclosure pursuant to an order. I agree with these submissions. The amendments to section 193(2)(a) and the repeal of section 189(4) of the *Criminal Code* provide a clear indication of Parliament's intention to broaden this exception to the offence created by section 193(1). Parliament removed the test of admissibility

and the requirement that the matter be one over which Parliament "has jurisdiction", with the result that the exception now permits the disclosure of information "in the course of" or "for the purpose of giving evidence in" a virtually unlimited range of tribunal proceedings, as long as the tribunal in question is able to require witnesses to give evidence under oath. As noted previously, the Commissioner is so empowered by section 52(8) of the *Act*.

The Attorney General cites three cases to support its position, referred to above, that section 193(2) "has only been applied to allow the limited release of records in proceeding where the subject communications were relevant to an issue (other than the issue of disclosure *per se*) in the proceedings themselves", implying that for this reason, the exception could not apply in the circumstances of this appeal. *R. v. Guess* (2000), 148 C.C.C. (3d) 321 (B.C.C.A.), leave to appeal dismissed [2000] S.C.C.A. No. 628 (S.C.C.) concerned an order for disclosure of intercepted communications in order to ensure adequate disclosure to defence counsel notwithstanding the offence provision relating to intercepted radio communications at section 193.1(1) of the *Criminal Code*. In *R. v. Siemens* (1997), 122 C.C.C. (3d) 552 (Alta. C.A.), the Alberta Court of Appeal stated that it was prepared to "assume without deciding that Crown disclosure to the defence of relevant intercepted communications falls within the exception in [subsection 193(2)(a)] 'in the course of or for the purpose of giving evidence in any civil or criminal proceedings …'" and focused primarily on the extent and nature of the Crown's disclosure obligations in connection with a criminal trial. *Tide Shore Logging Ltd. v. Commonwealth Insurance Company* (1979), 47 C.C.C. (2d) 215 (B.C.S.C.) dealt with a motion in a civil trial to obtain production of an intercepted communication. This case was decided before the amendments referred to above that broadened the exception at section 193(2)(a). The Court found that the disclosure sought by the applicant, even before trial, was "for the purpose of giving evidence" in a civil trial and therefore subject to the exception at what is now section 193(2)(a). In my view, none of these cases supports the proposition that the exception at section 193(2)(a) does not apply to proceedings before the Commissioner.

Therefore, I am satisfied that section 193(2)(a) allows the Ministry to inform the Commissioner of the existence and contents of the Category 4 records "in the course of" proceedings before me, and also "for the purpose of giving evidence" during those proceedings. The Ministry has informed me of the existence of these records and has provided copies of them to me. In turn, I am also satisfied that, subject to the requirements of the *Act*, because this information has been provided to me in "proceedings referred to in paragraph (2)(a)", the exception at section 193(3) would permit me to disclose the existence of the records in this order, as I am doing, and would permit me to order the Ministry to disclose any records that have been provided to me, unless an exemption in the *Act* applies. Therefore, in my view, section 193, as amended since I issued Order P-344, is not a source of express contradiction or actual conflict in operation with the *Act*.

As noted, the Ministry had also argued that the provisions at section 187 of the *Criminal Code*, requiring that the contents of the court's "sealed packet" containing the wiretap application materials be kept confidential, also create conflict with the *Act*. The Ministry did not elaborate on this argument, and the Attorney General did not refer to it. In any event, the Category 4 records that are the subject of this inquiry are the results of video surveillance, not "sealed packet" records.

Although no other provisions of the *Criminal Code* were identified by the Ministry or the Attorney General as possible sources of conflict with the *Act*, I have reviewed the other provisions of Part VI of the *Criminal Code* that are made applicable to video surveillance under Part XV and I find that none creates such a conflict.

Therefore, I find that there is no express contradiction or actual conflict in operation between the *Act* and the provisions of Parts VI and XV of the *Criminal Code*, including sections 187 and 193(1), in the circumstances of this appeal. In my view, this is sufficient to resolve the issue, since paramountcy can only apply in a case of express contradiction or actual conflict in operation.

However, the Attorney General makes further submissions regarding the overall schemes of the legislation and the policy issues raised by the relationship between the *Act* and the *Criminal Code*.

The Attorney General cites *Michaud v. Quebec (Attorney General)*, 109 C.C.C. (3d) 289, 138 D.L.R. (4th) 423 (S.C.C.) to support its position that "[t]he Supreme Court of Canada has expressed concern for the risk of disclosure of the focus of the police investigation, the general modus operandi of police electronic surveillance, as well as the enormity of the work involved in producing the records as reasons for limiting disclosure of electronic surveillance records." The Attorney General notes that in *Michaud*, the target of electronic surveillance was seeking access to the sealed packet created in connection with the original wiretap application, and the information that was recorded. This was done by way of a motion under the former section 187(1)(a)(ii) of the *Criminal Code*, in the hopes of finding evidence on which to sue for damages as the result of an unlawful wiretap search. The Court recognized only limited or exceptional circumstances in which the target would be entitled to disclosure.

In a related argument, the Attorney General also submits that:

> [i]nterpreting the *Criminal Code* as the appellant suggests would mean that the target of a criminal investigation could apply to the Information and Privacy Commissioner for access to video surveillance records at any time. This could have profound effects on the conduct of criminal investigations, matters well beyond the expertise of the Information and Privacy Commissioner.
>
> The *Criminal Code* provides for a comprehensive treatment of the obtaining and releasing of video surveillance records. Consequently, the Information and Privacy Commissioner's authority under [the *Act*] does not extend to ordering the release of this information because to do otherwise would constitute a direct operational conflict.

In my view, a request for disclosure pursuant to the *Criminal Code* is not comparable to a request for access under the *Act*, which is a completely separate scheme with its own safeguards to protect law enforcement functions as well as personal privacy. I do not find *Michaud* persuasive in the context of the *Act*.

The Attorney General's submissions overlook the fact that the *Act* contains exemptions to protect the very interests that are at the heart of the privacy scheme in Part VI of the *Criminal Code*. For example, there is a strong parallel between the grounds for exemption provided under the section 14 law enforcement exemption in the *Act* and the reasons for withholding information requested by a surveillance target under section 187 of the *Criminal Code*.

As noted previously, a finding by me that paramountcy does not apply would not trigger an order for disclosure of the records to the appellant. Instead, any such order would require the Ministry to make an access decision under the *Act*. In making such an access decision, if the Ministry considers that disclosure could reasonably be expected to interfere with an ongoing law enforcement matter or investigation, it could claim the exemptions at sections 14(1)(a) or (b) of the *Act*. In addition, the remaining paragraphs within section 14(1) cover a wide variety of possible harms in the context of law enforcement. These could be claimed where disclosure could reasonably be expected to:

- reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

- disclose the identity of a confidential source of information in respect of a law enforcement matter;

- endanger the life or physical safety of a law enforcement officer or any other person;

- deprive a person of the right to a fair trial or impartial adjudication;

- interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons; or

- facilitate the commission of an unlawful act or hamper the control of crime.

In addition, if disclosure would be an unjustified invasion of personal privacy, the Ministry could claim either the mandatory exemption at section 21(1) of the *Act* or, if the record contains the requester's personal information, the discretionary exemption at section 49(b).

It is also noteworthy that, although the Ministry ultimately decided not to rely on sections 14(3) and 21(5) of the *Act* in this appeal, these sections would permit an institution to refuse to confirm or deny the existence of records that are subject to the law enforcement or personal privacy exemptions in response to other requests under the *Act*.

A review of these exemptions makes it clear that, in developing the access and privacy scheme in the *Act*, the legislature sought to protect the important interests of law enforcement bodies and the kinds of records they would be expected to have, including evidence seized or obtained during a criminal investigation. The Ontario Provincial Police has been subject to the *Act* since it first came into force, and all municipal police forces in Ontario are covered under the province's parallel municipal access legislation, the *Municipal Freedom of Information and Protection of Privacy Act*.

Accordingly, I do not accept the Attorney General's argument that the overall schemes of the *Act* and the *Criminal Code* conflict. I agree with the appellant's submission to the effect that "[I]f the Commissioner determines that s. 193(1) does not apply, … there is no conflict between [the *Act*] and the *Criminal Code*. Instead, the two statutes work jointly to ensure a balance between privacy and freedom of information."

I have already found that there is no express contradiction between section 193 of the *Criminal Code* and the *Act*, nor is there an "actual conflict in operation" in the circumstances of this appeal, and that the application of the paramountcy doctrine is not established. I have also concluded that the overall schemes of these two statutes do not conflict. For these reasons, I find that the *Act* applies to the Category 4 records and I will order the Ministry to make an access decision.

In closing, I would like to touch briefly on the two previous orders that applied the paramountcy doctrine. As I have already indicated, Order P-344 was decided before the amendments to section 193(2)(a), referred to above, were enacted by Parliament. In addition, as the appellant points out, Order P-344 is distinguishable because it dealt with a request for Ministry copies of records in the "sealed packet" referred to in section 187, rather than the results of surveillance which are dealt with in section 193. While the Court's copy of the sealed packet would be within the Court's custody and control and therefore not subject to the *Act* (see Order P-994), a request for copies of documents in the sealed packet in the custody or control of an institution under the *Act* could raise different issues than those addressed in this order. As far as Order P-625 is concerned, it did not analyze the effects of the changes to section 193(2)(a) of the *Criminal Code* that led me to the conclusion I have reached in this order.

FINAL ORDER:

1. Unless the Ministry brings an application for judicial review by **January 10, 2003**, I will publish this order and provide a copy to the appellant and the Attorneys General of Ontario and Canada by **January 15, 2003**.

2. I order the Ministry to make an access decision concerning the Category 4 records in accordance with sections 26, 28 and 29 of the *Act* without recourse to a time extension, and to send a copy of the decision to the appellant by **January 27, 2003**.

3. I further order the Ministry to provide me with a copy of the access decision referred to in Provision 2 when it is sent to the appellant.

Original signed by: December 27, 2002
Tom Mitchinson
Assistant Commissioner