Is Discretion the Last Refuge of Scoundrels?  
A Comment on Criminal Lawyers' Assn v. Ontario (Ministry of Public Safety and Security)

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1. Introduction

Is access to information best left to a set of clearly expressed statutory rules, the well-reasoned discretion of information and privacy decision-makers or the court’s interpretation of overarching constitutional principles? This article explores the desirability of each of these possibilities in the context of Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety and Security). 1

In the relatively arid world of access to information case law, the facts of Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety and Security) stand out in dramatic relief. In 1996 Justice Glithero ordered a stay of proceedings in a first degree murder trial for what was believed to be a mob hit, due to the "abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, [and] negligent breach of the duty to maintain original evidence". 2 After investigating these allegations of misconduct and submitting a 318-page report to the provincial government, the Ontario Provincial Police (OPP) issued a press release stating that there was "no evidence that the officers attempted to obstruct justice by destroying or withholding a vital piece of evidence" and "no evidence that information was withheld from defence was done deliberately and with the intent to obstruct justice". 3 The report was not publicly released. Given the stark discrepancy between Justice Glithero’s conclusions and the OPP’s statement, allegations continued to swirl involving the OPP and a possible cover-up.

Whether or not its public release will end this controversy, there is clearly a pressing public interest in the disclosure of the full OPP report. Such disclosure, however, is being shielded by an act of discretionary authority pursuant to Ontario’s Freedom of Information and Protection of Privacy Act (FIPPA). 4

Because of the public interest at stake in understanding what happened in this case and its implications for the administration of justice in Ontario, the Criminal Lawyers' Association (CLA) sought access to the OPP report, as well as a related memorandum and letter, pursuant to FIPPA. Although all of these items qualified as records "in the custody or under the control of [a government] institution" under the Act and therefore prima facie attracted a right of access, 5 the Ministry of Public Safety and Security refused disclosure, invoking three statutory exemptions to
access: s. 14 (law enforcement), s. 19 (solicitor-client privilege) and s. 21 (personal information). On appeal to the Information and Privacy Commissioner of Ontario, the Assistant Commissioner held that the exemptions were all properly invoked but that the personal information exemption was subject to the s. 23 public interest override and, on the facts of the case, met the test of "a compelling public interest in the disclosure of the record [that] clearly outweighs the purpose of the exemption". Nevertheless, because the public interest override does not apply to the other two exemptions, they were determined to properly shield the information at issue from public disclosure. The CLA appealed, arguing that by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions, s. 23 of FIPPA infringes both s. 2(b) of the Charter and the underlying constitutional principle of democracy and is not justified under s. 1 of the Charter. The Ontario Court of Appeal, in a split decision, agreed.

This comment argues that many of the constitutional arguments presented both at trial and at the Court of Appeal misunderstand the proper significance of the fact that both s. 14 and s. 19 are discretionary exemptions. The arguments presented at trial and on appeal assume that because the public interest override does not apply to either the law enforcement or solicitor-client privilege exemptions there is no way for the public interest to be considered in relation to the access request at issue. However, we argue that the proper exercise of discretion under s. 14 or s. 19 does implicate contemplation of the public interest and, moreover, that this exercise of discretion is subject to review by the courts on a reasonableness standard.

There are several implications to this argument. First, it suggests that, contrary to the Ontario Court of Appeal holding, constitutional argument is not required to compel the consideration of the public interest. Second, even if one can successfully make the argument that the failure to extend the public interest override to these exemptions is a constitutional failure, the s.1 argument is much more difficult than the Ontario Court of Appeal suggests. The Court of Appeal held that the minimal impairment test could not be met because subjecting ss. 14 and 19 to a public interest override provision would be more minimally impairing than not. However, if, as we argue below, the discretionary exemptions are interpreted to themselves necessitate a public interest consideration, then this argument is harder to make. The difference between the public interest considered pursuant to an exercise of discretion and pursuant to a statutory override largely turns on the standard of judicial scrutiny applicable to each decision; it is not clear that the minimal impairment test requires the courts to endorse a stricter standard of scrutiny with regard to the latter. Third, although this argument seems to undercut the radical potential of finding a
constitutionally entrenched right of access to information, we suggest that judicial review of
discretion has the potential to guide and, where appropriate, constrain government action under
FIPPA, and related access statutes, with greater consistency and effectiveness than constitutional
review would permit. Discretion is the gateway to many problems in relation to the implementation
of a robust access to information regime; judicial review of that discretion is an important part of
the solution to those problems. Finally, this discussion of discretion points to a different law reform
agenda regarding the design of administrative procedures *vis-à-vis* access to information that will
properly discipline its exercise outside of the review process.

2. Discretion and FIPPA

(1) The OCA Decision

The CLA made two constitutional arguments in relation to the failure of the s. 23 public
interest override to apply to both the law enforcement and solicitor-client privilege exemptions.
The first was that this failure violated the constitutional principle of democracy. The second was
that it violated s. 2(b) of the Charter, guaranteeing "freedom of thought, belief, opinion and
expression, including freedom of the press and other media of communication", and that this
violation was not saved by s. 1.

At trial, Justice Blair held that it was "redundant" to apply the unwritten principle of
democracy in order to find a right of access, for this principle "already underlies and informs the
freedoms outlined in s. 2(b)". Similarly, in the Ontario Court of Appeal decision LaForme J.A.
held that it was unnecessary to consider the question as "the s. 2(b) jurisprudence already accounts
for democracy". The case therefore turned on the Charter arguments regarding s. 2(b).

The conceptual difficulty with the Charter claim is that it seems to require the court to
visit the controversial question of whether s. 2(b) protects both positive and negative rights. The
proposition that the failure of the government to extend the public interest override to the
impugned exemptions contemplates a right of access to information -- whether a right to
information necessary to enable expression or a right *to* information itself -- that would impose a
positive obligation on the government to actively provide such information rather than simply
refrain from interfering with a citizen's attempts to gain access. Although there are some cases that
would seem to open the door to such a finding, there has been a general judicial reluctance to walk
through this door. In this vein, at trial Justice Blair refused to accept the analogy between access to
information and either the "postering/leafleting" cases where the Supreme Court has found a
positive obligation to provide access to public property for the purposes of speech in some circumstances or the open courts decisions, where the Supreme Court has endorsed a right of access to information in the judicial and quasi-judicial context. 10

Very likely because of these difficulties and controversies, the majority opinion of the Ontario Court of Appeal avoided a direct answer on the s. 2(b) argument. LaForme J.A. attempted to eschew the thicket of positive and negative rights with the following reasoning: 11 “Where a record falls under a discretionary exemption, the Crown does not commit a positive act if it decides to disclose the record. Rather, it commits a positive act if it refuses to disclose the record, because the obligation pursuant to the purpose of the Act is disclosure. Falling within a discretionary exemption does not change this position, as it would with a mandatory exemption.”

And, later: "As I see it, pursuant to the Act itself, the lack of government action would automatically lead to disclosure." 12 Finally, in a subsequent discussion of whether there was purposeful infringement of s. 2(b), LaForme J.A. held inter alia that "in choosing not to disclose the records necessary to enable the CLA to express itself on an issue found to be of compelling public interest, the Minister's exercise of discretion in this fashion has the effect of restricting expressive content". 13

The majority therefore got around the problem of whether s. 2(b) protects positive rights by interpreting the discretionary exemptions in a very peculiar manner. LaForme J.A. essentially held that the statute provided a default right of access to information if the information in question fell under a discretionary exemption. Understood in this way, exercising discretion was a government act that interfered with this right of access and therefore attracted Charter scrutiny. Apart from the statutory interpretation questions raised by this method of interpreting the statute -- that there was a "right" conferred by the statute the scope of which was wider than that articulated in the statute itself -- this involves, in our view, a misreading of the significance of the discretionary exemptions.

All exemptions in FIPPA are either discretionary or mandatory. If a requested record falls under a mandatory exemption, then access must be denied. If a requested record falls under a discretionary exemption then a Minister "may refuse" to disclose it. Assuming that there are legitimate reasons for an exemption (this was not in dispute in the case), then it is better, especially in a political culture that regards access to information as a democratic norm, to have a discretionary exemption than a mandatory one. This is because a discretionary exemption calls for disclosure as a matter of course and subjects any decision to deny access to the scrutiny of
administrative law norms. LaForme J.A.'s decision, however, has the effect of placing decisions on both discretionary and mandatory exemptions outside the parameters of administrative law; discretionary exemptions are singled out for constitutional scrutiny.

LaForme J.A.'s decision to subject discretionary exemptions to constitutional analysis betrays two more important misunderstandings of the nature of the discretionary exemptions at issue. First, the decision fails to recognize that a public interest override is necessary for the public interest to be considered. Second, the exercise of this discretion is treated as effectively unreviewable because it is taken out of the realm of administrative law and instead thrown into the sphere of constitutional law.

The first misunderstanding is well illustrated in LaForme J.A.'s holding on the s. 1 Charter issue. He found that the impugned provisions fail s. 1 because they do not impair expression as little as possible. In contrast, he held that applying the public interest override to the law enforcement and solicitor-client privilege exemptions would meet the minimal impairment test because it would ensure "that any infringement on free expression is limited to situations where the public interest in disclosure does not outweigh the purpose of the exemption". [14]

The second misunderstanding is well evidenced by LaForme J.A.'s comments regarding independent review: [15]

In this case, the objectives of the Act are not met because there is no independent oversight of the Minister's decision not to disclose. This is because the Commissioner has no power to review the Minister's decision. The exemption, therefore, is not exercised in a limited way since the Act does not provide for the possibility that the public interest might outweigh the purpose for the exemption. Thus, the general right to access to information is thwarted. The only salutary effect the Ministry can point to is that it has preserved its ability to conduct reviews of the police and Crown Attorneys in private.

LaForme J.A. treats the exercise of discretion as an act that is effectively insulated from review.

In this comment, we argue that the exercise of discretion pursuant to FIPPA both demands a consideration of the public interest and is subject to judicial review on a standard of reasonableness. On this view, the difference between a discretionary exemption alone and one subject to the public interest override lies not in the possibility of accommodating a public interest balancing exercise but rather in what standard of review this balancing should be subject to. This approach calls for a very different kind of analysis than that engaged in by the Ontario Court of Appeal.
(2) Exercise and Review of Discretion

Discretion is, in essence, judgment. When a legislative provision indicates that an official "may" take certain action, it constitutes a delegation of public authority to the judgment of that official. Public decision-makers cannot lawfully exercise discretionary authority in order to advance their own or other private interests. The exercise of statutory discretion necessarily involves consideration of the public interest and the purposes of the empowering statute.

Within the general access to information community it is widely understood that the exercise of discretion requires the consideration of the public interest. This is perhaps made clearest by ongoing debates regarding the federal Access to Information Act (AIA). There have been consistent calls for the reform of the AIA, including proposals for a general public interest override. However, the 2002 Task Force rejected such an override, arguing that "Discretionary exemptions already imply a balancing of the public interest in protecting the information, and the public interest in disclosure." This was also the understanding when the AIA was first passed. The 1977 Federal Green Paper, in outlining and discussing a number of proposed exemptions, noted: “It is perhaps worth emphasizing that these exemptions are intended to require case-by-case judgments of the balance of public interests which relate to each application. It should be recognized that the passage of ” time and the change of circumstances can alter fundamentally the balance of public interests. No matter how broad the potential application of any set of exemptions, then, the government will need to assess each case on its merits at a particular time, and, insofar as exemptions are applied to deny documents, to make a specific case for the damage to the public interest which would attach to release of the documents in question.

Therefore a strong case can be made that in the context of access to information the very point of discretionary exemptions -- in contrast to mandatory exemptions -- is to allow the decision-maker to engage in a public interest balancing exercise. The purpose of ensuring consideration of the public interest is not to restrict access but to enhance it.

It is here also important to note one aspect of the 1977 Green Paper that is helpful in illustrating the development of administrative law norms and how they should apply in the context of access to information. The Green Paper indicates that balancing the public interest through the discretionary authority of the Minister rather than a statutory public interest override is superior because it insulates the decision from judicial review: 20
To require that [a judge] become a judge of a Minister's actions, that he should have the power to replace the opinion of the Minister with his own opinion, is to change his role entirely and to bring him into the political arena where he cannot properly defend himself. All of this could seriously threaten the independence of the courts and thereby place in jeopardy our present judicial system.

Under our current conventions, it is the Minister who must remain responsible for deciding whether to refuse or grant access to documents and this responsibility is a constitutional one owned to his Cabinet colleagues, to Parliament, and ultimately to the electorate. A judge cannot be asked, in our system of government, to assume the role of giving an opinion on the merits of the very question that has been decided by a Minister. There is no way that judicial officer can be properly made aware of all the political, economic, social and security factors that may have led to the decision in issue. Nor should the courts be allowed to usurp the constitutional role that Parliament plays in making a Minister answerable to it for his actions.

While this might have been an acceptable view regarding the relative roles of the Minister, Parliament and the courts in 1977, there is no question that it has been overtaken by contemporary developments in administrative law. The question, therefore, is not whether the public interest should be considered but who should consider it, whether the ultimate decision can be reviewed, and what is the standard of review.

Indeed, in the context of FIPPA it is now well accepted that the exercise of discretion can be reviewed both by the Information and Privacy Commissioner and by the courts. For example, the Information and Privacy Commissioner has held that she may determine whether the institution failed to exercise discretion and whether it erred in exercising its discretion. However, if the Commissioner finds such an error, the office must send the matter back to the government institution to be reconsidered rather than substitute its own exercise of discretion. One of the bases upon which the Commissioner may find an error in exercising discretion is if the decision "fails to take into account relevant considerations", which include:

- the purposes of the Act, including the principles that
- information should be available to the public
- individuals should have a right of access to their own personal information
- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
• the relationship between the requester and any affected persons
• whether disclosure will increase public confidence in the operation of the institution
• the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
• the age of the information
• the historic practice of the institution with respect to similar information

This list is, in reality, a non-exhaustive list of factors that go into a case-by-case balancing of the reasons for disclosure and the reasons for refusing disclosure. Although the "public interest" is not named as such, it is arguably the tie that implicitly binds each of the particular factors. This is particularly true if we accept the proposition that discretion must be exercised in conformity with the purposes of the Act and understand that the very reason for the purposes as stated is to promote accountability and democratic decision-making. It is also important to note that one of the purposes of FIPPA is that "decisions on the disclosure of government information should be reviewed independently of government". 23

Therefore it is clear that, in exercising discretion in relation to one of the discretionary exemptions under FIPPA, the Minister is called upon to balance the public interest in disclosure against the public interest in refusing disclosure and that this decision is reviewable by the Information and Privacy Commissioner and the courts.

(3) Role and Significance of the Statutory Override

If a discretionary exemption calls for an exercise of discretion that both involves a public interest balancing and is reviewable by the Information and Privacy Commissioner as well as the courts, then a question is raised as to the role of the s. 23 public interest override. That is, does this interpretation of the discretionary exemptions render s. 23 redundant, thereby violating the presumption that statutes are "internally consistent and coherent"? 24

We argue that s. 23 is not redundant. There are two important differences between it and the discretionary exemptions. The first is that a statutory override permits the Information and Privacy Commissioner to substitute her own view regarding the public interest balancing for that of the Minister. The second is that s. 23 requires disclosure only where there is a "compelling" public interest that "clearly outweighs" the interest protected by the exemption. In contrast, when exercising discretion a Minister may disclose records even where the public interest is not
"compelling" and does not reach the threshold of "clearly" outweighing other interests. This can explain why there is room for both the exercise of discretion and a statutory override: pursuant to her discretion, the Minister may order the disclosure of records in more circumstances than can be done pursuant to s. 23.

Even if we are correct in asserting that a statutory public interest override is not needed in order to require the consideration of the public interest in the exercise of discretion, it still might be the case that a statutory public interest override is desirable, given the differences just outlined. This returns us to the constitutional argument, because the only way to require such an override is to make the case that the narrow parameters of its current applicability constitute a constitutional defect. In this comment, we do not take a position on the relative merits of such a constitutional argument. However, the argument regarding discretion that we have put forward will have an impact on the nature of the s. 1 arguments that will need to be made in light of a finding of a breach of s. 2(b).

As the Supreme Court noted in Slaight Communication v. Davidson, the notion of reasonableness in administrative law and the test for justifying a constitutional infringement as a reasonable limit under s. 1 are closely linked. 25

Slaight is a foundational case in the law of judicial review of discretionary decision-making. In Slaight, the Supreme Court addressed a challenge to a labour arbitrator's decision in the context of a wrongful dismissal allegation. The arbitrator had ordered the employer to write a letter of recommendation for the former employee who had challenged his dismissal; the arbitration also prevented the employer from commenting on the employee's performance beyond the contents of the letter. The labour arbitrator found that the employee had been unjustly dismissed. In fashioning a remedy, he employed the discretionary authority contained in s. 61.5(9)(c) of the Canada Labour Code, 26 which authorized him to "do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal". 27 Justice Lamer (as he then was), dissenting in part but with support of the entire court on this issue, suggested a two-pronged approach to review of discretionary decision-making under the Charter:

1. Where the decision was made pursuant to legislation that either expressly or by necessary implication confers the power to infringe a Charter right, the legislation itself will be the subject of Charter scrutiny.
2. Where the legislation confers an imprecise discretion and does not authorize, either expressly or by necessary implication, a violation of a Charter right, the order will be the subject of review. 28

The public interest balancing demanded by the discretionary exemption falls into the second category. Despite LaForme J.A.'s finding on the relation between access to information and the right to expression, FIPPA's discretionary exemption provision does not confer a power to infringe a Charter right. Any potential Charter infringement that might result depends on how the discretion is exercised in particular circumstances. By extension, where it is shown that the exercise of this discretion does infringe the Charter in the circumstances, the key question will be the same under the Charter analysis as it is under the administrative law analysis -- namely, was the exercise of discretion reasonable?

Moreover, it is not clear that LaForme J.A.'s argument regarding the minimal impairment test has the force he claims. He argued that the fact that the law enforcement and solicitor-client privilege exemptions were not subject to the s. 23 override meant that FIPPA failed to minimally impair s. 2(b) rights by not providing a mechanism for considering the public interest. Our analysis indicates that the relevant comparison for s. 1 analysis is between a regime that involves a public interest balancing reviewable on a standard of reasonableness and a regime that involves a public interest balancing reviewable on a standard of reasonableness (see below) unless a "compelling public interest" in disclosure "clearly outweighs" the purpose of the exemption, in which case the standard is effectively correctness. 29 On this comparison it is much less likely that a court would find that the lack of a s. 23 override meant that the legislation failed the minimal impairment test.

3. The Standard of Review: What is Reasonableness?

The Information and Privacy Commissioner has held that a government institution errs in exercising its discretion under FIPPA where

• it does so in bad faith or for an improper purpose
• it takes into account irrelevant considerations
• it fails to take into account relevant considerations 30

These criteria are identical to the traditional grounds of judicial review over the exercise of executive or ministerial discretion. This was formerly referred to as the "misuse of discretion" or the "ultra vires " doctrine, 31 but in Baker v. Canada (Minister of Citizenship and Immigration) 32 the Supreme Court merged this standard of review for discretion with the broader standard of
review doctrine for all administrative decision-making, including that of adjudicative tribunals. These criteria then were adopted as *indicia* of the patent unreasonableness standard of review, which was appropriate where the highest degree of deference to an administrative decision-maker applied. 33 Recently, there has been discussion of the need to return to a distinct standard of review regime for discretionary determinations. 34 For now, following the court's last revamping of the standard of review doctrine in *New Brunswick (Board of Management) v. Dunsmuir*, a standard of reasonableness (representing the fusion of the previous reasonableness *simpliciter* and patent unreasonableness standards) applies to the judicial review of discretionary decision-making. While these doctrinal debates reflect the dynamic nature of the standard of review, they all confirm that a court would review the exercise of a statutory discretion on the same basis as the criteria set out in the IPC's approach to the review of government decisions under FIPPA.

The standard of review in administrative law addresses the question of the grounds on which and the circumstances in which a court may interfere with the decision of an administrative decision-maker. The answer to this question must start first from the principled proposition that no administrative act may lay absolutely outside the scope of judicial interference (or there would be no mechanism by which to ensure the rule of law is respected by the executive), and second, from the practical proposition that courts do not have the institutional competence, capacity or legitimacy to intervene in any administrative setting as they wish. This same logic must apply to the IPC's review of the decisions relating to access to information of other governmental bodies.

The courts have emphasized that the specialized nature of information and privacy decision-making and the importance of government oversight necessitate significant deference to the IPC's decisions. 37

The second contextual factor is the relative expertise of the Commissioner and the court both in relation to the Act generally and to the particular decision under review. One of the principles the Act is expressly founded on is that disclosure decisions should be reviewed independently of government. It creates the office of the Commissioner to deliver on that principle and gives to the Commissioner broad and unique powers of inquiry to review those decisions. It constitutes the Commissioner as a specialized decision maker. In my view, this implies that the legislature sees the Commissioner as the appropriate reviewer of disclosure decisions by government. The very structuring of the office and the specialized tools given to it to discharge one of the Act's explicit objectives suggests that the courts should exercise deference in relation to the Commissioner's decisions.

Courts have consistently found that the interpretations by the Ontario Information and Privacy Commissioner of the *Freedom of Information and Protection of Privacy Act* should be reviewed on
a standard of reasonableness. However, as to whether solicitor-client privilege applies to a given communication -- for example, where s. 19 is engaged -- courts have applied the less deferential standard of correctness to reviewing the decisions of the information and privacy commissioner. As the standard of review jurisprudence discloses, the closer the matter is to a judicial function the less deference will apply, while the more the matter involves special expertise, factual findings or policy preferences the more a court is likely to find a basis for deference.

Given that the courts have recognized that the level of deference owed an IPC decision is contingent on the particular decision at issue, the question is raised: Where judicial deference to the discretionary judgments of the IPC is at issue, or where deference by the IPC toward the discretionary judgments of other governmental institutions is at issue, what is the scope of "reasonableness"? This question was addressed in some detail in Dunsmuir. The majority in Dunsmuir directs the reasonableness assessment toward "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes". The new standard of reasonableness is described by the majority in the following terms:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Dunsmuir has been applied in the setting of information and privacy adjudication where courts have concluded that the "new" standard of reasonableness will be applicable, particularly where a commissioner is exercising a discretionary power under her or his empowering legislation.

Dunsmuir itself did not involve a review of an exercise of discretion. However, Binnie J., in his concurring reasons, observed that the new framework would inevitably have to apply to discretionary settings as well. Generally, the review of the exercise of discretion will involve a standard of review of reasonableness because, by definition, discretion involves a range of possible, acceptable outcomes. In other words, to say that a decision-maker has discretion is to say
that there is not a single right or wrong answer that must be given. The one exception to this position is where the discretion involves a decision that applies a constitutional right.

Since one of the premises of deference is that the administrative decision-maker has greater expertise relative to the courts, it follows that courts would not find a rationale for deference where an administrative decision-maker is deciding a constitutional question. For example, in *Trinity Western University v. British Columbia College of Teachers*, the court reviewed an exercise of discretion by the B.C. College of Teachers in denying a licence to a university to offer a teaching program based on the university's position in relation to gay and lesbian students. Notwithstanding the broad discretion given to the college as a regulator, the court held its decision should be reviewed on a correctness standard since the factors it considered related to religious freedom and equality rights.

In *Dunsmuir*, Binnie J. addressed the presence of constitutional issues within an administrative determination and observed that there is a significant difference between an administrative decision-maker *interpreting* Charter principles on the one hand and *applying* those principles on the other:

In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the Court's view of Charter principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts.

The leading case on judicial review for discretion outside the constitutional context remains *Baker v. Canada (Minister of Citizenship and Immigration)*, mentioned above. In *Baker*, the Supreme Court quashed the decision of an immigration officer to refuse to exercise his "humanitarian and compassionate grounds" discretion to allow a woman who had overstayed a visa to remain in Canada, on the basis that the decision was unreasonable. In explaining this decision, Justice L'Heureux-Dubé stated that "for the exercise of the discretion to fall within the standard of reasonableness" in the context of a woman subject to being separated from her children, "the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them". Three elements contributed to the finding that the best interests of children ought to be given "substantial weight": the objectives of the Act which authorized the decision-maker's discretion, the principles of international law, and the ministerial guidelines directing humanitarian and compassionate decision-making.
The decision in *Baker* raised questions about how active courts should be in reviewing discretionary decision-making. Instead of limiting the review of discretion to the traditional grounds, which could render a discretionary decision *ultra vires* (for example, the failure to give consideration to relevant factors or considering irrelevant factors), Justice L'Heureux-Dubé expressly considered the *manner* in which the immigration officer had treated a relevant factor, namely the best interests of children. As Mullan observes, this type of inquiry necessarily involves a review of the weight given to all factors, since "it is only in relation to the other factors or considerations that were properly taken into account that a judgment can be made as to whether that particular factor was appropriately evaluated." 48

Subsequently, in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 49 the Supreme Court appeared to resile from its position in *Baker*. In *Suresh*, the court considered the constitutionality of the potential for and procedures surrounding deportation despite the risk that the deportee may face torture in his country of origin. The court also considered the standard of review applicable to the Minister of Citizenship and Immigration's decision to issue a deportation certificate despite danger to the life or freedom of the person affected, pursuant to s. 53 of the *Immigration Act*, a discretionary decision. Although the case was decided on Charter grounds, the Supreme Court nevertheless took the opportunity to "clarify" a number of issues from *Baker*, including the court's role in weighing the various factors to be considered in the exercise of discretion. The court in *Suresh* maintained that any notion arising from *Baker* that judicial review involved a re-weighing of the factors considered by a discretionary decision-maker is a mistaken one: 50

It is the Minister who was obliged to give proper weight to the relevant factors and none other. *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors . . .

The court in *Suresh* articulated the judicial role in relation to the review of discretion as follows: 51

The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion. On one hand, this statement seemed to very clearly move the review back to a limited threshold determination of whether the appropriate factors were considered. On the other hand, the
appropriate factors still must be considered "in conformity" with the "constraints" imposed by the legislation, the Constitution, and those that are self-imposed by the Minister. 52 In Dunsmuir, the court focused the question of deference on the kind of question being addressed. As Binnie J. noted, 53

Of course, the degree of deference also depends on the nature and content of the question. An adjudicative tribunal called on to approve pipelines based on "public convenience and necessity" (Westcoast Energy Inc. v. Canada (National Energy Board), [1998] 1 S.C.R. 322) or simply to take a decision in the "public interest" is necessarily accorded more room to manoeuvre than is a professional body, given the task of determining an appropriate sanction for a member's misconduct.

Thus, where the manner in which discretion is exercised turns on the public interest, greater deference generally will be warranted.

4. Structuring Discretion, Guidelines and Discretionary Judgments

We argued above that the Court of Appeal misconstrued the importance of the public interest dimension in the discretion exercised under FIPPA's discretionary exemptions such as s. 14 (law enforcement) and s. 19 (solicitor-client privilege), and failed to consider the implications of the judicial review of that discretion under the standard of review doctrine. In this last section, we consider the need to structure such discretion more clearly.

It is fairly clear that a decision-maker exercising discretionary authority under the discretionary exemptions of the Act will have her or his decisions reviewed on a standard of reasonableness under the Dunsmuir standard of review analysis. 54 This standard of review, however, raises rather than resolves the issue of how precisely a court should review this discretion. A broad, public interest discretion, if it is going to be exercised in a coherent, predictable and reasonable fashion, requires some clear and accessible guidelines. In this section, we sketch what these guidelines might contain and how they might be treated in an administrative law analysis.

Guidelines issued by decision-making bodies may come in many forms. 55 They may be written in plain language to be disseminated to the public, such as information circulars issued by the Canada Revenue Agency. They may be posted on a ministry or decision-maker's website, such as the Immigration and Refugee Board guidelines. They may be available on request but not posted or disseminated. Finally, there may also be good reasons why such guidelines are not made available to the public -- guidelines on what constitutes child pornography, for example, are not
made available because the guideline itself may contain images that would constitute child pornography. The guidelines created for customs authorities to determine when material entering the country is "obscene" are one such example, as discussed below.

Courts have recognized the importance of guidelines to discretionary decision-making. For example, in Baker, discussed above, the fact the decision-maker did not follow the Ministry's own guidelines contributed to the Supreme Court's holding that the decision was unreasonable. That said, the court has been equally clear that guidelines issued by an executive decision-maker cannot be binding, nor be allowed to fetter a decision-maker's discretion (on the principle that it is only for Parliament, exercising its legislative powers, to circumscribe the authority of an executive decision-maker). 56

In Little Sisters Book and Art Emporium v. Canada (Minister of Justice), the Supreme Court of Canada considered the relevance of guidelines to the review of discretion. 57 In that case, the owners of Little Sisters, a bookstore in Vancouver that specialized in gay and lesbian-oriented materials, claimed that customs officials' repeated seizures of materials destined for the store on the basis of allegations of obscenity were a violation of their freedom of expression and equality rights under the Charter. Customs officials acted under the discretionary authority granted by the Customs Act, 58 which authorized officials to seize material that meets the threshold test for obscenity per the Criminal Code. Application of the obscenity test in the context of imported materials was left to the customs officials, who operated pursuant to a number of operational directives and manuals. Justice Binnie, writing for the majority of the Supreme Court, emphasized the influence of Memorandum D9-1-1 and its effect on the applicants' Charter rights in stating: 59

. . . use of the defective guide led to erroneous decisions that imposed an unnecessary administrative burden and cost on importers and Customs officers alike. Where an importer could not have afforded to carry the fight to the courts a defective Memorandum D9-1-1 may have directly contributed to a denial of constitutional rights.

Notwithstanding the court's acknowledgment of the offensiveness of Memorandum D9-1-1 and its influence over customs officials' decision-making, both Justice Binnie (for the majority) and Justice Iacobucci (in dissent) refused to subject the manual to Charter review. Following the framework established in Slaight Communications Inc. v. Davidson, 60 discussed above, the court considered itself limited to review of either the enabling statute or the individual decisions made by customs agents pursuant to it, but not the Ministry policies leading to the decision. Justice Binnie gave two reasons for this refusal: first, that Memorandum D9-1-1 was not "law" as it was enacted.
neither by Parliament nor pursuant to an explicit legislative authority; and second, that it would be impossible for courts to review the myriad of policy instruments at play in administrative settings.  

While the view that guidelines are not themselves subject to Charter review may merit reconsideration, \textit{Baker} makes clear that guidelines play a key role in determining whether an exercise of discretion was reasonable in the circumstances. A decision-maker may not be legally obliged to adhere to a guideline, but the existence of a guideline does give rise to an obligation on the part of the decision-maker to justify those cases where the decision-maker decided to depart from the guideline. Where guidelines are available to the public, they arguably give rise to legitimate expectations that they be followed, which in turn can enhance the degree of procedural fairness provided to affected parties.  

Assuming it would be advisable to create guidelines for the exercise of discretion under FIPPA, what should the content of such guidelines be, and when should a court intervene to ensure that the guidelines have been properly considered? A comprehensive treatment of this issue is beyond the scope of this article, as it would have to involve a detailed consideration of particular discretionary exemptions and their rationales. However, a few remarks can serve to highlight why a move in this direction could be potentially powerful. The first thing to note is that the question of whether or not guidelines were considered when exercising discretion to refuse access can only be answered if the Minister is required to give reasons for refusal. Indeed, if the standard of reasonableness of judicial review requires "existence of justification, transparency and intelligibility within the decision-making process", as demanded by \textit{Dunsmuir}, then it is difficult to avoid this conclusion.  

The second thing to note is that the guidelines would not include political considerations. This cannot be over-emphasized. The law enforcement exemption, for example, does not exist in order to shield the government of the day from political embarrassment or scandal and such considerations should form no part of the public interest consideration for the exercise of discretion. Instead, the guidelines should provide a structure for decision-making by the Minister whereby the reasons for a refusal of disclosure must refer to the underlying purpose of the exemption invoked in a manner that is, to borrow from \textit{Dunsmuir}, transparent and intelligible.  

\textbf{5. Conclusions}
The analysis in this comment suggests that a rigorous application of administrative law principles to the exercise of discretion under FIPPA can do much of the work for which the Ontario Court of Appeal relied on Charter analysis. The exercise of discretion under the Act already implies an obligation to consider the public interest and this discretion is reviewable on a standard of reasonableness. While this analysis does not render a statutory public interest override superfluous, it does call into question the extremely stark contrast that the Ontario Court of Appeal sought to draw in *Criminal Lawyers' Assn*. between a discretionary statutory exemption subject to a statutory override and a discretionary statutory exemption not subject to a statutory override. Moreover, it shifts the focus away from trying to make a difficult Charter argument regarding positive rights pursuant to the freedom of expression, and instead highlights the need to move towards creating ways to structure and review the exercise of discretion under the Act. It is our view that this shift has the potential to help transform access to information regimes in Canada into a more transparent and accountable system.

ENDNOTES

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5. Section 10 provides: "(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless, (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious."

6. Section 23 states, "An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."


Ibid., at para. 64.

Ibid., at para. 96.

CLA, supra, footnote 1, at para. 37.

Ibid., at para. 39. But note that the later discussion turns on the lack of a public interest override not on the exercise of discretion because he also wants to say that the lack of a public interest override has the effect of infringing expression. See para. 55.

Ibid., at para. 51. He said that any limitations on access were in fact limits to expression, given that the "scheme of the Act is to primarily assist in the exercise of expression". This is a poor analysis of the scheme of the Act. This was taken to absurd lengths when he went on to argue, at para. 61, that "If the legislature has constructed a statute in such a way that it limits a person's Charter rights, evidence of legislative intent cannot mitigate that limitation."

Ibid., at para. 71.

Ibid., at para. 94.


Currently, there is no stand alone public interest override federally, although there is a public interest test built into two mandatory exemptions: third party information and personal information.


Ibid., at pp. 17-18.

See, for example Orders PO-2660, MO-1573, P-344.

Order PO-2660 at p. 12.

FIPPA, supra, footnote 4, s. 1(a)(iii).


28 Slaight, ibid., at para. 91.

29 Although the Information and Privacy Commissioner's decision with respect to the interpretation of s. 23 might itself attract some deference from the courts, it is clear that the IPC can substitute its own determination for the Minister's under s. 23.

30 IPC Order PO-2660 at p. 12.


Supra, footnote 35, at para. 47.


Supra, footnote 35, at para. 136.


Supra, footnote 35, at para. 142.

Supra, footnote 32.

Ibid., at para. 75.

Ibid., at para. 72.


Ibid., at para. 37.

Ibid., at para. 38.

Ibid., at para. 36.

Dunsmuir, supra, footnote 35, at para. 137.

While a case under s. 23 has yet to be decided by a court, the Dunsmuir framework has been applied to decision-makers in the context of FIPPA to suggest deference will be appropriate to information and privacy decision-makers. See University of Windsor Faculty Assn. v. University of Windsor, [2008] O.J. No. 2003 (QL), 172 L.A.C. (4th) 106, 238 O.A.C. 379 (Div. Ct.) .


For the leading case on fettering discretion, see Thamotharem v. Canada (Minister of Citizenship and Immigration), [2008] 1 F.C.R. 385, 60 Admin. L.R. (4th) 247, 64 Imm. L.R. (3d) 226 (C.A.), leave to appeal to S.C.C. refused [2007] 3 S.C.R. xvi. The only circumstance where a guideline may be binding is where legislation itself confers the right to issue binding guidelines on


58. R.S.C. 1985, c. 1 (2nd Supp.).


63. See the discussion of legitimate expectations in *Baker*, supra, footnote 32, at para. 26.

64. *Supra*, footnote 35.