Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

RECORD OF THE RESPONDENT
CANADIAN TRANSPORTATION AGENCY
VOLUME 1

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Court File No. A-218-14

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

DR. GABOR LUKACS

Applicant

-and-

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF PATRICE BELLEROSE,
SWORN MAY 23, 2014

I, Patrice Bellerose, resident of the City of Gatineau, in the Province of Quebec, MAKE OATH AND SAY AS FOLLOWS:

1. I am the Manager of Records Services and Access to Information and Privacy (ATIP) in the Records Services & ATIP Division of the Information Services Directorate in the Corporate Management Branch of the Canadian Transportation Agency and, as such, have personal knowledge of the matters hereinafter deposed to.

2. In 1982, the *Privacy Act*, R.S.C., 1985, c. P-21, (the Act) received royal assent. The Canadian Transport Commission, predecessor to the National Transportation Agency, then

the Canadian Transportation Agency (Agency), was included in the Schedule which lists government institutions which are subject to the Act. When Parliament adds a government institution to the schedule of the Act, either through legislation or regulation, the decision is made for the institution to be subject to the full application of the Act. Successive legislation modifications to the *Privacy Act* maintained the Agency in the schedule to the Act. Attached hereto and marked as Exhibit "A" to my Affidavit is a copy of the Schedule to the *Privacy Act* listing the Government Institutions which are subject to the *Privacy Act*.

3. The Agency is subject to the *Privacy Act* and therefore must abide by it.

4. The *Access to Information Act,* R.S.C. 1985, c. A-1, and the *Privacy Act* assign overall responsibility to the President of Treasury Board (as the designated Minister) for the government-wide administration of the legislation. Attached hereto and marked as Exhibit "B" to my Affidavit is copy of section 3.1 of the *Privacy Act*, and section 3.2 of the *Access to Information Act*.

5. Section 73 of the *Access to Information Act* and section 73 of the *Privacy Act* authorize the head of a government institution to designate, by order, one or more officers or employees of that institution to exercise or perform any of the powers, duties or functions of the head of the institution that are specified in the order. Delegation is entirely at the discretion of

the head of the institution. Once a delegation order is signed, delegates are accountable to the head of the institution for any decisions they make. Delegates exercise the powers in their own name because they are authorized to act. Ultimate responsibility, however, still rests with the head of the government institution. Attached hereto and marked as Exhibit "C" to my Affidavit is the Delegation of Authority document for the Agency relating to provisions of the *Access to Information Act* and the *Privacy Act*.

6. When the Agency receives a request for access to information, it has a duty under both the *Access to Information Act* and the *Privacy Act*, and associated regulations, to review the information for which the request was made to determine whether a record contains any information, including personal information, which is protected under the *Privacy Act.*

Section 19 of the *Access to Information Act*, provides:

> Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

Attached hereto and marked as Exhibit "D" to my Affidavit is a copy of section 19 of the *Access to Information Act*.

7. The Agency looks at each request to access Agency records on a case-by-case basis. When doing so, the Agency must determine whether any of the exemptions provided for in the *Access to Information Act* and *Privacy Act* apply to the case. This is done for both formal and informal ATIP requests.

8. Section 7 of the *Privacy Act* provides that personal information under the control of a government institution shall not, without the consent of the individual, be used by the institution except for the purpose for which it was obtained or for the purpose for which it may be disclosed under subsection 8(2). More particularly, subparagraph 8(2)(a) and 8(2)(m)(i) state that personal information may be disclosed when the disclosure is for the purpose for which it was obtained and where the interest of the public outweighs the right of an individual to privacy. Attached hereto and marked as Exhibit "E" to my Affidavit are copies of sections 7 and 8 of the *Privacy Act.*

9. Section 10 of the *Privacy Act* provides for the creation of personal information banks (PIBs) for all personal information under the control of government institutions. Section 11 of the *Privacy Act* provides for the publication of a personal information index. Attached hereto and marked as Exhibit "F" to my Affidavit is a copy of sections 10 and 11 of the *Privacy Act.*

10. Personal Information under the control of the Agency must be accounted for in either personal information banks or classes of personal information and consequently published in *Info Source. Info Source*: Sources of Federal Government and Employee Information provides information about the functions, programs, activities and related information holdings of government institutions subject to the *Access to Information Act* and the *Privacy Act*. It provides individuals and employees of the government (current and former)

with relevant information to access personal information about themselves held by government institutions subject to the *Privacy Act* and to exercise their rights under the *Privacy Act*. Attached hereto and marked as Exhibit "G" to my Affidavit is a copy of the home page of the *Info Source* website located at www.infosource.gc.ca

11. The Agency's "*Info Source*: Sources of Federal Government and Employee Information" document provides information about the functions, programs, activities and related records and personal information holdings of the Agency. The document contains a list of all PIBs at the Agency. On November 18, 2013, the Agency proposed removing PIBs regarding adjudication cases in its "Sources of Federal Government and Employee Information 2012" document. Attached hereto and marked as Exhibit "H" is the Agency "Sources of Federal Government and Employee Information 2012" document.

12. However, on March 11, 2014, the Agency received the Treasury Board Secretariat (TBS) reply. TBS disagreed with the Agency. In its *Info Source* 2013 Assessment, TBS states:

> "TBS disagrees with the interpretation that personal information banks related to case files are not required due to the application of the rules of natural justice and open court principle by administrative tribunals. There are no provisions in the *Privacy Act* that grant to government institutions subject to the Act the discretion to apply or not the provisions found in sections 10 and 11 of the Act.
>
> ...
>
> Therefore, personal information under the control of the CTA must be accounted for either in personal information banks or classes of personal information and consequently published in *Info Source*."

Attached hereto and marked as Exhibit "I" is Treasury Board Secretariat's "Canadian Transportation Agency *InfoSource* 2013 Assessment".

13. This Affidavit is made at the request of counsel to the Canadian Transportation Agency in support of the Agency's Reply to the application for judicial review in this matter and for no other or improper purpose.

DATED at the City of Gatineau, in the Province of Quebec, this 23rd day of May, 2014

SWORN BEFORE ME at the City of Gatineau
in the Province of Quebec, this 23rd day of
May, 2014.

Commissioner of Oaths

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

Tab A

Ceci est la pièce A de affidavit
This is Exhibit referred to in the Affidavit

de Patrice Bellerose
of

assermenté devant moi ce 23rd jour de May ~~199~~ 2014
sworn to before me this day of

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

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

SCHEDULE
(Section 3)

GOVERNMENT INSTITUTIONS

DEPARTMENTS AND MINISTRIES OF STATE

Department of Agriculture and Agri-Food
Ministère de l'Agriculture et de l'Agroalimentaire

Department of Canadian Heritage
Ministère du Patrimoine canadien

Department of Citizenship and Immigration
Ministère de la Citoyenneté et de l'Immigration

Department of Employment and Social Development
Ministère de l'Emploi et du Développement social

Department of the Environment
Ministère de l'Environnement

Department of Finance
Ministère des Finances

Department of Fisheries and Oceans
Ministère des Pêches et des Océans

Department of Foreign Affairs, Trade and Development
Ministère des Affaires étrangères, du Commerce et du Développement

Department of Health
Ministère de la Santé

Department of Indian Affairs and Northern Development
Ministère des Affaires indiennes et du Nord canadien

Department of Industry
Ministère de l'Industrie

Department of Justice
Ministère de la Justice

Department of National Defence (including the Canadian Forces)
Ministère de la Défense nationale (y compris les Forces canadiennes)

Department of Natural Resources
Ministère des Ressources naturelles

Department of Public Safety and Emergency Preparedness
Ministère de la Sécurité publique et de la Protection civile

Department of Public Works and Government Services
Ministère des Travaux publics et des Services gouvernementaux

Department of Transport
Ministère des Transports

Department of Veterans Affairs
Ministère des Anciens Combattants

Department of Western Economic Diversification
Ministère de la Diversification de l'économie de l'Ouest canadien

OTHER GOVERNMENT INSTITUTIONS

Asia-Pacific Foundation of Canada
Fondation Asie-Pacifique du Canada

Atlantic Canada Opportunities Agency
Agence de promotion économique du Canada atlantique

Belledune Port Authority
Administration portuaire de Belledune

British Columbia Treaty Commission
Commission des traités de la Colombie-Britannique

Canada Border Services Agency
Agence des services frontaliers du Canada

ANNEXE
(article 3)

INSTITUTIONS FÉDÉRALES

MINISTÈRES ET DÉPARTEMENTS D'ÉTAT

Ministère de la Citoyenneté et de l'Immigration
Department of Citizenship and Immigration

Ministère de la Défense nationale (y compris les Forces canadiennes)
Department of National Defence (including the Canadian Forces)

Ministère de la Diversification de l'économie de l'Ouest canadien
Department of Western Economic Diversification

Ministère de l'Agriculture et de l'Agroalimentaire
Department of Agriculture and Agri-Food

Ministère de la Justice
Department of Justice

Ministère de la Santé
Department of Health

Ministère de la Sécurité publique et de la Protection civile
Department of Public Safety and Emergency Preparedness

Ministère de l'Emploi et du Développement social
Department of Employment and Social Development

Ministère de l'Environnement
Department of the Environment

Ministère de l'Industrie
Department of Industry

Ministère des Affaires étrangères, du Commerce et du Développement
Department of Foreign Affairs, Trade and Development

Ministère des Affaires indiennes et du Nord canadien
Department of Indian Affairs and Northern Development

Ministère des Anciens Combattants
Department of Veterans Affairs

Ministère des Finances
Department of Finance

Ministère des Pêches et des Océans
Department of Fisheries and Oceans

Ministère des Ressources naturelles
Department of Natural Resources

Ministère des Transports
Department of Transport

Ministère des Travaux publics et des Services gouvernementaux
Department of Public Works and Government Services

Ministère du Patrimoine canadien
Department of Canadian Heritage

AUTRES INSTITUTIONS FÉDÉRALES

Administrateur de l'Office du transport du grain
Grain Transportation Agency Administrator

Administration du pipe-line du Nord
Northern Pipeline Agency

Administration du Régime de soins de santé de la fonction publique fédérale
Federal Public Service Health Care Plan Administration Authority

Administration du rétablissement agricole des Prairies
Prairie Farm Rehabilitation Administration

Administration portuaire de Belledune
Belledune Port Authority

Canada Emission Reduction Incentives Agency
Agence canadienne pour l'incitation à la réduction des émissions

Canada Employment Insurance Commission
Commission de l'assurance-emploi du Canada

Canada Foundation for Innovation
Fondation canadienne pour l'innovation

Canada Foundation for Sustainable Development Technology
Fondation du Canada pour l'appui technologique au développement durable

Canada Industrial Relations Board
Conseil canadien des relations industrielles

Canada-Newfoundland Offshore Petroleum Board
Office Canada — Terre-Neuve des hydrocarbures extracôtiers

Canada-Nova Scotia Offshore Petroleum Board
Office Canada — Nouvelle-Écosse des hydrocarbures extracôtiers

Canada Revenue Agency
Agence du revenu du Canada

Canada School of Public Service
École de la fonction publique du Canada

Canadian Advisory Council on the Status of Women
Conseil consultatif canadien de la situation de la femme

Canadian Centre for Occupational Health and Safety
Centre canadien d'hygiène et de sécurité au travail

Canadian Cultural Property Export Review Board
Commission canadienne d'examen des exportations de biens culturels

Canadian Environmental Assessment Agency
Agence canadienne d'évaluation environnementale

Canadian Food Inspection Agency
Agence canadienne d'inspection des aliments

Canadian Government Specifications Board
Office des normes du gouvernement canadien

Canadian Grain Commission
Commission canadienne des grains

Canadian Human Rights Commission
Commission canadienne des droits de la personne

Canadian Human Rights Tribunal
Tribunal canadien des droits de la personne

Canadian Institutes of Health Research
Instituts de recherche en santé du Canada

Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

Canadian Museum for Human Rights
Musée canadien des droits de la personne

Canadian Museum of Immigration at Pier 21
Musée canadien de l'immigration du Quai 21

Canadian Northern Economic Development Agency
Agence canadienne de développement économique du Nord

Canadian Nuclear Safety Commission
Commission canadienne de sûreté nucléaire

Canadian Polar Commission
Commission canadienne des affaires polaires

Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Canadian Security Intelligence Service
Service canadien du renseignement de sécurité

Administration portuaire de Halifax
Halifax Port Authority

Administration portuaire de Hamilton
Hamilton Port Authority

Administration portuaire de Montréal
Montreal Port Authority

Administration portuaire de Nanaïmo
Nanaimo Port Authority

Administration portuaire de Port-Alberni
Port Alberni Port Authority

Administration portuaire de Prince-Rupert
Prince Rupert Port Authority

Administration portuaire de Québec
Quebec Port Authority

Administration portuaire de Saint-Jean
Saint John Port Authority

Administration portuaire de Sept-Îles
Sept-Îles Port Authority

Administration portuaire de St. John's
St. John's Port Authority

Administration portuaire de Thunder Bay
Thunder Bay Port Authority

Administration portuaire de Toronto
Toronto Port Authority

Administration portuaire de Trois-Rivières
Trois-Rivières Port Authority

Administration portuaire de Vancouver
Vancouver Port Authority

Administration portuaire de Vancouver Fraser
Vancouver Fraser Port Authority

Administration portuaire de Windsor
Windsor Port Authority

Administration portuaire d'Oshawa
Oshawa Port Authority

Administration portuaire du fleuve Fraser
Fraser River Port Authority

Administration portuaire du North-Fraser
North Fraser Port Authority

Administration portuaire du Saguenay
Saguenay Port Authority

Agence canadienne de développement économique du Nord
Canadian Northern Economic Development Agency

Agence canadienne d'évaluation environnementale
Canadian Environmental Assessment Agency

Agence canadienne d'inspection des aliments
Canadian Food Inspection Agency

Agence canadienne pour l'incitation à la réduction des émissions
Canada Emission Reduction Incentives Agency

Agence de développement économique du Canada pour les régions du Québec
Economic Development Agency of Canada for the Regions of Quebec

Agence de la consommation en matière financière du Canada
Financial Consumer Agency of Canada

Agence de la santé publique du Canada
Public Health Agency of Canada

Agence de promotion économique du Canada atlantique
Atlantic Canada Opportunities Agency

Canadian Space Agency
Agence spatiale canadienne

Canadian Transportation Accident Investigation and Safety Board
Bureau canadien d'enquête sur les accidents de transport et de la sécurité des transports

Canadian Transportation Agency
Office des transports du Canada

Canadian Wheat Board
Commission canadienne du blé

Communications Security Establishment
Centre de la sécurité des télécommunications

Copyright Board
Commission du droit d'auteur

Correctional Service of Canada
Service correctionnel du Canada

Director of Soldier Settlement
Directeur de l'établissement de soldats

The Director, The Veterans' Land Act
Directeur des terres destinées aux anciens combattants

Economic Development Agency of Canada for the Regions of Quebec
Agence de développement économique du Canada pour les régions du Québec

Energy Supplies Allocation Board
Office de répartition des approvisionnements d'énergie

Federal Economic Development Agency for Southern Ontario
Agence fédérale de développement économique pour le Sud de l'Ontario

Federal-Provincial Relations Office
Secrétariat des relations fédérales-provinciales

Federal Public Service Health Care Plan Administration Authority
Administration du Régime de soins de santé de la fonction publiquefédérale

Financial Consumer Agency of Canada
Agence de la consommation en matière financière du Canada

Financial Transactions and Reports Analysis Centre of Canada
Centre d'analyse des opérations et déclarations financières du Canada

First Nations Financial Management Board
Conseil de gestion financière des premières nations

First Nations Tax Commission
Commission de la fiscalité des premières nations

Fraser River Port Authority
Administration portuaire du fleuve Fraser

Grain Transportation Agency Administrator
Administrateur de l'Office du transport du grain

Gwich'in Land and Water Board
Office gwich'in des terres et des eaux

Gwich'in Land Use Planning Board
Office gwich'in d'aménagement territorial

Halifax Port Authority
Administration portuaire de Halifax

Hamilton Port Authority
Administration portuaire de Hamilton

Historic Sites and Monuments Board of Canada
Commission des lieux et monuments historiques du Canada

Immigration and Refugee Board
Commission de l'immigration et du statut de réfugié

Agence des services frontaliers du Canada
Canada Border Services Agency

Agence du revenu du Canada
Canada Revenue Agency

Agence fédérale de développement économique pour le Sud de l'Ontario
Federal Economic Development Agency for Southern Ontario

Agence Parcs Canada
Parks Canada Agency

Agence spatiale canadienne
Canadian Space Agency

Bibliothèque et Archives du Canada
Library and Archives of Canada

Bureau canadien d'enquête sur les accidents de transport et de la sécurité des transports
Canadian Transportation Accident Investigation and Safety Board

Bureau de la coordonnatrice de la situation de la femme
Office of the Co-ordinator, Status of Women

Bureau de l'administrateur de la Caisse d'indemnisation des dommages dus à la pollution par les hydrocarbures causée par les navires
Office of the Administrator of the Ship-source Oil Pollution Fund

Bureau de l'enquêteur correctionnel du Canada
Office of the Correctional Investigator of Canada

Bureau de l'infrastructure du Canada
Office of Infrastructure of Canada

Bureau de privatisation et des affaires réglementaires
Office of Privatization and Regulatory Affairs

Bureau du Conseil privé
Privy Council Office

Bureau du contrôleur général
Office of the Comptroller General

Bureau du directeur des poursuites pénales
Office of the Director of Public Prosecutions

Bureau du directeur général des élections
Office of the Chief Electoral Officer

Bureau du surintendant des institutions financières
Office of the Superintendent of Financial Institutions

Bureau du vérificateur général du Canada
Office of the Auditor General of Canada

Centre canadien d'hygiène et de sécurité au travail
Canadian Centre for Occupational Health and Safety

Centre d'analyse des opérations et déclarations financières du Canada
Financial Transactions and Reports Analysis Centre of Canada

Centre de la sécurité des télécommunications
Communications Security Establishment

Comité de surveillance des activités de renseignement de sécurité
Security Intelligence Review Committee

Comité externe d'examen de la Gendarmerie royale du Canada
Royal Canadian Mounted Police External Review Committee

Comité externe d'examen des griefs militaires
Military Grievances External Review Committee

Commissariat à la protection de la vie privée
Office of the Privacy Commissioner

Commissariat à l'information
Office of the Information Commissioner

Commissariat à l'intégrité du secteur public
Office of the Public Sector Integrity Commissioner

Indian Residential Schools Truth and Reconciliation Commission
Commission de vérité et de réconciliation relative aux pensionnats indiens

Law Commission of Canada
Commission du droit du Canada

Library and Archives of Canada
Bibliothèque et Archives du Canada

Mackenzie Valley Environmental Impact Review Board
Office d'examen des répercussions environnementales de la vallée du Mackenzie

Mackenzie Valley Land and Water Board
Office des terres et des eaux de la vallée du Mackenzie

Military Grievances External Review Committee
Comité externe d'examen des griefs militaires

Military Police Complaints Commission
Commission d'examen des plaintes concernant la police militaire

Montreal Port Authority
Administration portuaire de Montréal

Nanaimo Port Authority
Administration portuaire de Nanaïmo

The National Battlefields Commission
Commission des champs de bataille nationaux

National Energy Board
Office national de l'énergie

National Farm Products Council
Conseil national des produits agricoles

National Film Board
Office national du film

National Research Council of Canada
Conseil national de recherches du Canada

Natural Sciences and Engineering Research Council
Conseil de recherches en sciences naturelles et en génie

Northern Pipeline Agency
Administration du pipe-line du Nord

North Fraser Port Authority
Administration portuaire du North-Fraser

Nunavut Surface Rights Tribunal
Tribunal des droits de surface du Nunavut

Nunavut Water Board
Office des eaux du Nunavut

Office of Infrastructure of Canada
Bureau de l'infrastructure du Canada

Office of Privatization and Regulatory Affairs
Bureau de privatisation et des affaires réglementaires

Office of the Administrator of the Ship-source Oil Pollution Fund
Bureau de l'administrateur de la Caisse d'indemnisation des dommages dus à la pollution par les hydrocarbures causée par les navires

Office of the Auditor General of Canada
Bureau du vérificateur général du Canada

Office of the Chief Electoral Officer
Bureau du directeur général des élections

Office of the Commissioner of Lobbying
Commissariat au lobbying

Office of the Commissioner of Official Languages
Commissariat aux langues officielles

Office of the Comptroller General
Bureau du contrôleur général

Commissariat au lobbying
Office of the Commissioner of Lobbying

Commissariat aux langues officielles
Office of the Commissioner of Official Languages

Commission canadienne des affaires polaires
Canadian Polar Commission

Commission canadienne des droits de la personne
Canadian Human Rights Commission

Commission canadienne des grains
Canadian Grain Commission

Commission canadienne de sûreté nucléaire
Canadian Nuclear Safety Commission

Commission canadienne d'examen des exportations de biens culturels
Canadian Cultural Property Export Review Board

Commission canadienne du blé
Canadian Wheat Board

Commission de la fiscalité des premières nations
First Nations Tax Commission

Commission de la fonction publique
Public Service Commission

Commission de l'assurance-emploi du Canada
Canada Employment Insurance Commission

Commission de l'immigration et du statut de réfugié
Immigration and Refugee Board

Commission de révision des lois
Statute Revision Commission

Commission des champs de bataille nationaux
The National Battlefields Commission

Commission des libérations conditionnelles du Canada
Parole Board of Canada

Commission des lieux et monuments historiques du Canada
Historic Sites and Monuments Board of Canada

Commission des plaintes du public contre la Gendarmerie royale du Canada
Royal Canadian Mounted Police Public Complaints Commission

Commission des relations de travail dans la fonction publique
Public Service Labour Relations Board

Commission des traités de la Colombie-Britannique
British Columbia Treaty Commission

Commission de vérité et de réconciliation relative aux pensionnats indiens
Indian Residential Schools Truth and Reconciliation Commission

Commission d'examen des plaintes concernant la police militaire
Military Police Complaints Commission

Commission du droit d'auteur
Copyright Board

Commission du droit du Canada
Law Commission of Canada

Conseil canadien des relations industrielles
Canada Industrial Relations Board

Conseil consultatif canadien de la situation de la femme
Canadian Advisory Council on the Status of Women

Conseil de gestion financière des premières nations
First Nations Financial Management Board

Conseil de la radiodiffusion et des télécommunications canadiennes
Canadian Radio-television and Telecommunications Commission

Office of the Co-ordinator, Status of Women
Bureau de la coordonnatrice de la situation de la femme

Office of the Correctional Investigator of Canada
Bureau de l'enquêteur correctionnel du Canada

Office of the Director of Public Prosecutions
Bureau du directeur des poursuites pénales

Office of the Information Commissioner
Commissariat à l'information

Office of the Privacy Commissioner
Commissariat à la protection de la vie privée

Office of the Public Sector Integrity Commissioner
Commissariat à l'intégrité du secteur public

Office of the Superintendent of Financial Institutions
Bureau du surintendant des institutions financières

Oshawa Port Authority
Administration portuaire d'Oshawa

Parks Canada Agency
Agence Parcs Canada

Parole Board of Canada
Commission des libérations conditionnelles du Canada

Patented Medicine Prices Review Board
Conseil d'examen du prix des médicaments brevetés

Petroleum Compensation Board
Office des indemnisations pétrolières

The Pierre Elliott Trudeau Foundation
La Fondation Pierre-Elliott-Trudeau

Port Alberni Port Authority
Administration portuaire de Port-Alberni

Prairie Farm Rehabilitation Administration
Administration du rétablissement agricole des Prairies

Prince Rupert Port Authority
Administration portuaire de Prince-Rupert

Privy Council Office
Bureau du Conseil privé

Public Health Agency of Canada
Agence de la santé publique du Canada

Public Service Commission
Commission de la fonction publique

Public Service Labour Relations Board
Commission des relations de travail dans la fonction publique

Public Service Staffing Tribunal
Tribunal de la dotation de la fonction publique

Quebec Port Authority
Administration portuaire de Québec

Regional Development Incentives Board
Conseil des subventions au développement régional

Registry of the Public Servants Disclosure Protection Tribunal
Greffe du Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles

Royal Canadian Mounted Police
Gendarmerie royale du Canada

Royal Canadian Mounted Police External Review Committee
Comité externe d'examen de la Gendarmerie royale du Canada

Royal Canadian Mounted Police Public Complaints Commission
Commission des plaintes du public contre la Gendarmerie royale du Canada

Saguenay Port Authority
Administration portuaire du Saguenay

Conseil de recherches en sciences humaines
Social Sciences and Humanities Research Council

Conseil de recherches en sciences naturelles et en génie
Natural Sciences and Engineering Research Council

Conseil des subventions au développement régional
Regional Development Incentives Board

Conseil d'examen du prix des médicaments brevetés
Patented Medicine Prices Review Board

Conseil national de recherches du Canada
National Research Council of Canada

Conseil national des produits agricoles
National Farm Products Council

Directeur de l'établissement de soldats
Director of Soldier Settlement

Directeur des terres destinées aux anciens combattants
The Director, The Veterans' Land Act

École de la fonction publique du Canada
Canada School of Public Service

Fondation Asie-Pacifique du Canada
Asia-Pacific Foundation of Canada

Fondation canadienne pour l'innovation
Canada Foundation for Innovation

Fondation du Canada pour l'appui technologique au développement durable
Canada Foundation for Sustainable Development Technology

Gendarmerie royale du Canada
Royal Canadian Mounted Police

Greffe du Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles
Registry of the Public Servants Disclosure Protection Tribunal

Instituts de recherche en santé du Canada
Canadian Institutes of Health Research

La Fondation Pierre-Elliott-Trudeau
The Pierre Elliott Trudeau Foundation

Musée canadien de l'immigration du Quai 21
Canadian Museum of Immigration at Pier 21

Musée canadien des droits de la personne
Canadian Museum for Human Rights

Office Canada — Nouvelle-Écosse des hydrocarbures extracôtiers
Canada-Nova Scotia Offshore Petroleum Board

Office Canada — Terre-Neuve des hydrocarbures extracôtiers
Canada-Newfoundland Offshore Petroleum Board

Office d'aménagement territorial du Sahtu
Sahtu Land Use Planning Board

Office de répartition des approvisionnements d'énergie
Energy Supplies Allocation Board

Office des droits de surface du Yukon
Yukon Surface Rights Board

Office des eaux du Nunavut
Nunavut Water Board

Office des indemnisations pétrolières
Petroleum Compensation Board

Office des normes du gouvernement canadien
Canadian Government Specifications Board

Office des terres et des eaux de la vallée du Mackenzie
Mackenzie Valley Land and Water Board

Office des terres et des eaux du Sahtu
Sahtu Land and Water Board

Sahtu Land and Water Board
Office des terres et des eaux du Sahtu

Sahtu Land Use Planning Board
Office d'aménagement territorial du Sahtu

Saint John Port Authority
Administration portuaire de Saint-Jean

Security Intelligence Review Committee
Comité de surveillance des activités de renseignement de sécurité

Sept-Îles Port Authority
Administration portuaire de Sept-Îles

Shared Services Canada
Services partagés Canada

Social Sciences and Humanities Research Council
Conseil de recherches en sciences humaines

Specific Claims Tribunal
Tribunal des revendications particulières

Statistics Canada
Statistique Canada

Statute Revision Commission
Commission de révision des lois

St. John's Port Authority
Administration portuaire de St. John's

Thunder Bay Port Authority
Administration portuaire de Thunder Bay

Toronto Port Authority
Administration portuaire de Toronto

Treasury Board Secretariat
Secrétariat du Conseil du Trésor

Trois-Rivières Port Authority
Administration portuaire de Trois-Rivières

Vancouver Fraser Port Authority
Administration portuaire de Vancouver Fraser

Vancouver Port Authority
Administration portuaire de Vancouver

Veterans Review and Appeal Board
Tribunal des anciens combattants (révision et appel)

Windsor Port Authority
Administration portuaire de Windsor

Yukon Environmental and Socio-economic Assessment Board
Office d'évaluation environnementale et socioéconomique du Yukon

Yukon Surface Rights Board
Office des droits de surface du Yukon

R.S., 1985, c. P-21, Sch.; R.S., 1985, c. 22 (1st Supp.), s. 11, c. 44 (1st Supp.), s. 5, c. 46 (1st Supp.), s. 9; SOR/85-612; R.S., 1985, c. 8 (2nd Supp.), s. 27, c. 19 (2nd Supp.), s. 52; SOR/86-136; R.S., 1985, c. 1 (3rd Supp.), s. 12, c. 3 (3rd Supp.), s. 2, c. 18 (3rd Supp.), s. 39, c. 20 (3rd Supp.), s. 39, c. 24 (3rd Supp.), s. 53, c. 28 (3rd Supp.), s. 308, c. 1 (4th Supp.), s. 48, c. 7 (4th Supp.), s. 7, c. 10 (4th Supp.), s. 22, c. 11 (4th Supp.), s. 15, c. 21 (4th Supp.), s. 5, c. 28 (4th Supp.), s. 36, c. 31 (4th Supp.), s. 101, c. 41 (4th Supp.), s. 53, c. 47 (4th Supp.), s. 52; SOR/88-110; 1989, c. 3, s. 47, c. 27, s. 22; 1990, c. 1, s. 31, c. 3, s. 32, c. 13, s. 25; SOR/90-326, 345; 1991, c. 3, s. 12, c. 6, s. 24, c. 16, s. 23, c. 38, ss. 29, 38; SOR/91-592; 1992, c. 1, ss. 114, 145(F), 155, c. 33, s. 70, c. 37, s. 78; SOR/92-97, 99; 1993, c. 1, ss. 10, 20, 32, 42, c. 3, ss. 17, 18, c. 28, s. 78, c. 31, s. 26, c. 34, ss. 104, 148; 1994, c. 26, ss. 57, 58, c. 31, s. 20, c. 38, ss. 21, 22, c. 41, ss. 29, 30, c. 43, s. 91; 1995, c. 1, ss. 54 to 56, c. 5, ss. 20, 21, c. 11, ss. 31, 32, c. 12, s. 11, c. 18, ss. 89, 90, c. 28, ss. 54, 55, c. 29, ss. 15, 31, 35, 75, 84, c. 45, s. 24; 1996, c. 8, ss. 27, 28, c. 9, s. 28, c. 10, ss. 253, 254, c. 11, ss. 77 to 80, c. 16, ss. 46 to 48; SOR/96-357, 539; 1997, c. 6, s. 84, c. 9, ss. 112, 113, c. 20, s. 55; 1998, c. 9, ss. 44, 45, c. 10, ss. 190 to 194, c. 25, s. 167, c. 26, ss. 77, 78, c. 31, s. 57, c. 35, s. 123; SOR/98-119, 150; SOR/

Office des transports du Canada
Canadian Transportation Agency

Office d'évaluation environnementale et socioéconomique du Yukon
Yukon Environmental and Socio-economic Assessment Board

Office d'examen des répercussions environnementales de la vallée du Mackenzie
Mackenzie Valley Environmental Impact Review Board

Office gwich'in d'aménagement territorial
Gwich'in Land Use Planning Board

Office gwich'in des terres et des eaux
Gwich'in Land and Water Board

Office national de l'énergie
National Energy Board

Office national du film
National Film Board

Secrétariat des relations fédérales-provinciales
Federal-Provincial Relations Office

Secrétariat du Conseil du Trésor
Treasury Board Secretariat

Service canadien du renseignement de sécurité
Canadian Security Intelligence Service

Service correctionnel du Canada
Correctional Service of Canada

Services partagés Canada
Shared Services Canada

Statistique Canada
Statistics Canada

Tribunal canadien des droits de la personne
Canadian Human Rights Tribunal

Tribunal canadien du commerce extérieur
Canadian International Trade Tribunal

Tribunal de la dotation de la fonction publique
Public Service Staffing Tribunal

Tribunal des anciens combattants (révision et appel)
Veterans Review and Appeal Board

Tribunal des droits de surface du Nunavut
Nunavut Surface Rights Tribunal

Tribunal des revendications particulières
Specific Claims Tribunal

L.R. (1985), ch. P-21, ann.; L.R. (1985), ch. 22 (1er suppl.), art. 11, ch. 44 (1er suppl.), art. 5, ch. 46 (1er suppl.), art. 9; DORS/85-612; L.R. (1985), ch. 8 (2e suppl.), art. 27, ch. 19 (2e suppl.), art. 52; DORS/86-136; L.R. (1985), ch. 1 (3e suppl.), art. 12, ch. 3 (3e suppl.), art. 2, ch. 18 (3e suppl.), art. 39, ch. 20 (3e suppl.), art. 39, ch. 24 (3e suppl.), art. 53, ch. 28 (3e suppl.), art. 308, ch. 1 (4e suppl.), art. 48, ch. 7 (4e suppl.), art. 7, ch. 10 (4e suppl.), art. 22, ch. 11 (4e suppl.), art. 15, ch. 21 (4e suppl.), art. 5, ch. 28 (4e suppl.), art. 36, ch. 31 (4e suppl.), art. 101, ch. 41 (4e suppl.), art. 53, ch. 47 (4e suppl.), art. 52; DORS/88-110; 1989, ch. 3, art. 47, ch. 27, art. 22; 1990, ch. 1, art. 31, ch. 3, art. 32, ch. 13, art. 25; DORS/90-326, 345; 1991, ch. 3, art. 12, ch. 6, art. 24, ch. 16, art. 23, ch. 38, art. 29 et 38; DORS/91-592; 1992, ch. 1, art. 114, 145(F) et 155, ch. 33, art. 70, ch. 37, art. 78; DORS/92-97, 99; 1993, ch. 1, art. 10, 20, 32 et 42, ch. 3, art. 17 et 18, ch. 28, art. 78, ch. 31, art. 26, ch. 34, art. 104 et 148; 1994, ch. 26, art. 57 et 58, ch. 31, art. 20, ch. 38, art. 21 et 22, ch. 41, art. 29 et 30, ch. 43, art. 91; 1995, ch. 1, art. 54 à 56, ch. 5, art. 20 et 21, ch. 11, art. 31 et 32, ch. 12, art. 11, ch. 18, art. 89 et 90, ch. 28, art. 54 et 55, ch. 29, art. 15, 31, 35, 75 et 84, ch. 45, art. 24; 1996, ch. 8, art. 27 et 28, ch. 9, art. 28, ch. 10, art. 253 et 254, ch. 11, art. 77 à 80, ch. 16, art. 46 à 48; DORS/96-357, 539; 1997, ch. 6, art. 84, ch. 9, art. 112 et 113, ch. 20, art. 55; 1998, ch. 9, art. 44 et 45, ch. 10, art. 190 à 194, ch. 25, art. 167, ch. 26, art. 77 et 78, ch. 31, art. 57, ch. 35, art. 123; DORS/98-119, 150; DORS/98-321, art. 1; DORS/98-567; 1999, ch. 17, art. 174 et 175, ch. 31, art. 177 et 178; 2000, ch. 6, art.

98-321, s. 1; SOR/98-567; 1999, c. 17, ss. 174, 175, c. 31, ss. 177, 178; 2000, c. 6, ss. 45, 46, c. 17, s. 90, c. 28, s. 50, c. 34, s. 94(F); SOR/2000-176; 2001, c. 9, s. 590, c. 22, ss. 18, 19, c. 33, ss. 25, 26, c. 34, ss. 16, 78; SOR/2001-144, s. 1; SOR/2001-201, 330; 2002, c. 7, s. 228, c. 10, s. 191, c. 17, ss. 14, 25; SOR/2002-44, 72, 175, 292, 344; 2003, c. 7, s. 129, c. 22, ss. 189, 248, 255, 256; SOR/2003-149, 422, 427, 434, 439; 2004, c. 2, s. 75, c. 7, s. 35, c. 11, ss. 40, 41; SOR/2004-23, 206; 2005, c. 9, s. 152, c. 10, ss. 30, 31, c. 30, s. 90, c. 34, s. 72 to 74, c. 35, s. 63, c. 38, s. 138, c. 46, s. 58.1; SOR/2005-252; 2006, c. 4, s. 212, c. 9, ss. 97, 98, 140, 190 to 193; SOR/2006-25, 29, 33, 71, 100, 218; SOR/2007-216; 2008, c. 9, s. 11, c. 22, s. 50, c. 28, s. 99; SOR/2008-131, 136; SOR/2009-175, 244, 249; 2010, c. 7, s. 10, c. 12, s. 1677; SOR/2011-163, 259; 2012, c. 1, s. 160, c. 19, ss. 276, 387, 472, 502, 576, 590, 679, 749, c. 31, ss. 262, 294; 2013, c. 14, s. 19, c. 24, ss. 124, 125, c. 33, ss. 185 to 187, c. 40, ss. 227, 228, 285; 2014, c. 2, s. 26; SOR/2014-67.

45 et 46, ch. 17, art. 90, ch. 28, art. 50, ch. 34, art. 94(F); DORS/2000-176; 2001, ch. 9, art. 590, ch. 22, art. 18 et 19, ch. 33, art. 25 et 26, ch. 34, art. 16 et 78; DORS/2001-144, art. 1; DORS/2001-201, 330; 2002, ch. 7, art. 228, ch. 10, art. 191, ch. 17, art. 14 et 25; DORS/2002-44, 72, 175, 292, 344; 2003, ch. 7, art. 129, ch. 22, art. 189, 248, 255 et 256; DORS/2003-149, 422, 427, 434, 439; 2004, ch. 2, art. 75, ch. 7, art. 35, ch. 11, art. 40 et 41; DORS/2004-23, 206; 2005, ch. 9, art. 152, ch. 10, art. 30 et 31, ch. 30, art. 90, ch. 34, art. 72 à 74, ch. 35, art. 63, ch. 38, art. 138, ch. 46, art. 58.1; DORS/2005-252; 2006, ch. 4, art. 212, ch. 9, art. 97, 98, 140, 190 à 193; DORS/2006-25, 29, 33, 71, 100, 218; DORS/2007-216; 2008, ch. 9, art. 11, ch. 22, art. 50, ch. 28, art. 99; DORS/2008-131, 136; DORS/2009-175, 244, 249; 2010, ch. 7, art. 10, ch. 12, art. 1677; DORS/2011-163, 259; 2012, ch. 1, art. 160, ch. 19, art. 276, 387, 472, 502, 576, 590, 679 et 749, ch. 31, art. 262 et 294; 2013, ch. 14, art. 19, ch. 24, art. 124 et 125, ch. 33, art. 185 à 187, ch. 40, art. 227, 228 et 285; 2014, ch. 2, art. 26; DORS/2014-67.

Tab B

Ceci est la pièce B de affidavit
This is Exhibit referred to in the Affidavit

de Patrice Bellerose
of

assermenté devant moi ce 23rd jour de May 2014
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

Privacy Act, R.S.C., 1985, c. P-21, section 3.1

DESIGNATION

Power to designate Minister

3.1 (1) The Governor in Council may designate a member of the Queen's Privy Council for Canada to be the Minister for the purposes of any provision of this Act.

Power to designate head

(2) The Governor in Council may, by order, designate a person to be the head of a government institution, other than a department or ministry of state, for the purposes of this Act.

2006, c. 9, s. 182.

DÉSIGNATION

Désignation d'un ministre

3.1 (1) Le gouverneur en conseil peut désigner tout membre du Conseil privé de la Reine pour le Canada à titre de ministre pour l'application de toute disposition de la présente loi.

Désignation du responsable d'une institution fédérale

(2) Il peut aussi désigner, par décret, toute personne à titre de responsable d'une institution fédérale — autre qu'un ministère ou un département d'État — pour l'application de la présente loi.

2006, ch. 9, art. 182.

DESIGNATION

Power to designate Minister

3.2 (1) The Governor in Council may designate a member of the Queen's Privy Council for Canada to be the Minister for the purposes of any provision of this Act.

Power to designate head

(2) The Governor in Council may, by order, designate a person to be the head of a government institution, other than a department or ministry of state, for the purposes of this Act.

2006, c. 9, s. 142.

DÉSIGNATION

Désignation d'un ministre

3.2 (1) Le gouverneur en conseil peut désigner tout membre du Conseil privé de la Reine pour le Canada à titre de ministre pour l'application de toute disposition de la présente loi.

Désignation du responsable d'une institution fédérale

(2) Il peut aussi désigner, par décret, toute personne à titre de responsable d'une institution fédérale — autre qu'un ministère ou un département d'État — pour l'application de la présente loi.

2006, ch. 9, art. 142.

Tab C

Ceci est la piece C de affidavit
This is Exhibit referred to in the Affidavit

de Patrice Bellerose
of

assermenté devant moi ce 23rd jour de May 199 2014
sworn to before me this day of

SP Lessard

~~Commissaire à l'assermentation~~
~~Commissioner for Oaths~~

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

019

Canada

Canadian Transportation Agency | Office des transports du Canada

Canadian Transportation Agency
www.cta.gc.ca

Appendix D: Delegation of Authority

Canadian Transportation Agency

Delegation of Authority

Access to Information and Privacy and Data Protection

In accordance with section 73 of the *Access to Information Act* and the *Privacy Act*, I hereby order that the persons appointed to the positions identified in the attached Delegation Orders, including the persons authorized to act for the said persons in their absence, be authorized to exercise or perform any of the powers, duties or functions that are specified in the Delegation Orders.

Geoffrey C. Hare

Chairman and Chief Executive Officer

Date: June 15, 2009

Table 2 : Delegation of Authority – Access to Information

Action	Section of the *Access to Information Act*	Authority Delegated to	
		General Counsel	Access to Information and Privacy Coordinator
1. Notice where access requested • **give written notice to the requester as to whether or not access to records or parts thereof will be given**	7(*a*)	(Not delegated)	
2. Transfer to another institution	8(1)	X	X

020

Action	Section of the *Access to Information Act*	Authority Delegated to	
		General Counsel	Access to Information and Privacy Coordinator
• **transfer a request to another government institution with a greater interest**			
3. Extension of time limits • **extension of time limits and giving notices to requester and Information Commissioner**	9	X	X
4. Additional fees • **assessing additional fees chargeable under the AIA and Section 7 of the regulations, notification to requester, waiving of fees**	11(2)(3)(4)(5)(6)	X	X
5. Language of access • **determining if it is in the public interest to translate records requested in a particular official language**	12(2)	X	X
6. Access in an alternative format • **determining if the giving of access in an alternative format to a person with a sensory disability is necessary and reasonable**	12(3)	X	X
7. Invoking exemptions • **determining whether or not to invoke the following exemptions to refuse access and exercising discretion where appropriate:**		(Not delegated)	
a) information obtained in confidence	13		
b) federal-provincial affairs	14		

021

Action	Section of the *Access to Information Act*	Authority Delegated to	
		General Counsel	Access to Information and Privacy Coordinator
c) international affairs and defence	15		
d) law enforcement and investigations	16		
e) safety of individuals	17		
f) economic interests of Canada	18		
g) personal information	19		
h) third party information	20		
i) advice	21		
j) testing procedures, tests and audits	22		
k) solicitor-client privilege	23		
l) statutory prohibitions	24		
8. Severance • **determining if exempt information can reasonably be severed from otherwise releasable information**	25	(Not delegated)	
9. Information to be published • **determining whether to refuse to disclose information that will be published within 90 days of the request**	26	(Not delegated)	
10. Third party notification • **written notice to third parties of intent to disclose information that relates to them and extend time limits**	27(1)(4)	X	X
11. Third party notification - representations • **review third party representations and decide whether or not to disclose records and give written notice of the decision to the third party and waive requirement to**	28(1)(2)(4)	(Not delegated)	

Action	Section of the *Access to Information Act*	Authority Delegated to	
		General Counsel	Access to Information and Privacy Coordinator
submit representations in writing			
12. Disclosure on recommendation of the Information Commissioner • **written notification to the requester and third party (s) regarding the decision to disclose following a recommendation by the Information Commissioner**	29(1)	(Not delegated)	
13. Advise Information Commissioner of third party involvement • **advise the Information Commissioner of any third party that was notified under subsection 27(1), or would have been notified if the Agency had intended to disclose the record**	33	X	X
14. Right to make representations • **make representations to the Information Commissioner in the course of an investigation of a complaint**	35(2)	ATIP Coordinator, General Counsel, Counsel and program staff may provide information in the course of an investigation.	
15. Notice to Information Commissioner of action taken or proposed • **where appropriate, provide notice to the Commissioner of any action taken or proposed to be taken to implement recommendations, or reasons why no such action will be taken**	37(1)(b)	(Not delegated)	
16. Access to be given to complainant	37(4)	X	X

023

Action	Section of the *Access to Information Act*	Authority Delegated to	
		General Counsel	Access to Information and Privacy Coordinator
• **where decision was made to provide access, provide access**			
17. Notice to third party (application to Federal Court for review) • **upon being given notice of an application to Federal Court for review under section 41 or 42, give written notice of the application to third party(s)**	43(1)	X	
18.Notice to applicant (application to Federal Court by third party) • **give written notice of the application to requester**	44(2)	X	
19. Special rules for hearings • **for an application under section 41 or 42 relating to refusal to disclose (or appeal) by reason of 13(1)(*a*) or (*b*) or 15 (international affairs or defence), the institution concerned can request that the application can be heard and determined in the National Capital Region, and can request to make representations *ex parte***	52(2)(3)	X	
20. Exempted information severed from manuals • **decision to refuse to disclose parts of manuals in accordance with exemption criteria**	71(2)	(Not delegated)	
21. Annual Report	72(1)	(Not delegated)	

024

Action	Section of the *Access to Information Act*	Authority Delegated to	
		General Counsel	Access to Information and Privacy Coordinator
• **submit Annual Report to Parliament**			
22. Responsibilities under sections 6 and 8 of the *Access to Information Regulations*:	77		
• **subsection 6(1): consent to process an access request transferred from another government institution within time limits set out in the AIA.**		X	X
• **subsection 8(1): determining that the requester's preference for copies is not practical pursuant to 8(1)(*a*)(*b*) and that records must be examined**		X	X
• **subsection 8(2): determining that the requester's preference for examining records is not practical pursuant to 8(2)(*a*)(*b*) and that copies will be provided**		X	X
• **subsection 8(3): provide reasonable facilities and time for examination and ensure fees have been paid**		X	X

Table 3: Delegation of Authority – Privacy and Data Protection

Action	Section of the *Privacy Act*	Authority Delegated to	
		General Counsel	Access to Information and Privacy Coordinator
1. Disclosure of personal information	8(2)(*j*)(*m*)	(Not delegated)	

025

Action	Section of the *Privacy Act*	Authority Delegated to	
		General Counsel	Access to Information and Privacy Coordinator
• **authorize the disclosure of personal information for research purposes and in the public interest or the interest of the individual**			
2. Requests from investigative bodies • **retain a copy of the requests and the disclosed records**	8(4)		X
3. Notify Privacy Commissioner of 8(2)(*m*) disclosures • **notify Commissioner of public interest disclosures and disclosure which would clearly benefit individuals to whom the information relates**	8(5)	(Not delegated)	
4. Retain record of disclosures • **retain a record of use or disclosure of personal information where the use or disclosure is not included in InfoSource, and attach the record to the personal information**	9(1)		X
5. Notify Privacy Commissioner of consistent use • **notify Commissioner of consistent use or disclosure where the use or disclosure is not included in InfoSource and update in next publication**	9(4)	(Not delegated)	
6. Include personal information in Personal Information Banks	10		X

026

Action	Section of the *Privacy Act*	Authority Delegated to	
		General Counsel	Access to Information and Privacy Coordinator
• include all personal information under the control of the Agency in Personal Information Banks			
7. Respond to requests for access • give written notice to requesters, who are not Agency employees or their agents, as to whether or not access to the records will be given and provide access if access is to be given • give written notice to requesters, who are Agency employees or their agents, as to whether or not access to the records will be given and provide access if access is to be given	14	X	
8. Extension of time limits • extend time limits for responding to requests for access	15	X	X
9. Language of access • decide whether to translate information	17(2)(*b*)	X	X
10. Access in an alternative format • determine if the giving of access in an alternative format to a person with a sensory disability is necessary and reasonable	17(3)(*b*)	X	X
11. Exempt banks	18(2)	(Not delegated)	

027

Action	Section of the *Privacy Act*	Authority Delegated to	
		General Counsel	Access to Information and Privacy Coordinator
• **Refuse to disclose information contained in an exempt bank**			
12. Invoking exemptions: • **determine whether or not to invoke the following exemptions, for requests not filed by Agency employees or their agents, to refuse access and exercising discretion where appropriate:**			
a) personal information obtained in confidence	19(1)(2)		
b) federal-provincial affairs	20		
c) international affairs and defence	21	X	
d) law enforcement and investigation	22		
e) information prepared by an investigative body for security clearances	23		
f) information collected by the Canadian Penitentiary Services, National Parole Services or National Parole Board	24		
g) safety of individuals	25		
h) personal information about other individuals	26		
i) solicitor-client privilege	27		
j) medical records	28		
13. Receive notice of investigations • **receive notice of investigations by the Privacy Commissioner**	31	X	
14. Right to make representations • **make representations to the Privacy Commissioner during investigation**	33(2)	ATIP Coordinator, General Counsel, Counsel and program staff may provide information in the course of an investigation.	

Action	Section of the *Privacy Act*	Authority Delegated to	
		General Counsel	Access to Information and Privacy Coordinator
15. Privacy Commissioner's Report • **receive Commissioner's report of findings, give notice of action taken**	35(1)	X	
16. Access to be given to complainant • **give complainant access to information after 35(1)(*b*) notice**	35(4)	X	X
17. Review of exempt banks • **receive Commissioner's findings of investigation of exempt bank**	36(3)	(Not delegated)	
18. Compliance investigation • **receive report of Privacy Commissioner's findings after compliance investigations of sections 4 to 8**	37(3)	(Not delegated)	
19. Special rules for hearings • **request that Section 51 court hearings be held in NCR**	51(2)(*b*)	X	
20. Representations in hearings • **request and be given right to make representations in Sec. 51 hearings**	51(3)	X	
21. Annual Report • **submit Annual Report to Parliament**	72(1)	(Not delegated)	
22. Responsibilities under sections 9, 11, 13 and 14 of the *Privacy Regulations*	77		

029

Action	Section of the *Privacy Act*	Authority Delegated to	
		General Counsel	Access to Information and Privacy Coordinator
• **section 9: provide reasonable facilities and time for examination of information**		X	X
• **subsection 11(2): upon receipt of Correction Request Form, provide notification to individual that correction has been made and provide notifications in 11(2)(b) and (c)**		X	
• **subsection 11(4): where a request for correction is refused, attach notification to the personal information that a correction was refused and provide notifications in 11(4)(b)(c) and (d)**		X	
• **subsection 13(1): authorize the disclosure of medical records to a qualified medical practitioner or psychologist for opinion as to whether disclosure would be contrary to the best interests of the individual**		X	

Date Modified :
2012-01-11

Top of Page

Important Notices

Privacy Act, R.S.C., 1985, c. P-21, section 73

Delegation by the head of a government institution

73. The head of a government institution may, by order, designate one or more officers or employees of that institution to exercise or perform any of the powers, duties or functions of the head of the institution under this Act that are specified in the order.

1980-81-82-83, c. 111, Sch. II "73".

Pouvoir de délégation du responsable d'une institution

73. Le responsable d'une institution fédérale peut, par arrêté, déléguer certaines de ses attributions à des cadres ou employés de l'institution.

1980-81-82-83, ch. 111, ann. II « 73 »

Delegation by the head of a government institution

73. The head of a government institution may, by order, designate one or more officers or employees of that institution to exercise or perform any of the powers, duties or functions of the head of the institution under this Act that are specified in the order.

1980-81-82-83, c. 111, Sch. I "73".

73. Le responsable d'une institution fédérale peut, par arrêté, déléguer certaines de ses attributions à des cadres ou employés de l'institution.

1980-81-82-83, ch. 111, ann. I « 73 ».

Pouvoir de délégation du responsable d'une institution

Tab D

Ceci est la pièce D de affidavit
This is Exhibit referred to in the Affidavit

de Patrice Bellerose
of

assermenté devant moi ce 23rd jour de May 2014
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

Tab E

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de Patrice Bellerose
of

assermenté devant moi ce 23rd jour de May 199 2014
sworn to before me this day of

SP Lessard

~~Commissaire à l'assermentation~~
~~Commissioner for Oaths~~

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

(*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or

(*b*) for a purpose for which the information may be disclosed to the institution under subsection 8(2).

1980-81-82-83, c. 111, Sch. II "7".

a) qu'aux fins auxquelles ils ont été recueillis ou préparés par l'institution de même que pour les usages qui sont compatibles avec ces fins;

b) qu'aux fins auxquelles ils peuvent lui être communiqués en vertu du paragraphe 8(2).

1980-81-82-83, ch. 111, ann. II « 7 ».

Disclosure of personal information

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

Communication des renseignements personnels

8. (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.

Where personal information may be disclosed

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

(*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;

(*b*) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

(*c*) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information;

(*d*) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;

(*e*) to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed;

(*f*) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the council of the Westbank First Nation, the council of a participating First Nation — as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act* —, the government of a foreign state, an international organization of states or an international organization

Cas d'autorisation

(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :

a) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;

b) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;

c) communication exigée par *subpoena*, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de renseignements;

d) communication au procureur général du Canada pour usage dans des poursuites judiciaires intéressant la Couronne du chef du Canada ou le gouvernement fédéral;

e) communication à un organisme d'enquête déterminé par règlement et qui en fait la demande par écrit, en vue de faire respecter des lois fédérales ou provinciales ou pour la tenue d'enquêtes licites, pourvu que la demande précise les fins auxquelles les renseignements sont destinés et la nature des renseignements demandés;

f) communication aux termes d'accords ou d'ententes conclus d'une part entre le gouvernement du Canada ou l'un de ses organismes et, d'autre part, le gouvernement d'une province ou d'un État étranger, une or-

established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;

(*g*) to a member of Parliament for the purpose of assisting the individual to whom the information relates in resolving a problem;

(*h*) to officers or employees of the institution for internal audit purposes, or to the office of the Comptroller General or any other person or body specified in the regulations for audit purposes;

(*i*) to the Library and Archives of Canada for archival purposes;

(*j*) to any person or body for research or statistical purposes if the head of the government institution

(i) is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and

(ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates;

(*k*) to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada;

(*l*) to any government institution for the purpose of locating an individual in order to collect a debt owing to Her Majesty in right of Canada by that individual or make a payment owing to that individual by Her Majesty in right of Canada; and

(*m*) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or

ganisation internationale d'États ou de gouvernements, le conseil de la première nation de Westbank, le conseil de la première nation participante — au sens du paragraphe 2(1) de la *Loi sur la compétence des premières nations en matière d'éducation en Colombie-Britannique* — ou l'un de leurs organismes, en vue de l'application des lois ou pour la tenue d'enquêtes licites;

g) communication à un parlementaire fédéral en vue d'aider l'individu concerné par les renseignements à résoudre un problème;

h) communication pour vérification interne au personnel de l'institution ou pour vérification comptable au bureau du contrôleur général ou à toute personne ou tout organisme déterminé par règlement;

i) communication à Bibliothèque et Archives du Canada pour dépôt;

j) communication à toute personne ou à tout organisme, pour des travaux de recherche ou de statistique, pourvu que soient réalisées les deux conditions suivantes :

(i) le responsable de l'institution est convaincu que les fins auxquelles les renseignements sont communiqués ne peuvent être normalement atteintes que si les renseignements sont donnés sous une forme qui permette d'identifier l'individu qu'ils concernent,

(ii) la personne ou l'organisme s'engagent par écrit auprès du responsable de l'institution à s'abstenir de toute communication ultérieure des renseignements tant que leur forme risque vraisemblablement de permettre l'identification de l'individu qu'ils concernent;

k) communication à tout gouvernement autochtone, association d'autochtones, bande d'Indiens, institution fédérale ou subdivision de celle-ci, ou à leur représentant, en vue de l'établissement des droits des peuples autochtones ou du règlement de leurs griefs;

l) communication à toute institution fédérale en vue de joindre un débiteur ou un créancier de Sa Majesté du chef du Canada et de recouvrer ou d'acquitter la créance;

d) la première nation dont le nom figure à l'annexe II de la *Loi sur l'autonomie gouvernementale des premières nations du Yukon.*

Definition of "aboriginal government"

(7) The expression "aboriginal government" in paragraph (2)(*k*) means

(*a*) Nisga'a Government, as defined in the Nisga'a Final Agreement given effect by the *Nisga'a Final Agreement Act*;

(*b*) the council of the Westbank First Nation;

(*c*) the Tlicho Government, as defined in section 2 of the *Tlicho Land Claims and Self-Government Act*;

(*d*) the Nunatsiavut Government, as defined in section 2 of the *Labrador Inuit Land Claims Agreement Act*;

(*e*) the council of a participating First Nation as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act*;

(*f*) the Tsawwassen Government, as defined in subsection 2(2) of the *Tsawwassen First Nation Final Agreement Act*; or

(*g*) a Maanulth Government, within the meaning of subsection 2(2) of the *Maanulth First Nations Final Agreement Act.*

Définition de « gouvernement autochtone »

(7) L'expression « gouvernement autochtone » à l'alinéa (2)*k*) s'entend :

a) du gouvernement nisga'a, au sens de l'Accord définitif nisga'a mis en vigueur par la *Loi sur l'Accord définitif nisga'a*;

b) du conseil de la première nation de Westbank;

c) du gouvernement tlicho, au sens de l'article 2 de la *Loi sur les revendications territoriales et l'autonomie gouvernementale du peuple tlicho*;

d) du gouvernement nunatsiavut, au sens de l'article 2 de la *Loi sur l'Accord sur les revendications territoriales des Inuit du Labrador*;

e) du conseil de la première nation participante, au sens du paragraphe 2(1) de la *Loi sur la compétence des premières nations en matière d'éducation en Colombie-Britannique*;

f) du gouvernement tsawwassen, au sens du paragraphe 2(2) de la *Loi sur l'accord définitif concernant la Première Nation de Tsawwassen*;

g) de tout gouvernement maanulth, au sens du paragraphe 2(2) de la *Loi sur l'accord définitif concernant les premières nations maanulthes.*

Definition of "council of the Westbank First Nation"

(8) The expression "council of the Westbank First Nation" in paragraphs (2)(*f*) and (7)(*b*) means the council, as defined in the Westbank First Nation Self-Government Agreement given effect by the *Westbank First Nation Self-Government Act.*

R.S., 1985, c. P-21, s. 8; R.S., 1985, c. 20 (2nd Supp.), s. 13, c. 1 (3rd Supp.), s. 12; 1994, c. 35, s. 39; 2000, c. 7, s. 26; 2004, c. 11, s. 37, c. 17, s. 18; 2005, c. 1, ss. 106, 109, c. 27, ss. 21, 25; 2006, c. 10, s. 33; 2008, c. 32, s. 30; 2009, c. 18, s. 23.

Définition de « conseil de la première nation de Westbank »

(8) L'expression « conseil de la première nation de Westbank» aux alinéas (2)*f*) et (7)*b*) s'entend du conseil au sens de l'Accord d'autonomie gouvernementale de la première nation de Westbank mis en vigueur par la *Loi sur l'autonomie gouvernementale de la première nation de Westbank.*

L.R. (1985), ch. P-21, art. 8; L.R. (1985), ch. 20 (2e suppl.), art. 13, ch. 1 (3e suppl.), art. 12; 1994, ch. 35, art. 39; 2000, ch. 7, art. 26; 2004, ch. 11, art. 37, ch. 17, art. 18; 2005, ch. 1, art. 106 et 109, ch. 27, art. 21 et 25; 2006, ch. 10, art. 33; 2008, ch. 32, art. 30; 2009, ch. 18, art. 23.

Tab F

Ceci est la piece F de affidavit
This is Exhibit referred to in the Affidavit

de Patrice Bellerose
of

assermenté devant moi ce 23rd jour de May 2014
sworn to before me this day of

SP Lessard

Commissaire à l'assermentation
Commissioner for Oaths

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

Privacy Act, R.S.C., 1985, c. P-21, sections 10 and 11

PERSONAL INFORMATION BANKS

Personal information to be included in personal information banks

10. (1) The head of a government institution shall cause to be included in personal information banks all personal information under the control of the government institution that

(*a*) has been used, is being used or is available for use for an administrative purpose; or

(*b*) is organized or intended to be retrieved by the name of an individual or by an identifying number, symbol or other particular assigned to an individual.

Exception for Library and Archives of Canada

(2) Subsection (1) does not apply in respect of personal information under the custody or control of the Library and Archives of Canada

FICHIERS DE RENSEIGNEMENTS PERSONNELS

Renseignements personnels versés dans les fichiers de renseignements personnels

10. (1) Le responsable d'une institution fédérale veille à ce que soient versés dans des fichiers de renseignements personnels tous les renseignements personnels qui relèvent de son institution et qui :

a) ont été, sont ou peuvent être utilisés à des fins administratives;

b) sont marqués de façon à pouvoir être retrouvés par référence au nom d'un individu ou à un numéro, symbole ou autre indication identificatrice propre à cet individu.

Exception : Bibliothèque et Archives du Canada

(2) Le paragraphe (1) ne s'applique pas aux renseignements personnels qui relèvent de Bibliothèque et Archives du Canada et qui y ont

that has been transferred there by a government institution for historical or archival purposes.

R.S., 1985, c. P-21, s. 10; R.S., 1985, c. 1 (3rd Supp.), s. 12; 2004, c. 11, s. 38.

PERSONAL INFORMATION INDEX

Index of personal information

11. (1) The designated Minister shall cause to be published on a periodic basis not less frequently than once each year, an index of

(*a*) all personal information banks setting forth, in respect of each bank,

(i) the identification and a description of the bank, the registration number assigned to it by the designated Minister pursuant to paragraph 71(1)(*b*) and a description of the class of individuals to whom personal information contained in the bank relates,

(ii) the name of the government institution that has control of the bank,

(iii) the title and address of the appropriate officer to whom requests relating to personal information contained in the bank should be sent,

(iv) a statement of the purposes for which personal information in the bank was obtained or compiled and a statement of the uses consistent with those purposes for which the information is used or disclosed,

(v) a statement of the retention and disposal standards applied to personal information in the bank, and

(vi) an indication, where applicable, that the bank was designated as an exempt bank by an order under section 18 and the provision of section 21 or 22 on the basis of which the order was made; and

(*b*) all classes of personal information under the control of a government institution that are not contained in personal information banks, setting forth in respect of each class

(i) a description of the class in sufficient detail to facilitate the right of access under this Act, and

(ii) the title and address of the appropriate officer for each government institution to whom requests relating to personal information within the class should be sent.

été versés par une institution fédérale pour dépôt ou à des fins historiques.

L.R (1985), ch. P-21, art. 10; L.R. (1985), ch. 1 (3e suppl.), art. 12; 2004, ch. 11, art. 38.

RÉPERTOIRE DE RENSEIGNEMENTS PERSONNELS

Publication du répertoire

11. (1) Le ministre désigné fait publier, selon une périodicité au moins annuelle, un répertoire :

a) d'une part, de tous les fichiers de renseignements personnels, donnant, pour chaque fichier, les indications suivantes :

(i) sa désignation, son contenu, la cote qui lui a été attribuée par le ministre désigné, conformément à l'alinéa 71(1)*b*), ainsi que la désignation des catégories d'individus sur qui portent les renseignements personnels qui y sont versés,

(ii) le nom de l'institution fédérale de qui il relève,

(iii) les titre et adresse du fonctionnaire chargé de recevoir les demandes de communication des renseignements personnels qu'il contient,

(iv) l'énumération des fins auxquelles les renseignements personnels qui y sont versés ont été recueillis ou préparés de même que l'énumération des usages, compatibles avec ces fins, auxquels les renseignements sont destinés ou pour lesquels ils sont communiqués,

(v) l'énumération des critères qui s'appliquent à la conservation et au retrait des renseignements personnels qui y sont versés,

(vi) s'il y a lieu, le fait qu'il a fait l'objet d'un décret pris en vertu de l'article 18 et la mention de la disposition des articles 21 ou 22 sur laquelle s'appuie le décret;

b) d'autre part, de toutes les catégories de renseignements personnels qui relèvent d'une institution fédérale mais ne sont pas versés dans des fichiers de renseignements personnels, donnant, pour chaque catégorie, les indications suivantes :

(i) son contenu, en termes suffisamment précis pour faciliter l'exercice du droit d'accès prévu par la présente loi,

(ii) les titre et adresse du fonctionnaire de l'institution chargé de recevoir les demandes de communication des renseignements personnels qu'elle contient.

Statement of uses and purposes

(2) The designated Minister may set forth in the index referred to in subsection (1) a statement of any of the uses and purposes, not included in the statements made pursuant to subparagraph (1)(*a*)(iv), for which personal information contained in any of the personal information banks referred to in the index is used or disclosed on a regular basis.

Énumération des usages et fins

(2) Le ministre désigné peut insérer, dans le répertoire, des usages ou fins non prévus au sous-alinéa (1)*a*)(iv) mais s'appliquant, dans le cadre de communications courantes, à des renseignements personnels versés dans les fichiers de renseignements personnels.

Index to be made available

(3) The designated Minister shall cause the index referred to in subsection (1) to be made available throughout Canada in conformity with the principle that every person is entitled to reasonable access to the index.

1980-81-82-83, c. 111, Sch. II "11".

Diffusion

(3) Le ministre désigné est responsable de la diffusion du répertoire dans tout le Canada, étant entendu que toute personne a le droit d'en prendre normalement connaissance.

1980-81-82-83, ch. 111, ann. II « 11 ».

Tab G

Ceci est la pièce G de affidavit
This is Exhibit referred to in the Affidavit

de Patrice Bellerose
of

assermenté devant moi ce 23rd jour de May 2014
sworn to before me this day of

~~Commissaire à l'assermentation~~
~~Commissioner for Oaths~~

SIMON-PIERRE LESSARD, AVOCAT
199616-9
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Government of Canada / Gouvernement du Canada

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Home

Info Source Publications

Info Source is a series of publications containing information about the Government of Canada's access to information and privacy programs. The primary purpose of *Info Source* is to assist individuals in exercising their rights under the *Access to Information Act* and the *Privacy Act*. *Info Source* also supports the government's commitment to facilitate access to information regarding its activities.

Info Source includes the following three publications:

- ***Info Source: Sources of Government and Employee Information***
  - provides information about the functions, programs, activities and related information holdings of government institutions subject to the *Access to Information Act* and the *Privacy Act*; and
  - provides individuals and employees of the government (current and former) with relevant information to access personal information about themselves held by government institutions subject to the *Privacy Act* and to exercise their rights under the *Privacy Act*.
- **Info Source: Bulletin - Statistical Reporting**
  - contains statistical information about access to information and privacy requests on an annual basis; and
  - provides cumulative statistics about access to information and privacy requests since 1983.
- ***Info Source: Bulletin - Federal Court Decision Summaries***
  - includes an annual summary of key federal court cases related to the *Access to Information Act* and the *Privacy Act*.

Date Modified: 2013-08-30

Tab H

Ceci est la pièce H de l'affidavit
This is Exhibit referred to in the Affidavit

de Patrice Bellerose
of

assermenté devant moi ce 23rd jour de May 20 14
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

SIMON-PIERRE LESSARD, AVOCAT
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Canada

Canadian Transportation Agency | Office des transports du Canada

Canadian Transportation Agency
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Sources of Federal Government and Employee Information 2012

Info Source: Sources of Federal Government and Employee Information provides information about the functions, programs, activities and related information holdings of government institutions subject to the *Access to Information Act* and the *Privacy Act*. It provides individuals and employees of the government (current and former) with relevant information to access personal information about themselves held by government institutions subject to the *Privacy Act* and to exercise their rights under the *Privacy Act*.

The Introduction to *Info Source: Sources of Federal Government and Employee Information* and an index of institutions subject to the *Access to Information Act* and the *Privacy Act* are available centrally.

The *Access to Information Act* and the *Privacy Act* assign overall responsibility to the President of Treasury Board (as the designated Minister) for the government-wide administration of the legislation.

General Information

Background

The Agency works collaboratively with many partners in order to help sustain a transportation system that works for all Canadians.

Learn more:

- About the Agency
- History
- Legislation and Regulations

Responsibilities

The mandate of the Agency stems from the laws and regulations for which it has authority, namely the *Canada Transportation Act*.

Learn more:

- What we do
- Role and Structure
- Mission, Mandate, Vision and Values

Institutional Functions, Programs and Activities

Adjudication and Alternative Dispute Resolution

The Agency helps to protect the interests of users, service providers and others affected by the national transportation system through access to a specialized dispute resolution system of formal and informal processes for rail, air and marine transportation matters within the national transportation system. Where possible, the Agency encourages the resolution of disputes through informal processes such as facilitation, mediation, and arbitration. As a quasi-judicial tribunal, the Agency also has the authority to issue decisions and orders on matters within its jurisdiction of federally-regulated modes of transportation through formal adjudication.

Resolution of Air, Marine, Rail, and Accessibility Transportation Disputes

The Agency helps to protect the interests of the travelling public, shippers and Canadian air carriers by ensuring that fares, rates, charges, and terms and conditions of carriage are consistent with Canadian legislation, regulations and rules on appeals of new or revised air navigational charges imposed by NAV Canada. The Agency is also responsible for resolving disputes between travellers and transportation providers by ensuring the undue obstacles to the mobility of persons with disabilities are removed from federally regulated transportation services and facilities for all modes of transport under federal jurisdiction, namely, air, rail, marine and interprovincial bus services. It resolves disputes between railways and shippers on various issues, such as rates and level of service arising within the rail industry; and between railway companies and municipalities, road authorities, landowners and others over railway infrastructure matters. In addition, the Agency resolves disputes between vessel operators and port and pilotage authorities pertaining to certain marine activities including the power to rule, in response to a complaint, on whether charges for pilotage in federally regulated waters or fees fixed by port authorities, respectively, are unreasonable and not in the public interest or are unjustly discriminatory.

Accessible Transportation

Description:	Records related to the regulation of, and resolution of complaints related to transportation facilities, equipment and services provided in the federal transportation network to travelers with disabilities.
Document Types:	Correspondence, statements of work, proposals, evaluation criteria, procedures, policies, legal opinions, surveys, conditions, standards, statistical reports, medical reports and evaluations, agreements, applications, background papers, and decisions.
Format:	Videotapes, audiotapes, photographs and Braille.
Record Number:	CTA DRB 001

Complaints Regarding Services Provided to Persons with Disabilities

Description:	This bank contains a record of investigations of complaints concerning the possible existence of undue obstacles to the mobility of persons with disabilities under the Canada Transportation Act. This bank may contain personal information in the form of an individual's name; his or her home, business, mailing or email address or telephone number; medical condition; disability; age; and marital status.
Class of Individuals:	Individuals who have filed complaints.
Purpose:	To determine whether or not undue obstacles to the travel of passengers with disabilities exist and, if so, to determine the appropriate corrective measure. Information that is provided is used to investigate complaints and copies are forwarded to transportation service providers for comments. Complaints on similar issues are sometimes processed together and information is shared with the involved applicants. Agency decisions are issued on complaints and posted on our website.
Consistent Uses:	None.
Retention and Disposal Standards:	Records are destroyed ten years after the complaint is resolved.
RDA Number:	95/023
Related Record Number:	CTA DRB 001
TBS Registration:	002154
Bank Number:	CTA PPU 033

Air Travel Complaints

Description:	Records related to air travelers' complaints about air carriers including incidents such as delays, cancelled flights, delayed, lost or damaged luggage, ticketing, quality of service, cargo, reservations, denied boarding, unruly passengers, discontinuance or reduction of service to a community, fares and rates. Records may include baggage claim tickets, flight reports, carrier passenger reports, ticketing information, fares, rates and charges, carrier-operated loyalty programs, terms and conditions of carriage, tariffs, and incident reports.
Document Types:	Statements of work, proposals, evaluation criteria, procedures, policies, legal opinions, surveys, conditions, standards, statistical reports, medical reports and evaluations, correspondence, background papers, and

	decisions.
Record Number:	CTA DRB 002

Air Travel Complaints

Description:	This bank contains a record of Air Travel Complaints regarding such incidents as delayed or cancelled flights, delayed, lost or damaged luggage, ticketing, quality of service, cargo, reservations, denied boarding, unruly passengers, discontinuance or reduction of service to a community, fares and rates. This bank contains personal information in the form of individuals' names, addresses and contact numbers.
Class of Individuals:	Members of the general public who lodge Air Travel Complaints.
Purpose:	The purpose is to resolve Air Travel Complaints. If a complaint relates to an air carrier or other responsible body, a copy of the complaint is forwarded to them for comments or for their resolution as appropriate.
Consistent Uses:	None.
Retention and Disposal Standards:	Records are retained for ten years and then destroyed.
RDA Number:	95/023
Related Record Number:	CTA DRB 003, CTA DRB 002
TBS Registration:	004442
Bank Number:	CTA PPU 014

Rail, Air and Marine Disputes

Description:	Records related to rail, air and marine disputes and investigations including marine complaints and investigations on port authority user fees, pilotage authority fees and charges and services relating to shipping cartels; air investigations on tariffs, pricing, advertising, licensing and discontinuance of service and NAV Canada appeals; rail level of services and rate complaints and investigations, interswitching rates, competitive line rates and running rights applications; rail infrastructure complaints including crossing disputes between railways and road authorities, municipalities, land owners and utility companies; apportionment of costs for railway works; approval of rail line

	construction; environmental assessments; railway noise and vibration complaints; changes in road authorities at crossings; and the transfer and discontinuance of rail lines including track determinations.
Document Types:	Correspondence, legal opinions, agreements, applications, background papers, statistics, maps, photographs, construction plans and decisions.
Record Number:	CTA DRB 003

Air Travel Complaints

Description:	This bank contains a record of Air Travel Complaints regarding such incidents as delayed or cancelled flights, delayed, lost or damaged luggage, ticketing, quality of service, cargo, reservations, denied boarding, unruly passengers, discontinuance or reduction of service to a community, fares and rates. This bank contains personal information in the form of individuals' names, addresses and contact numbers.
Class of Individuals:	Members of the general public who lodge Air Travel Complaints.
Purpose:	The purpose is to resolve Air Travel Complaints. If a complaint relates to an air carrier or other responsible body, a copy of the complaint is forwarded to them for comments or for their resolution as appropriate.
Consistent Uses:	None.
Retention and Disposal Standards:	Records are retained for ten years and then destroyed.
RDA Number:	95/023
Related Record Number:	CTA DRB 003, CTA DRB 002
TBS Registration:	004442
Bank Number:	CTA PPU 014

Rail, Air and Marine Disputes

Description:	This bank describes information that is related to resolving disputes concerning federally-regulated modes of transportation (air, rail, and marine). Personal information may include name, contact information, financial information, opinions and views of, or about, individuals, and signature.
Class of Individuals:	General public; agents of individuals and

	carriers, including lawyers and consultants; and mediators.
Purpose:	Personal information is collected pursuant to the Canada Transportation Act and is used to administer the disputes program and to resolve disputes.
Consistent Uses:	Full text versions of decisions are posted on the CTA website, but will not be accessible by Internet search engines. As a result, an Internet search of a person's name mentioned in a decision will not provide any information from the full-text version of decisions posted on the Agency's website. Personal information may be used or disclosed for program evaluation.
Retention and Disposal Standards:	Records will be retained for 10 years after closure except for complaints related to rail infrastructure pre-dating 2006 which are retained for the retention period of the relevant infrastructure, and then are destroyed.
RDA Number:	95/023, 96/044
Related Record Number:	CTA DRB 003
TBS Registration:	20091614
Bank Number:	CTA PPU 001

Economic Regulation

The Agency helps to protect the interests of users, service providers and others affected by the national transportation system through the economic regulation of air, rail and marine transportation by the administration of laws, regulations, voluntary codes of practice, educational and outreach programs.

Air, Rail, Marine and Accessibility Transportation Regulation

The Agency helps to protect the interests of the travelling public through the regulation of air, rail, marine and accessibility transportation by regulating and administering a licensing system for air carriers that provide domestic or international publicly available air transportation services; enforcing the relevant provisions of the Canada Transportation Act and its related regulations; administering a permit system for international charter operations; helping to negotiate and administer bilateral air agreements with other countries and administering international air tariffs. The Agency also ensures that undue obstacles to the mobility of persons with disabilities are removed from federally-regulated transportation services and facilities by developing regulations, codes of practice, standards, educational and outreach programs concerning the level of accessibility in modes of transport under federal jurisdiction, such as air, rail, and marine. It further regulates rail transportation in Canada by issuing certificates of fitness allowing rail carriers to operate; approving rail line construction, rail crossing construction, and overseeing environmental assessments for rail projects triggered under the Canadian Environmental Assessment Act. It oversees the process for discontinuing service on rail lines and disposing of related assets, and undertakes other duties with economic, public and national interests in mind. It also determines regulated railway interswitching rates and the railway companies' revenue caps for the movement of Western grain. The Agency develops rail costing standards and regulations; and audits railway companies'

accounting and statistics-generating systems, as required. Additionally, the Agency acts as an economic regulator for certain marine activities. It protects the interests of Canadian vessel operators engaged in coasting trade by determining if a Canadian ship is suitable and/or available; when the use of a foreign ship is being proposed; and administers legislation governing shipping conferences.

Industry Determinations and Analysis

Description:	Records related to the administration of legislation governing the railways including revenue caps for the movement of western grain, railway cost and the determination of the net salvage value of rail lines being abandoned. Records may include railway depreciation, cost of capital, net salvage values, Uniform Classification of Accounts, Unit Cost determination, interswitching rates, price indices, rail traffic data base, Revenue Caps for Western Grain, and Volume Related Composite Price Index.
Document Types:	Financial audits, statistical analysis, and audits of railway accounting systems for Western Grain movement, background papers, briefings and consultations, correspondence, legal opinions, presentations, reports, studies, directives, guidelines, Orders in Council, plans, policies, maps and photographs.
Record Number:	CTA IRD 001

International Agreements and Tariffs

Description:	Records related to the negotiation and implementation of international air agreements and conventions and the administration of prices, terms and conditions of carriage applicable to international travel. Records may include bilateral air transport negotiations and implementation of agreements and conventions, applications for extra bilateral authorities, liaison with Department of Foreign Affairs and International Trade, code share and wet lease; and international air tariff filings including pricing, surcharges and terms and conditions of carriage, special permissions, general schedules, air tariff regulations, International Air Transportation Association resolutions and practices, and review of accessible provisions in air carrier tariffs.
Document Types:	Applications, forms, assessments, background papers, briefings and consultations, correspondence, legal opinions, legislation, maps, Orders in Council, plans, photographs, policies,

	presentations, reports, studies, operating certificates, insurance certificates, licences, permits and agreements.
Record Number:	CTA IRD 002

Air Service Licensing Program

Description:	This bank contains a record of Air Service Licence Applications for use in granting or denying licence authorities under the Canada Transportation Act. The bank contains applications and interventions in support or opposition thereto. The bank may also contain personal information relating to the applicant or other parties of record in the form of an individual's name; his or her home, business, mailing or email address or telephone number; nationality; age; identifying numbers; and financial information. Note that since July 1, 1996 interventions are no longer a part of the air service licence application process.
Class of Individuals:	Applicants and interveners in the licensing process.
Purpose:	For granting or denying licences under the Canada Transportation Act.
Consistent Uses:	None.
Retention and Disposal Standards:	Files are destroyed twenty years following the cancellation of the licence.
RDA Number:	95/023
Related Record Number:	CTA IRD 002, CTA IRD 003
TBS Registration:	000320
Bank Number:	CTA PPU 015

Rail Rationalization

Description:	Records related to the evaluation of proposals to rationalize rail networks prior to July 1, 1996. Records may include railway costs and revenues; applications for abandonment of rail lines and removal of stations; branch line and passenger subsidy programs; branch line rehabilitation; conveyance of railway lines; and track determinations. Since then, the Agency has no approval responsibility for Rail Rationalization and these program records will be disposed of in accordance with their Retention and Disposal Standards.

Document Types:	Assessments, background papers, briefings and consultations, correspondence, decisions and orders, legal opinions, maps, Orders in Council, plans, photographs, presentations, and reports and studies.
Record Number:	CTA RAI 176

Regulatory Approvals and Compliance

Description:	Records related to the licensing of air carriers, certificates of fitness for railway companies, railway crossings, railway environmental assessments projects, regulation of certain marine activities and ensuring compliance with legislation and taking enforcement action. Records may include domestic and international air carrier licences, international charter permits, financial requirements, Canadian ownership requirements, protection of advance payments, liability insurance requirements; railway certificates of fitness, railway agreements, railway environmental assessments, applications for licences to use foreign ships in Canadian waters, Shipping Conferences Exemption Act, 1987 filings, Canadian ship database; inspection of air carriers and enforcement, sanction and administrative monetary penalties, information and education, inspections of passenger terminal operator for accessibility and monitoring of accessibility training regulations.
Document Types:	Application forms, assessments, background papers, briefings and consultations, correspondence, legal opinions, legislation, maps, Orders in Council, plans, photographs, policies, presentations, reports and studies, licenses and permits.
Record Number:	CTA IRD 003

Air Service Licensing Program

Description:	This bank contains a record of Air Service Licence Applications for use in granting or denying licence authorities under the Canada Transportation Act. The bank contains applications and interventions in support or opposition thereto. The bank may also contain personal information relating to the applicant or other parties of record in the form of an individual's name; his or her home, business, mailing or email address or telephone number; nationality; age; identifying numbers; and financial information. Note that since July 1, 1996

	interventions are no longer a part of the air service licence application process.
Class of Individuals:	Applicants and interveners in the licensing process.
Purpose:	For granting or denying licences under the Canada Transportation Act.
Consistent Uses:	None.
Retention and Disposal Standards:	Files are destroyed twenty years following the cancellation of the licence.
RDA Number:	95/023
Related Record Number:	CTA IRD 002, CTA IRD 003
TBS Registration:	000320
Bank Number:	CTA PPU 015

Enforcement

Description:	This bank contains information relating to the Enforcement of Agency regulations, and investigation of possible infractions or alleged illegal operations by air carriers. Enforcement activities may involve communication with other government departments, including the RCMP and the Department of Justice. This bank may contain, depending on the nature of the investigation, personal information in the form of an individual's name; his or her home, business, mailing or email address or telephone number; investigation details; and views or opinions of another individual about the individual.
Class of Individuals:	Individuals involved in possible infractions and occasionally information relating to the plaintiffs.
Purpose:	To determine whether or not there have been infractions and, if so, to determine the appropriate action. The results of warnings and notices of violation issued pursuant to the Designated Provisions Regulations are published on the Agency's website. This information includes the name of the carrier or individual, whether there was an application for review of the warning, whether or not the penalty was paid and whether or not the case was referred to the Transportation Appeal Tribunal of Canada.
Consistent Uses:	None.
Retention and Disposal	Files are destroyed ten years following the completion of the investigation.

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Standards:	
RDA Number:	95/023
Related Record Number:	CTA IRD 003
TBS Registration:	000319
Bank Number:	CTA PPU 010

Secretariat

Description:	Records related to Agency decisions, orders, reports and notices; the administration of public hearings, inquiries, executive and ministerial correspondence; and the co-ordination of translation services.
Document Types:	Agency orders and decisions; executive and ministerial correspondence; and transcripts and exhibits of Agency public hearings and inquiries.
Record Number:	CTA SEC 001

Internal Services

Internal Services are groups of related activities and resources that are administered to support the needs of programs and other corporate obligations of an organization. These groups are: Management and Oversight Services; Communications Services; Legal Services; Human Resources Management Services; Financial Management Services; Information Management Services; Information Technology Services; Real Property Services; Materiel Services; Acquisition Services; and Travel and Other Administrative Services. Internal Services include only those activities and resources that apply across an organization and not to those provided specifically to a program.

Acquisitions

Acquisition Services involve activities undertaken to acquire a good or service to fulfil a properly completed request (including a complete and accurate definition of requirements and certification that funds are available) until entering into or amending a contract.

- Procurement and Contracting
  - Professional Services Contracts

Communications Services

Communications Services involve activities undertaken to ensure that Government of Canada communications are effectively managed, well coordinated and responsive to the diverse information needs of the public. The communications management function ensures that the public – internal or external – receives government information, and that the views and concerns of the public are taken into account in the planning, management and evaluation of policies, programs, services and initiatives.

- Communications
  - Internal Communications
  - Public Communications

Financial Management

Financial Management Services involve activities undertaken to ensure the prudent use of public resources, including planning, budgeting, accounting, reporting, control and oversight, analysis, decision support and advice, and financial systems.

- Financial Management
  - Accounts Payable
  - Accounts Receivable
  - Acquisition Cards

Human Resources Management

Human Resources Management Services involve activities undertaken for determining strategic direction, allocating resources among services and processes, as well as activities relating to analyzing exposure to risk and determining appropriate countermeasures. They ensure that the service operations and programs of the federal government comply with applicable laws, regulations, policies, and/or plans.

- Awards (Pride and Recognition)
  - Recognition Program
- Classification of Positions
  - Staffing
- Compensation and Benefits (no hyperlink available)
  - Attendance and Leave
  - Pay and Benefits
- Employment Equity and Diversity
  - Employment Equity and Diversity
- Hospitality
  - Hospitality
- Labour Relations
  - Canadian Human Rights Act - Complaints
  - Discipline
  - Grievances
  - Harassment
  - Internal Disclosure of Wrongdoing in the Workplace
  - Values and Ethics Code for the Public Service
- Occupational Health and Safety
  - Employee Assistance
  - Harassment
  - Occupational Health and Safety
  - Vehicle, Ship, Boat and Aircraft Accidents
- Official Languages
  - Official Languages
- Performance Management Reviews

- Discipline
- Performance Management Reviews

- Recruitment and Staffing
  - Applications for Employment
  - Employee Personnel Record
  - EX Talent Management
  - Personnel Security Screening
  - Staffing
  - Values and Ethics Code for the Public Service

- Relocation
  - Relocation

- Training and Development
  - Training and Development

Information Management

Information Management Services involve activities undertaken to achieve efficient and effective information management to support program and service delivery; foster informed decision making; facilitate accountability, transparency, and collaboration; and preserve and ensure access to information and records for the benefit of present and future generations.

- Information Management
  - Automated Document, Records, and Information Management Systems
  - Library Services

Information Technology

Information Technology Services involve activities undertaken to achieve efficient and effective use of information technology to support government priorities and program delivery, to increase productivity, and to enhance services to the public.

- Information Technology
  - Electronic Network Monitoring

Legal services

Legal services involve activities undertaken to enable government departments and agencies to pursue policy, program and service delivery priorities and objectives within a legally sound framework.

- Legal services

Management and Oversight Services

Management and Oversight Services involve activities undertaken for determining strategic direction, and allocating resources among services and processes, as well as those activities related to analyzing exposure to risk and determining appropriate countermeasures. They ensure that the service operations and programs of the federal government comply with applicable laws, regulations, policies, and/or plans.

- Cooperation and Liaison

- Lobbying Act Requirements
- Outreach Activities

- Executive Services
  - Executive Correspondence

- Internal Audit and Evaluation
  - Evaluation
  - Internal Audit

- Planning and Reporting

Materiel

Materiel Services involve activities undertaken to ensure that materiel can be managed by departments in a sustainable and financially responsible manner that supports the cost-effective and efficient delivery of government programs.

- Materiel Management
  - Vehicle, Ship, Boat and Aircraft Accidents

Real Property

Real Property Services involve activities undertaken to ensure real property is managed in a sustainable and financially responsible manner, throughout its life cycle, to support the cost-effective and efficient delivery of government programs.

- Real Property Management

Travel and Other Administrative Services

Travel and Other Administrative Services include Government of Canada (GC) travel services, as well as those other internal services that do not smoothly fit with any of the internal services categories.

- Access to Information and Privacy
  - Access to Information and Privacy Requests

- Administrative Services
  - Parking

- Boards, Committees and Councils
  - Governor in Council Appointments
  - Members of Boards, Committees and Councils

- Business Continuity Planning
  - Business Continuity Planning

- Proactive Disclosure
  - Hospitality
  - Travel

- Security
  - Identification and Building-Pass Cards
  - Internal Disclosure of Wrongdoing in the Workplace
  - Personnel Security Screening

    - Security Incidents
    - Security Video Surveillance and Temporary Visitor Access Control Logs and Building Passes

- Travel
    - Travel

Classes of Personal Information

The general subject files of the Agency contain a certain amount of personal information relating to general correspondence, complaints and enquiries. The personal information contained in this class may include the name; home, business, mailing or email address; telephone number; reward program numbers; corporate financial information; medical information; and personal opinions or views of the individual, but is not arranged by personal identifiers. This form of personal information is normally retrievable only if specifics are provided concerning the subject and the date of the correspondence. The purpose of this bank is to maintain information relating to general correspondence, complaints and inquiries concerning the various functions of the Agency. The retention period for this class of personal information is controlled by the records schedules of the general subject files in which they are stored.

Manuals

- Accessible Complaints and Investigations Division - Procedural Guidelines: Accessible Transportation Directorate - Complaints
- Dispute Resolution Branch: Reference Guide for Agency Jurisdiction and the Responsible Division
- Mediation Practice Manual

Additional Information

The Government of Canada encourages the release of information through informal requests. You may wish to consult the Canadian Transportation Agency's completed Access to Information (ATI) summaries and open data (where applicable). To make an informal request, contact:

Communications Directorate
Canadian Transportation Agency
Jules-Léger Building
15 Eddy Street, 19th Floor
Gatineau, Quebec K1A 0N9

Toll free:
1-888-222-2592
TTY:
1-800-669-5575
Facsimile:
819-953-8353
E-mail:
info@otc-cta.gc.ca
Internet:
www.otc-cta.gc.ca

Please see the Introduction to this publication for information on formal access procedures under the provisions of the *Access to Information Act* and the *Privacy Act*. To make a formal request:

Mail your letter or Access to Information Request Form (*Access to Information Act*) or Personal Information Request Form (*Privacy Act*), along with any necessary documents (such as consent or the $5.00 application fee for a request under the *Access to Information Act*) to the following address:

Patrice Bellerose
Access to Information and Privacy Coordinator
Jules Léger Building
15 Eddy Street
Gatineau, Quebec K1A 0N9

Telephone:
819-994-2564
Facsimile:
819-997-6727

patrice.bellerose@cta-otc.gc.ca

Please note: Each request made to the Canadian Transportation Agency under the *Access to Information Act* must be accompanied by an application fee of $5.00, cheque or money order made payable to the Receiver General for Canada.

Reading Room

In accordance with the *Access to Information Act* and *Privacy Act*, an area on the premises will be made available should the applicant wish to review materials on site. The address is:

Library
Canadian Transportation Agency
Jules-Léger Building
15 Eddy Street, 17th Floor
Gatineau, Quebec

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Office des transports du Canada | Canadian Transportation Agency

Canada

Office des transports du Canada
www.otc.gc.ca

Accueil Publications

Sources de renseignements du gouvernement fédéral et sur les fonctionnaires féd...

Sources de renseignements du gouvernement fédéral et sur les fonctionnaires fédéraux 2012

Info Source : Sources de renseignements du gouvernement fédéral et sur les fonctionnaires fédéraux fournit de l'information au sujet des fonctions, des programmes, des activités et des fonds de renseignements connexes des institutions gouvernementales visées par la *Loi sur l'accès à l'information* et la *Loi sur la protection des renseignements personnels*. Il donne aux personnes et aux employés du gouvernement (actuels et anciens) des renseignements pertinents afin à leur donner accès aux renseignements personnels les concernant et qui sont détenus par les institutions gouvernementales visées par la *Loi sur la protection des renseignements personnels,* et à les aider à exercer leurs droits en vertu de la *Loi sur la protection des renseignements personnels*.

Un accès central permet de consulter l'avant-propos d'*Info Source : Sources de renseignements du gouvernement fédéral et sur les fonctionnaires fédéraux* et une liste des organisations assujetties à la *Loi sur l'accès à l'information* et à la *Loi sur la protection des renseignements personnels.*

La *Loi sur l'accès à l'information* et à *Loi sur la protection des renseignements personnels* désignent les responsabilités générales du président du Conseil du Trésor (à titre de ministre responsable) pour ce qui est de l'administration pangouvernementale des lois.

Renseignements généraux

Historique

L'Office collabore avec de nombreux partenaires pour contribuer à soutenir un réseau de transport qui donne des résultats concluants pour tous les Canadiens.

Pour en savoir plus :

- À notre sujet
- Historique
- Lois et Règlements

Responsabilités

Le mandat de l'Office découle des lois et règlements pour lesquels il est l'autorité en la matière, c'est-à-dire la *Loi sur les transports au Canada*.

Pour en savoir plus :

- Ce que nous faisons
- Rôle et structure
- Énoncé de mission, mandat, vision et valeurs
- Le processus de prise de décisions

Fonctions, programmes et activités de l'institution

Règlement des différends et modes alternatifs de résolution des conflits

L'Office contribue à protéger les intérêts des usagers, des fournisseurs de services et des autres parties touchées par le réseau de transport national en offrant un système spécialisé de règlement des différends selon des processus formels et informels pour les questions de transport ferroviaire, aérien et maritime au sein du système de transport national. Lorsque c'est possible, l'Office encourage le règlement des différends au moyen d'un processus informel comme la facilitation, la médiation et l'arbitrage. En tant que tribunal quasi judiciaire, l'Office a également le pouvoir d'émettre des décisions et des arrêtés sur les questions qui relèvent de sa compétence sur les modes de transport de compétence fédérale au moyen du processus formel de règlement des différends.

Règlement des différends sur le transport aérien, maritime, ferroviaire et accessible

L'Office contribue à protéger les intérêts du public voyageur, des expéditeurs et des transporteurs aériens canadiens en assurant que les prix, taux, frais et conditions de transport sont conformes à la loi et aux règlements canadiens, et rend des décisions sur les appels des frais de transport aérien nouveaux ou modifiés imposés par NAV Canada. L'Office est également responsable de régler les différends entre les voyageurs et les fournisseurs de services de transport en assurant que les obstacles abusifs aux possibilités de déplacement des personnes ayant une déficience sont éliminés des services et des installations de transport de compétence fédérale pour tous les modes de transport de compétence fédérale, soit le transport aérien, ferroviaire et maritime ainsi que les services d'autobus interprovinciaux. Il règle les différends entre les compagnies de chemin de fer et les expéditeurs sur diverses questions, comme les prix et le niveau de service, soulevées au sein de l'industrie ferroviaire et entre les compagnies de chemin de fer et les municipalités, les administrations routières, les propriétaires et les autres sur les questions d'infrastructure ferroviaire. De plus, l'Office règle les différends entre les armateurs et les autorités portuaires et de pilotage ayant trait à certaines activités maritimes, comme le pouvoir de se prononcer, en réponse à une plainte, sur la question de savoir si les frais de pilotage dans les eaux relevant de la compétence fédérale ou les taux imposés par les autorités portuaires, respectivement, sont déraisonnables et contraires à l'intérêt du public ou injustement discriminatoires.

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Différends ferroviaire, aérien et maritime

Description :	Documents relatifs aux enquêtes et aux différends ferroviaires, aériens et maritimes incluant les plaintes maritimes et enquêtes sur les frais d'utilisation des administrations portuaires, prix des frais des administrations de pilotage et les services relatifs aux cartels d'expédition; enquêtes aériennes sur les tarifs, les prix, la publicité, la délivrance de licences et l'abandon de service et les appels de NavCan; plaintes et enquêtes sur les niveaux de service ferroviaire, taux d'interconnexion, demandes de droits de circulation et de taux de ligne concurrentielle; plaintes sur l'infrastructure ferroviaire, y compris les différends opposant les compagnies de chemin de fer aux administrations routières, aux municipalités, aux propriétaires fonciers et aux compagnies de services publics relativement aux franchissements; répartition des coûts pour les travaux ferroviaires, autorisation pour la construction de lignes de chemin de fer; évaluations environnementales, plaintes en matière de bruit et de vibration ferroviaire; changements d'administrations routières aux franchissements; et transfert et abandon des lignes de chemin de fer, y compris la détermination des voies.
Types de documents :	Correspondance, avis juridiques, accords, demandes, documents d'information, rapport statistiques, cartes, photographies, plans de construction, et décisions.
Numéro du dossier :	OTC RDD 003

Plaintes relatives au transport aérien

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Description :	Ce fichier contient des renseignements concernant les plaintes relatives au transport aérien tels que les délais et annulation de vols, des bagages perdus ou endommagés, l'émission de billets le transport de marchandise, les réservations, le refus d'embarquement, les passagers turbulents, l'interruption ou la réduction de service aux collectivités, les prix et les taux. Il contient des renseignements personnels tels que les noms, les adresses et les coordonnées des particuliers.
Catégorie de personnes :	Membres du grand public qui déposent une plainte relative au transport aérien.
But :	Le but est de résoudre les plaintes. Si une plainte concerne un transporteur aérien ou tout autre organisme responsable, une copie de la plainte leur est envoyée pour qu'ils puissent faire des commentaires ou pour qu'ils puissent la régler de façon appropriée.
Usages compatibles :	Aucun.
Normes de conservation et de destruction :	Les fichiers sont conservés pour une période de dix ans et sont ensuite détruits.
No. ADD :	95/023
Renvoi au document no. :	OTC RDD 003, OTC RDD 002
Enregistrement (SCT) :	004442
Numéro de fichier :	OTC PPU 014

Différends relatifs aux transports ferroviaires, aériens et marins

Description :	Cette banque décrit des renseignements liés au règlement des différends concernant les modes de transport (aériens, ferroviaires et marins) sous réglementation fédérale. Les renseignements personnels peuvent inclure le nom, les coordonnées, des renseignements financiers, les opinions et les idées des individus incluant celles au sujet d'autres individus, et la signature.
Catégorie de personnes :	Grand public; agents des particuliers et des transporteurs, y compris les avocats, les consultants et les médiateurs.
But :	Les renseignements personnels sont recueillis en vertu de la Loi sur les transports au Canada et servent à administrer le programme des différends et à régler les différends.
Usages compatibles :	Le texte intégral des décisions est affiché sur le site Web de l'Office des transports du Canada (OTC), mais ne sera pas accessible sur Internet par voie des moteurs de recherche. Par conséquent, une recherche sur Internet pour trouver le nom d'une personne mentionnée dans une décision ne fournira aucun renseignement tiré du texte intégral d'une décision affichée sur le site Web de l'Office. Les renseignements personnels peuvent être utilisés ou divulgués aux fins de l'évaluation des programmes.
Normes de conservation et de destruction :	Les dossiers seront retenus pour une période de 10 ans suivant la fermeture du dossier, sauf pour les plaintes liées à l'infrastructure ferroviaire qui remontent avant 2006 et qui sont entreposés pour la durée de conservation de l'infrastructure visée et sont détruits par la suite.
No. ADD :	95/023, 96/044

Enregistrement (SCT) :	20091614
Numéro de la catégorie de documents connexe :	OTC RDD 003
Numéro de fichier :	OTC PPU 001

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Plaintes relatives au transport aérien

Description :	Documents relatifs au règlement des plaintes des voyageurs aériens contre des transporteurs aériens incluant les délais et annulation de vols, des bagages perdus ou endommagés, l'émission de billets le transport de marchandise, les réservations, le refus d'embarquement, les passagers turbulents, l'interruption ou la réduction de service aux collectivités, les prix et les taux. Les dossiers peuvent contenir des billets pour réclamation pour bagages manquants, rapports de vols, listes de passagers des transporteurs, renseignements sur la billetterie, prix, taux et frais, programme de fidélisations des transporteurs, conditions de transport, énoncées, tarifs, et rapports d'incident
Types de documents :	Énoncé de travail, propositions, critères d'évaluation, procédures, politiques, avis juridiques, sondages, conditions, normes, rapports de statistiques, rapports médicaux, évaluations médicales,correspondance, documents d'information et décisions.
Numéro du dossier :	OTC RDD 002

Plaintes relatives au transport aérien

Description :	Ce fichier contient des renseignements concernant les plaintes relatives au transport aérien tels que les délais et annulation de vols, des bagages perdus ou endommagés, l'émission de billets le transport de marchandise, les réservations, le refus d'embarquement, les passagers turbulents, l'interruption ou la réduction de service aux

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	collectivités, les prix et les taux. Il contient des renseignements personnels tels que les noms, les adresses et les coordonnées des particuliers.
Catégorie de personnes :	Membres du grand public qui déposent une plainte relative au transport aérien.
But :	Le but est de résoudre les plaintes. Si une plainte concerne un transporteur aérien ou tout autre organisme responsable, une copie de la plainte leur est envoyée pour qu'ils puissent faire des commentaires ou pour qu'ils puissent la régler de façon appropriée.
Usages compatibles :	Aucun.
Normes de conservation et de destruction :	Les fichiers sont conservés pour une période de dix ans et sont ensuite détruits.
No. ADD :	95/023
Renvoi au document no. :	OTC RDD 003, OTC RDD 002
Enregistrement (SCT) :	004442
Numéro de fichier :	OTC PPU 014

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Transports accessibles

Description :	Documents relatifs à la réglementation et au règlement de plaintes portant sur les installations de transport, l'équipement et les services destinés aux voyageurs ayant une déficience qui empruntent le réseau des transports fédéral.
Types de documents :	Correspondance, énoncé des travaux, propositions, critères d'évaluation, procédures, politiques, avis juridiques, sondages, conditions, normes, rapports statistiques, rapports et évaluations médicaux, accords, demandes, documents d'information, et décisions.
Format :	Bandes sonores, bandes vidéo, photographie et Braille.
Numéro du dossier :	OTC RDD 001

Plaintes relatives aux services fournis aux personnes ayant une déficience

Description :	Ce fichier sert à tenir des dossiers sur les enquêtes faisant suite à des plaintes déposées en vertu de la Loi sur les transports au Canada concernant des obstacles présumés aux possibilités de déplacement des personnes ayant une déficience. Ce fichier peut contenir des renseignements personnels tels que le nom d'un particulier; son adresse au bureau ou à son domicile, son adresse postale ou courriel et son numéro de téléphone; son état physique; sa déficience; son âge et sa situation de famille.
Catégorie de personnes :	Les personnes qui soumettent des plaintes.
But :	Déterminer s'il existe effectivement des obstacles abusifs aux déplacement des voyageurs ayant

	une déficience et, le cas échéant, les mesures correctives à prendre. L'information fournie est utilisée aux fins d'enquête sur les plaintes et elle est transmise aux fournisseurs de services de transport pour recueillir leurs commentaires. Les plaintes portant sur des mêmes préoccupations sont parfois traitées parallèlement et l'information est partagée avec les demandeurs concernés. L'Office rend des décisions à l'égard de toutes les plaintes, lesquelles sont affichées sur son site Internet.
Usages compatibles :	Aucun.
Normes de conservation et de destruction :	Les dossiers sont détruits dix ans après le règlement de la plainte.
No. ADD :	95/023
Renvoi au document no. :	OTC RDD 001
Enregistrement (SCT) :	002154
Numéro de fichier :	OTC PPU 033

Réglementation économique

L'Office contribue à protéger les intérêts des usagers, des fournisseurs de services et des autres parties touchées par le réseau de transport national au moyen de la réglementation économique du transport aérien, ferroviaire et maritime par l'administration des lois, des règlements, des codes de pratiques volontaires et des programmes de sensibilisation et de diffusion externe.

Réglementation du transport aérien, ferroviaire, maritime et accessible

L'Office aide à protéger les intérêts du public voyageur par la réglementation du transport aérien, ferroviaire, maritime et accessible en réglementant et administrant un système de délivrance de licences pour les transporteurs aériens qui offrent des services de transport aérien intérieurs ou internationaux accessibles au public, en appliquant les dispositions pertinentes de la Loi sur les transports au Canada et ses règlements connexes, en administrant un régime de permis pour les activités d'affrètement international, en aidant à négocier et à administrer des accords aériens bilatéraux avec d'autres pays et en administrant les tarifs aériens internationaux. L'Office s'assure également que les obstacles abusifs aux possibilités de déplacement des personnes ayant une déficience

sont éliminés des services et installations de transport de compétence fédérale en élaborant des règlements, des codes de pratiques, des normes et des programmes de sensibilisation et de diffusion externe sur le niveau d'accessibilité dans les modes de transports aérien, ferroviaire et maritime de compétence fédérale. Il réglemente en outre le transport ferroviaire au Canada en délivrant des certificats d'aptitude qui permettent aux transporteurs ferroviaires d'exploiter leurs services, en approuvant la construction de voies ferrées et la construction de franchissements routiers, et supervise l'évaluation environnementale des projets ferroviaires déclenchée par la Loi canadienne sur l'évaluation environnementale. Il supervise le processus d'interruption de service sur les voies ferrées et de disposition des biens connexes, et remplit d'autres obligations en gardant à l'esprit les intérêts économiques, publics et nationaux. Il détermine également les tarifs d'interconnexion ferroviaire et le plafond de revenu des compagnies de chemins de fer pour le mouvement du grain de l'Ouest. L'Office élabore des normes et des règlements sur les coûts ferroviaires et vérifie les systèmes comptables et les systèmes de statistiques des compagnies de chemin de fer au besoin. De plus, l'Office agit comme organisme de réglementation économique pour certaines activités maritimes. Il protège les intérêts des exploitants de navire canadiens engagés dans le cabotage en déterminant si un navire canadien est adapté ou disponible lorsque recours à un navire étranger est proposé, et applique la loi qui régit les conférences maritimes.

074

Approbations règlementaires et conformité

Description :	Documents relatifs aux licences des transporteurs aériens, aux certificats d'aptitude pour les compagnies de chemin de fer, aux franchissements routiers, à l'évaluation environnementale d'un projet ferroviaire, à la réglementation de certaines activités maritimes, à l'assurance de la conformité avec la législation et à la prise de mesures d'application de la loi. Les dossiers peuvent contenir des documents de délivrance de licences intérieures et internationales pour le transport aérien, permis d'affrètement international, exigences financières, exigences en matière de propriété canadienne, protection des paiements anticipés, exigences en matière d'assurance responsabilité; certificats ferroviaires d'aptitude, accords ferroviaires, évaluations environnementales ferroviaires, demandes de licences pour l'utilisation de navires étrangers en eaux canadiennes, dépôts de documents aux termes de la Loi dérogatoire de 1987 sur les conférences maritimes, base de données relatives aux navires canadiens, inspection des transporteurs aériens et application de la loi, amendes et sanctions administratives pécuniaires, information et éducation, inspections des exploitants de gare de voyageurs pour l'accessibilité et le contrôle des règles sur la formation en matière d'accessibilité.
Types de documents :	Demandes, évaluations, documents d'information, notes d'information et consultations, correspondance, avis juridiques, dispositions législatives, cartes, décrets, plans, photographies, politiques, présentations, rapports et études, licences et permis.

075

Numéro du dossier : OTC RDI 003

076

Application de la loi

Description :	Ce fichier renferme les dossiers relatifs à l'application des règlements de l'Office, et aux enquêtes sur les plaintes déposées contre des transporteurs aériens qui auraient commis des infractions. Les activités d'application de la loi peuvent comporter un contact avec d'autres ministères du gouvernement, y compris la GRC et le ministère de la Justice. Ce fichier peut contenir des renseignements personnels, suivant la nature de l'enquête, tels que le nom d'un particulier; son adresse au bureau ou à domicile, son adresse postale ou courriel et son numéro de téléphone; les détails de l'enquête; et les idées ou opinions d'autrui sur lui.
Catégorie de personnes :	Des personnes soupçonnées d'avoir commis des violations et, quelquefois, de l'information concernant les plaignants.
But :	Vérifier s'il y a violation et, le cas échéant, déterminer le suivi approprié. Les résultats des avertissements et des procès-verbaux de violation émis en vertu du Règlement sur les textes désignés sont affichés sur le site Internet de l'Office. Cette information comprend le nom du transporteur ou de la personne visée, toute demande de révision d'un avertissement, une indication à savoir si l'amende a ou non été payée et si le dossier a été renvoyé au Tribunal d'appel des transports du Canada.
Usages compatibles :	Aucun.
Normes de conservation et de destruction :	Les dossiers sont détruits dix ans suite à l'achèvement de l'enquête.
No. ADD :	95/023

077

Renvoi au document no. :	OTC RDI 003
Enregistrement (SCT) :	000319
Numéro de fichier :	OTC PPU 010

Demandes de licence d'exploitation de services aériens

Description :	Ce fichier sert à la tenue des renseignements relatifs aux demandes de licence d'exploitation de services aériens afin d'établir l'admissibilité de ces demandes en vertu de la Loi sur les transports au Canada. Le fichier contient des demandes et des interventions à l'appui de ou en opposition à ces demandes incluant des renseignements personnels ayant trait aux demandeurs ou aux autres parties intéressées tels que le nom d'un particulier; son adresse au bureau ou à domicile, son adresse postale ou courriel et son numéro de téléphone; la nationalité; l'âge; des numéros identificateurs; et de l'information financière. À noter que depuis le 1er juillet 1996, les interventions ne font plus partie du processus des demandes de licence pour l'exploitation de services aériens.
Catégorie de personnes :	Les demandeurs et les intervenants prenant part au processus de délivrance d'une licence.
But :	Accorder les licences ou rejeter les demandes en vertu de la Loi sur les transports au Canada.
Usages compatibles :	Aucun.
Normes de conservation et de destruction :	Les dossiers sont détruits vingt ans à la suite de l'annulation d'une licence.
No. ADD :	95/023
Renvoi au document no. :	OTC RDI 002, OTC RDI 003
Enregistrement (SCT) :	000320
Numéro de fichier :	OTC PPU 015

Détermination de l'industrie et analyse

080

Rationalisation du réseau ferroviaire

Description :	Documents relatifs à l'évaluation des propositions visant la rationalisation des réseaux ferroviaires avant le 1er juillet 1996. Les dossiers peuvent contenir des dépenses et recettes des compagnies de chemin de fer; demandes d'abandon d'embranchements ferroviaires et d'enlèvement de gares; programmes de subvention des embranchements et des voyageurs; remise en état des embranchements; demandes de cession de lignes ferroviaires; et détermination de voies. Depuis lors, l'Office n'approuve plus les projets de rationalisation ferroviaire et l'on disposera de ces documents d'exploitation conformément aux normes de délais de conservation et d'élimination.
Types de documents :	Évaluations, documents d'information, notes d'information et consultations, correspondance, décisions et arrêtés, avis juridiques, cartes, décrets, plans, photographies, présentations, rapports et études.
Numéro du dossier :	OTC RDI 176

Secrétariat

Description :	Documents relatifs aux arrêtés, décisions, rapports et avis de l'Office; l'administration des audiences publiques et des enquêtes; la coordination des services de traduction; et la correspondance ministérielle et de la haute direction.
Types de documents :	Arrêtés, décisions, correspondance ministérielle et de la haute direction; et dépositions et pièces des audiences publiques et des enquêtes de l'Office.

Numéro du dossier : OTC SEC 001

Tarifs et accords internationaux

Description :	Documents relatifs à la négociation, à la mise en ouvre de conventions ou d'accords aériens internationaux et à l'administration des prix et des conditions de transport applicables au transport international. Les dossiers peuvent contenir des documents de négociation et mise en œuvre de conventions et d'accords, demandes d'attributions bilatérales additionnelles, liaison avec le ministère des Affaires étrangères et du Commerce international, partage de codes et location d'aéronefs avec équipage; dépôt de tarifs aériens internationaux, y compris les prix, les suppléments et les conditions de transport, les permissions spéciales, les horaires, la réglementation sur les tarifs aériens, les pratiques et les résolutions de l'Association du transport aérien international et l'examen des dispositions sur l'accessibilité dans les tarifs des transporteurs aériens.
Types de documents :	Demandes, formulaires, evaluations, documents d'information, notes d'informations et consultations, correspondance, avis juridiques, dispositions législatives, cartes, décrets, plans, photographies, politiques, présentations, rapports, études, certificats d'exploitation, certificats d'assurance, licences et permis et accords.
Numéro du dossier :	OTC RDI 002

Demandes de licence d'exploitation de services aériens

Description :	Ce fichier sert à la tenue des renseignements relatifs aux demandes de licence d'exploitation de services aériens afin d'établir l'admissibilité de ces demandes en

	vertu de la Loi sur les transports au Canada. Le fichier contient des demandes et des interventions à l'appui de ou en opposition à ces demandes incluant des renseignements personnels ayant trait aux demandeurs ou aux autres parties intéressées tels que le nom d'un particulier; son adresse au bureau ou à domicile, son adresse postale ou courriel et son numéro de téléphone; la nationalité; l'âge; des numéros identificateurs; et de l'information financière. À noter que depuis le 1er juillet 1996, les interventions ne font plus partie du processus des demandes de licence pour l'exploitation de services aériens.
Catégorie de personnes :	Les demandeurs et les intervenants prenant part au processus de délivrance d'une licence.
But :	Accorder les licences ou rejeter les demandes en vertu de la Loi sur les transports au Canada.
Usages compatibles :	Aucun.
Normes de conservation et de destruction :	Les dossiers sont détruits vingt ans à la suite de l'annulation d'une licence.
No. ADD :	95/023
Renvoi au document no. :	OTC RDI 002, OTC RDI 003
Enregistrement (SCT) :	000320
Numéro de fichier :	OTC PPU 015

Services internes

Les services internes sont des groupes d'activités et de ressources connexes qui sont gérés de façon à répondre aux besoins des programmes et des autres obligations générales d'une organisation. Ces groupes sont les suivants : services de gestion et de surveillance, services des communications, services juridiques, services de gestion des ressources humaines, services de gestion des finances, services de gestion de l'information, services des technologies de l'information, services de gestion des biens, services de gestion du matériel, services de gestion des acquisitions et services de

gestion des voyages et autres services administratifs. Les services internes comprennent uniquement les activités et les ressources destinées à l'ensemble d'une organisation et non celles fournies à un programme particulier.

Acquisitions

Activités mises en œuvre dans de but de se procurer les biens et les services requis pour répondre à une demande dûment remplie (y compris une définition complète et précise des exigences et la garantie que les fonds sont disponibles), et ce, jusqu'à la passation ou à la modification d'un marché.

- Approvisionnement et marchés
  - Marchés de services professionnels

Gestion des ressources humaines

Activités de détermination de l'orientation stratégique, d'affectation des ressources entre les services et les processus et activités liées à l'analyse des risques et à la détermination des mesures d'atténuation à prendre. Elles permettent de veiller à ce que les services et les programmes du gouvernement fédéral respectent les lois, les règlements, les politiques et les plans applicables.

- Accueil
  - Accueil
- Classification des postes
  - Dotation
- Équité en matière d'emploi et diversité
  - Équité en matière d'emploi et diversité
- Évaluation de la gestion du rendement
  - Évaluation de la gestion du rendement
  - Mesures disciplinaires
- Formation et perfectionnement
  - Formation et perfectionnement
- Langues officielles
  - Langues officielles
- Prix (Fierté et reconnaissance)
  - Programme de reconnaissance
- Recrutement et dotation
  - Code de valeurs et d'éthique de la fonction publique
  - Contrôle de sécurité du personnel
  - Demandes d'emploi

- Dossier personnel de l'employé
- Dotation
- Gestion des talents des cadres supérieurs

- Relations de travail
  - Code de valeurs et d'éthique de la fonction publique
  - Divulgation interne d'information sur les actes fautifs commis en milieu de travail
  - Griefs
  - Harcèlement
  - Mesures disciplinaires
  - Plaintes déposées en vertu de la Loi canadienne sur les droits de la personne

- Réinstallation
  - Réinstallation

- Rémunération et avantages sociaux
  - Présences et congés
  - Rémunération et avantages

- Santé et sécurité au travail
  - Accidents d'automobile, de bateau, d'embarcation et d'avion
  - Aide aux employés
  - Harcèlement
  - Santé et sécurité au travail

Gestion financière

Activités visant à assurer l'utilisation responsable des ressources publiques comme la planification, la gestion budgétaire, la comptabilité, la production de rapports, le contrôle et la surveillance, l'analyse, les conseils et le soutien au processus décisionnel, ainsi que les systèmes financiers.

- Gestion financière
  - Cartes d'achat
  - Comptes créditeurs
  - Comptes débiteurs

Services de communications

Activités mises en œuvre afin de veiller à ce que les communications du gouvernement du Canada soient gérées efficacement, bien coordonnées et répondent aux divers besoins

d'information du public. La fonction de gestion des communications assure la diffusion de renseignements gouvernementaux au public interne et externe ainsi que la prise en considération de ses préoccupations et intérêts dans la planification, la gestion et l'évaluation des politiques, des programmes, des services et des initiatives.

- Communications
  - Communications internes
  - Communications publiques

Services de gestion de l'information

Activités visant à assurer une gestion efficiente et efficace de l'information à l'appui de la prestation de programme et de services, à faciliter la prise de décisions éclairées, à faciliter la reddition des comptes, la transparence et la collaboration, ainsi qu'à conserver l'information et les documents pour le bénéfice de la présente génération et des générations futures en veillant à ce qu'ils demeurent accessibles.

- Gestion de l'information
  - Services de bibliothèque
  - Systèmes automatisés de gestion des documents, des dossiers et de l'information

Services de gestion et de surveillance

Activités de détermination de l'orientation stratégique, d'affectation des ressources entre les services et les processus et activités liées à l'analyse des risques et à la détermination des mesures d'atténuation à prendre. Elles permettent de veiller à ce que les services et les programmes du gouvernement fédéral respectent les lois, les règlements, les politiques et les plans qui s'appliquent.

- Coopération et liaison
  - Activités de sensibilisation
  - Exigences de la Loi sur le Lobbying
- Planification et établissement de rapports
- Services à la haute direction
  - Système de gestion de la correspondance de la direction
- Vérification interne et évaluation
  - Évaluation
  - Vérification interne

Services de technologie de l'information

Activités dont le but est d'assurer l'utilisation efficiente et efficace de la technologie de l'information, à l'appui des priorités gouvernementales et de la mise en œuvre des programmes afin d'accroître la productivité et d'améliorer les services offerts au public.

- Technologie de l'information
  - Journaux de contrôle des réseaux électroniques

Services de voyage et autres services administratifs

Ces services comprennent les services de voyages du gouvernement du Canada, ainsi que les autres services internes qui ne correspondent à aucune autre catégorie de services internes.

- Accès à l'information et protection des renseignements personnels
  - Accès à l'information et protection des renseignements personnels
- Conseils d'administration, comités et conseils
  - Membres de conseils d'administration, de comités et de conseils
  - Nominations par le gouverneur en conseil
- Divulgation proactive
  - Accueil
  - Voyages
- Planification de la continuité des activités
  - Planification de la continuité des activités
- Sécurité
  - Cartes d'identification et laissez-passer
  - Contrôle de sécurité du personnel
  - Divulgation interne d'information sur les actes fautifs commis en milieu de travail
  - Incidents de sécurité
  - Surveillance vidéo, registres de contrôle d'accès des visiteurs et laissez-passer
- Services administratifs
  - Stationnement
- Voyages
  - Voyages

Services des biens immobiliers

Activités ayant pour objet d'assurer une gestion des biens immobiliers durable et responsable sur le plan financier, tout au long de leur cycle de vie, afin de soutenir l'exécution rentable et efficace des programmes gouvernementaux.

- Gestion des biens immobiliers

Services du matériel

Activités visant à assurer, de la part des ministères, une gestion du matériel durable et responsable sur le plan financier afin de soutenir l'exécution rentable et efficace des programmes gouvernementaux.

- Gestion du matériel
  - Accidents d'automobile, de bateau, d'embarcation et d'avion

Services juridiques

Activités permettant aux ministères et organismes de réaliser les priorités et d'atteindre les objectifs associés à leurs politiques, programmes et services dans un cadre juridique approprié.

- Services juridiques

Légende

- Catégories de documents ordinaires
  - Fichiers de renseignements personnels ordinaires

Catégories de renseignements personnels

Les dossiers-matières généraux de l'Office contiennent certains renseignements personnels se rattachant à la correspondance, aux plaintes et aux demandes courantes. Ces renseignements personnels peuvent inclure le nom d'un particulier; son adresse au bureau ou à son domicile, son adresse postale ou courriel et son numéro de téléphone; les numéros de programme de récompense, des renseignements financiers des entreprises, des renseignements médicaux et les opinions ou les idées personnelles du particulier; mais ne sont pas classés par ordre de codes d'identification personnelle. Ces renseignements personnels ne sont toutefois accessibles que si l'on se réfère au sujet et à la date de la correspondance. Le but de ce fichier est de conserver l'information relative à la correspondance générale, aux plaintes et aux demandes courantes concernant les diverses fonctions de l'Office. Les périodes de conservation de ces catégories de renseignements personnels sont contrôlées par les calendriers de conservation des dossiers-matières généraux qui renferment ces renseignements.

Manuels

- Direction Générale du règlement du différend: Guide de référence général sur les secteurs de compétence de l'Office et les divisions responsables
- Manuel de pratique de la médiation

- Plaintes et enquêtes sur l'accessibilité - directives

Renseignements supplémentaires

Le gouvernement du Canada encourage la publication d'information par l'intermédiaire de demandes informelles. Vous pouvez consulter les sommaires complétés en matière d'accès à l'information et les données ouvertes de l'Office des transports du Canada (s'il y a lieu). Pour présenter une demande informelle, veuillez communiquer avec la personne suivante :

Direction des communications
Office des transports du Canada
Immeuble Jules-Léger
15, rue Eddy, 19e étage
Gatineau (Québec) K1A 0N9

Sans frais :
1-888-222-2592
ATS :
1-800-669-5575
Télécopieur :
819-953-8353
Courriel :
info@otc-cta.gc.ca
Internet :
www.otc.gc.ca

Veuillez consulter la présentation de cette publication pour obtenir de l'information sur les procédures d'accès officiel en vertu des dispositions de la *Loi sur l'accès à l'information* et la *Loi sur la protection des renseignements personnels*. Pour présenter une demande officielle :

Postez votre lettre, formulaire de demande d'accès à l'information (*Loi sur l'accès à l'information*) ou formulaire de demande d'accès à des renseignements personnels (*Loi sur la protection des renseignements personnels*), accompagné de tout document nécessaire (comme le consentement ou les frais de demande de 5,00 $ pour une demande en vertu de la *Loi sur l'accès à l'information*) à l'adresse suivante :

Patrice Bellerose
Coordonnatrice de l'accès à l'information et de la protection des renseignements personnels
Édifice Jules Leger
15, rue Eddy
Gatineau, (Québec) K1A 0N9

Téléphone :
819-994-2564
Télécopieur :
819-997-6727

patrice.bellerose@cta-otc.gc.ca

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Veuillez prendre note que chaque demande présentée à l'Office des transports du Canada en vertu de la *Loi sur l'accès à l'information* doit être accompagnée d'un chèque ou d'un mandat-poste de 5,00 $ émis à l'ordre du Receveur général du Canada.

Salle de lecture

Conformément à *Loi sur l'accès à l'information* et à la *Loi sur la protection des renseignements personnels*, un espace sera mis à la disposition du demandeur, s'il souhaite consulter du matériel sur place. L'adresse est la suivante :

Bibliothèque
Office des transports du Canada
Immeuble Jules-Léger
15, rue Eddy, 17e étage
Gatineau (Québec)

Avis importants

Haut de la page

Date de modification :
2012-06-28

Tab I

Ceci est la pièce | de affidavit
This is Exhibit referred to in the Affidavit

de Patrice Bellerose
of

assermenté devant moi ce 23rd jour de May 2014
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

From: Séguin, Patrick (TBS)<Patrick.Seguin@tbs-sct.gc.ca>
Sent: 11/03/2014 4:11:12 PM
To: Patrice.Bellerose@otc-cta.gc.ca
CC: ippd-dpiprp@tbs-sct.gc.ca
BCC:
Subject: CTA_OTC - Info Source 2013 Assessment

As part of the Treasury Board of Canada Secretariat's (TBS') responsibility to monitor compliance with the Policy on Access to Information and the Policy on Privacy Protection, I have reviewed your institution's chapter for Info Source: Source of Federal Government and Employee Information. Attached you will find the results of the review and recommendations for modifying your chapter.

Once institutions have posted their chapter, they must advise TBS of the changes/updates to Info Source at least once per year.

Detailed instructions on decentralized publishing are available on the TBS website at: http://www.tbs-sct.gc.ca/atip-aiprp/tools/isdpr-iserpd00-eng.asp

If you require assistance or further information, please do not hesitate to contact the Information and Privacy Policy Division at: ippd-dpiprp@tbs-sct.gc.ca<mailto:ippd-dpiprp@tbs-sct.gc.ca>.

****

Puisqu'il incombe au Secrétariat du Conseil du Trésor (SCT) de surveiller l'observation de la Politique sur l'accès à l'information et de la Politique sur la protection de la vie privée, j'ai passé en revue la chapitre d'Info Source : Source de renseignements fédéraux et sur les employés fédéraux de votre institution. Vous trouverez en annexe les résultats de l'examen et les recommandations pour modifier le chapitre.

Une fois qu'elles auront publié leur chapitre, les institutions devront aviser le SCT des modifications ou des mises à jour apportées à Info Source, et ce, au moins une fois par année.

Des instructions détaillées connexes sur la publication décentralisée sont publiés dans le site Web du SCT, à : http://www.tbs-sct.gc.ca/atip-aiprp/tools/isdpr-iserpd00-fra.asp

Si vous avez besoin d'aide ou de plus amples renseignements, n'hésitez pas à communiquer avec nous à ippd-dpiprp@tbs-sct.gc.ca<mailto:ippd-dpiprp@tbs-sct.gc.ca>.

Patrick Séguin
Policy Analyst | Analyste de politique
Information and Privacy Policy | Politiques de l'information et de la protection des renseignements personnels
Chief Information Officer Branch | Direction du dirigeant principal de l'information
Treasury Board of Canada Secretariat | Secrétariat du Conseil du Trésor du Canada
Ottawa, Canada K1A 0R5
Patrick.Seguin@tbs-sct.gc.ca
Telephone | Téléphone 613-716-4581 / Facsimile | Télécopieur 613-957-8020 / Teletypewriter | Téléimprimeur 613-957-9090
Government of Canada | Gouvernement du Canada

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<<File: Mime.822>>

Canadian Transportation Agency
Info Source 2013 Assessment

URL provided to TBS
English: http://www.otc-cta.gc.ca/eng/publication/sources-federal-government-and-employee-information-2012
French: http://www.otc-cta.gc.ca/fra/publication/sources-de-renseignements-du-gouvernement-federal-et-sur-les-fonctionnaires-federaux-201

General Observations
The Canadian Transportation Agency (CTA) made updates to its *Info Source* chapter following the last assessment. Overall, the chapter meets the *Info Source* decentralized publishing requirements, is organized according to CTA's Program Alignment Architecture (PAA) and reflects, in the most part, the records and personal information holdings of CTA.

CTA should consider removing reference to the year of its *Info Source* chapter in the title and URL. With decentralized publishing, the chapter has become an evergreen document that can be updated at any time but for which CTA must report on no later than June 30 of each year. In addition, removing the year from the URL avoids an annual update to the hyperlinks on CTAs and TBSs web sites.

TBS disagrees with the interpretation that personal information banks related to case files are not required due to the application of the rules of natural justice and open court principle by administrative tribunals. There are no provisions in the *Privacy Act* that grants to government institutions subject to the Act the discretion to apply or not the provisions found in sections 10 and 11 of the Act. When Parliament or Government adds a government institution to the schedule of the Act either through legislation or regulation the decision is made for the institution to subject the institution to the full application of the Act. In the case of the CTA, Parliament made that decision in 1982 when the *Privacy Act* received royal assent with the Canadian Transport Commission included in the schedule. That decision was maintained throughout successive legislation modifications. Therefore, personal information under the control of the CTA must be accounted for either in personal information banks or classes of personal information and consequently published in *Info Source*.

***Info Source* Introduction, Background and Responsibilities**
The chapter meets TBS requirements for this section.

Institutional Functions, Programs and Activities
The chapter meets TBS requirements for this section. It is noted that the Agency has included additional descriptions for one sub-activity under each of its program activities. This adds greater clarity about its mandated activities.

Institution-Specific Classes of Records (CRs) and Personal Information Banks (PIBs)
CTA has published all of its institution-specific classes of records and personal information banks.

The classes of records can be further refined by updating the text as follows:

Class of Records Number	Title	Comment
CTA IRD 002	International Agreements and Tariffs	"Description" section: "Please replace the title of DFAIT with the current title "Foreign Affairs, Trade and Development Canada".
CTA RAI 176	Rail Rationalization	"Description" section: Please move the first and last sentences to the "Note" section.

The PIB descriptions can be further refined by updating the text including the follows:

Bank Number	Title	Comment
CTA PPU 033	Complaints Regarding Services Provided to Persons with Disabilities	"Purpose" section: Please state the section of the legislative authority for the program.
		"Purpose" section: Please move information regarding sharing of personal information to the "Consistent Uses" section.
		"Purpose" section: Please move information regarding publication on the web to the "Consistent Uses" section.
CTA PPU 014	Air Travel Complaints	"Purpose" section: Please state the section of the legislative authority for the program.
		"Purpose" section: Please move information regarding sharing of personal information to the "Consistent Uses" section.
CTA PPU 001	Rail, Air and Marine Disputes	"Purpose" section: Please state the section of the legislative authority for the program.
CTA PPU 015	Air Service Licensing Program	"Description" section: Please remove reference to the legislative authority and account for it in the "Purpose" section.
		"Description" section: Please move the last sentence to the "Note" section.
		"Purpose" section: Please state the section of the legislative authority for the program.
CTA PPU 010	Enforcement	"Description" section: Please move references to information sharing to the "Consistent Uses" section and identify the PIB title and bank number of the program receiving the information.
		"Purpose" section: Please state

		the section of the legislative authority for the program.
		"Purpose" section: Please move information regarding publication on the web to the "Consistent Uses" section.

Standard Classes of Records and Personal Information Banks
The chapter does not meet TBS requirements for this section. CTA omitted 2 standard personal information banks which are registered, and related standard class of records, in its chapter. Please add:

Registered Standard Personal Information Banks	
Bank Number	**Title**
PSE 935	Human Resources Planning
PSU 913	Disclosure to Investigative Bodies

If CTA would like to deregister the above-noted standard personal information banks, please send an email to ippd-dpiprp@tbs-sct.gc.ca.

In addition, CTA has included 1 standard personal information bank in its chapter which it has not registered.:

Unregistered Standard Personal Information Banks	
Bank Number	**Title**
PSU 934	EX Talent Management

If CTA would like to register the above-noted standard personal information bank, please send an email to ippd-dpiprp@tbs-sct.gc.ca.

Classes of Personal Information
The chapter meets TBS requirements for this section with the exception that .

CTA needs to update the text to ensure that reference is made to the classes rather than a "bank".

TBS notes that CTA will be accounting for the personal information found in the Canadian Ship Database system in a class of personal information following the termination of the PIB CTA PPU 016 Canadian Ship Database System.

CTA is reminded that classes of personal information are used to account for personal information under the control of a government institution which is not used for administrative purposes or intended to be retrieved by name or other unique identifier.

Manuals
The chapter meets TBS requirements for this section.

Additional Information
The chapter meets TBS requirements, for the most part, for this section.

CTA should clarify the statement on encouraging informal requests by specifying that informal requests are done "outside the ATIP process".

CTA should remove reference to open data. CTA currently has no data sets available on the web site data.gc.ca. However, CTA should add a reference to its PIA summaries.

Reading Room
The chapter meets TBS requirements for this section.

Annual Publishing/Due Date: June 30
Institutions are required to advise TBS of the changes/updates to *Info Source* at least once per year, by the due date noted above. This can be done by sending an e-mail to TBS which identifies:

- all major changes made;
- changes made in response to TBS feedback; and
- the version of the PAA used (where applicable).

Where no changes have been made, a statement to that effect must be provided. The e-mail must be sent to: ippd-dpiprp@tbs-sct.gc.ca.

The complete decentralized publishing requirements are available on TBS' web site.

Tab 2

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

MEMORANDUM OF FACT AND LAW
OF THE RESPONDENT
CANADIAN TRANSPORTATION AGENCY

PART I - STATEMENT OF FACTS

1. On February 14, 2014, Gabor Lukacs (the Applicant), sent an e-mail to the Respondent, the Canadian Transportation Agency (the Agency) with the subject line "Request to view file No. M4120-3/13-05726 pursuant to section 2(b) of the Charter".

Affidavit of Gabor Lukacs, sworn
April 25, 2014, Exhibit "A"
Applicant's Record, Volume 1, Tab 2

2. The Applicant's request was treated by the Agency as an informal request for information even though the request of the Applicant was referred by him as a request under subsection 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

Patrice Bellerose cross-examination on Affidavit filed
on July 29, 2014 with the Agency's Motion to quash
Applicant's Record, Volume 1, Tab 3, Tr. 176:24-25 and Tr. 177:1-21

3. Accordingly, in accordance with the *Privacy Act*, R.S.C., 1985, c. P-21, all personal information was removed from all 121 pages related to the request.

Patrice Bellerose cross-examination on Affidavit filed
on July 29, 2014 with the Agency's Motion to quash
Applicant's Record, Volume 1, Tab 3, Tr. 182:1-21,
and Tr. 193:21-25

4. On March 19, 2014, Ms. Patrice Bellerose, Manager of Records Services and Access to Information and Privacy in the Records Services & ATIP Division of the Information Services Directorate in the Corporate Management Branch of the Agency sent an email to the Applicant with copies of records in response to his "request to view file 4120-3/13-05726".

Affidavit of Gabor Lukacs, sworn
April 25, 2014, Exhibit "I"
Tab 2 of the Applicant's Record, Volume 1

5. On March 24, 2014, the Applicant sent an e-mail to the Agency asking that he be provided with unredacted "copies of all documents in File No. M4120-3/13-05726 with respect to which no confidentiality order was made by a Member of the Agency".

Affidavit of Gabor Lukacs, sworn
April 25, 2014, Exhibit "J"
Applicant's Record, Volume 1, Tab 2

6. On March 26, 2014, Mr. Geoffrey C. Hare, Chair and Chief Executive Officer of the Agency, wrote to the Applicant to inform him that the Agency is a government institution listed in the schedule of the *Privacy Act*, and that although Agency case files are available to the public for consultation in accordance with the open court principle, personal information contained in the files such as an individual's home address, personal email address, personal phone number, date of birth, financial details, social insurance number, driver's license number, or credit card or passport details, is not available for consultation.

Affidavit of Gabor Lukacs, sworn
April 25, 2014, Exhibit "K"
Applicant's Record, Volume 1, Tab 2

7. On April 22, 2014, the Applicant served the Agency with the within Application for Judicial Review.

PART II – ISSUES

8. The issues to be determined by this Honourable Court in the within application are:

a) Whether subsection 2(b) of the *Charter* protects access to information and, if so, in what circumstances?

b) Whether the Applicant has met the three-part inquiry test which would engage a protection under subsection 2(b) of the *Charter*?

c) Whether this Honorable Court should strike parts of Patrice Bellerose's Affidavit sworn on May 23, 2014?

PART III – SUBMISSIONS

Overview

The Agency

Agency as an adjudicator

9. The Agency is an independent, quasi-judicial tribunal and economic regulator. It makes decisions and determinations on a wide range of matters involving extraprovincial bus for accessibility purposes, air, rail, and marine modes of transportation under the authority of Parliament.

Applicant's Record, Volume 1, at page 199, para. 4

10. One of the key tools the Agency uses in carrying out its mandate as an adjudicator is the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* (the Dispute Adjudication Rules) which came into effect on June 4, 2014 and replaced the General Rules.

Applicant's Record, Volume 1, at page 247

11. There is nothing in the *Canada Transportation Act* or in the Dispute Adjudication Rules which provides that the *Privacy Act* does not apply to the proceedings of the Agency. The Applicant has provided no evidence to the contrary.

Agency as a "government institution"

12. The Agency is a "government institution" and, as such, is governed by the *Privacy Act* as well as the *Access to Information Act*, R.S.C., 1985, c. A-1. For the purpose of the *Privacy Act* and the *Access to Information Act*, the Chair of the Agency is the head of the government institution.

Section 3 of *the Privacy Act*, R.S.C., 1985, c. P-21
Respondent's Record, Volume 1, Appendix A

Section 3 of the *Access to Information Act*, R.S.C. 1985, c. A-I
Respondent's Record, Volume 1, Appendix A

13. The Agency as a government institution collects, in accordance with section 4 of the *Privacy Act*, personal information that relates directly to its activities.

Section 4 of the *Privacy Act,* R.S.C., 1985, c. P-21
Respondent's Record, Volume 1, Appendix A

14. The Agency, as a government institution, looks at each request to access Agency records on a case-by-case basis. When doing so, the Agency must determine whether any of the exemptions provided for in the *Privacy Act* apply, in order to determine what information can be released to the public. This is done both for formal and informal requests.

Affidavit of Patrice Bellerose sworn on May 23, 2014, at para. 7
Respondent's Record, Volume 1, Tab 1

Privacy Act

15. The *Privacy Act* assigns overall responsibility to the President of the Treasury Board (as

the designated Minister) for the government-wide administration of that legislation.

Affidavit of Patrice Bellerose sworn on May 23, 2014, at para. 4.
Respondent's Record, Volume 1, Tab 1

16. Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the government institution except (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or (b) for a purpose for which the information may be disclosed to the institution under subsection 8(2).

Section 7 of the *Privacy Act*, R.S.C., 1985, c. P-21
Respondent's Record, Volume 1, Appendix A

17. Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the government institution.

Section 8(1) of the *Privacy Act*, R.S.C., 1985, c. P-21
Respondent's Record, Volume 1, Appendix A

18. Unless the consent of the individual concerned is specifically granted, one of the paragraphs in subsection 8(2) of the *Privacy Act* must be invoked to justify the disclosure.

AB v. Canada (Minister of Citizenship and Immigration),
[2002] F.C.J. No. 610, at para. 60
Respondent's Record, Volume 2, Appendix B, Tab 1

19. Subsection 8(2) of the *Privacy Act* enumerates thirteen situations where otherwise personal information may be disclosed.

Subsection 8(2) of the *Privacy Act*, R.S.C., 1985, c. P-21
Respondent's Record, Volume 1, Appendix A

20. In accordance with section 10 of the *Privacy Act*, all personal information collected by the Agency related to its activities is included in personal information banks.

Section 10 of the *Privacy Act*, R.S.C., 1985, c. P-21
Respondent's Record, Volume 1, Appendix A

21. Section 71 of the *Privacy Act* provides that the President of the Treasury Board Secretariat, as the designated minister, is responsible for the creation of personal information banks. Subsection 71(4) provides that only the designated minister can provide approval for modification of existing personal information banks.

Section 71 of the *Privacy Act*, R.S.C., 1985, c. P-21
Respondent's Record, Volume 1, Appendix A

22. The Supreme Court of Canada has recognized the quasi-constitutional status of the *Privacy Act*. The Supreme Court of Canada noted that the protection of privacy is a fundamental value in a modern and democratic society.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403,
at para. 65, 66
Respondent's Record, Volume 2, Appendix B, Tab 4

Standard of Review

23. The standard of review applicable in regards to a refusal by the head of the institution to disclose personal information is correctness. The standard of review for constitutional questions is also correctness.

> *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190
> Applicant's Record, Volume 2, Appendix B, Tab 5
>
> *Nault v. Canada (Public Works and Government Services),* 2011 F.C.A. 263, at para. 19
> Respondent's Record, Volume 2, Appendix B, Tab 8

Whether s. 2(b) of the *Charter* protects access to information and, if so, in what circumstances

24. The landmark case in regards to access to information to government documents and section 2(b) of the *Charter* was decided by the Supreme Court of Canada in 2010 in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* (Public Safety and Security of Ontario case).

25. The facts of the *Public Safety and Security of Ontario* case relate to a request made by the Criminal Lawyers' Association (CLA) under the Ontario *Freedom of Information and Protection of Privacy Act*, (FIPPA) to the Minister of the Solicitor General and Correctional Services (the Minister) for disclosure of records relating to an investigation done by the Ontario Provincial Police. The Minister refused to disclose the records at issue, claiming several exemptions under FIPPA. On review, the Assistant Information and Privacy Commissioner held that the impugned

records qualified for exemption under a number of sections of FIPPA.

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 S.C.R. 815
Respondent's Record, Volume 2, Appendix B, Tab 9

26. The Supreme Court of Canada made it clear that, contrary to the Applicant's submissions, section 2(b) of the *Charter* does not guarantee access to all documents in government hands. More specifically, "section 2(b) of the *Charter* guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government."

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 S.C.R. 815, at para. 30
Respondent's Record, Volume 2, Appendix B, Tab 9

27. The scope of the s. 2(b) of the *Charter* protection "includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints."

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 SCR. 815, at para. 31
Respondent's Record, Volume 2, Appendix B, Tab 9

28. Contrary to what the Applicant submits, there is no general constitutional right of access to documents in government hands because not every demand for access furthers the section 2(b) *Charter* purpose. The relevant section 2(b) *Charter* purpose is usually the furtherance of

discussion on matters of public importance.

> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, at paras. 34, 35
> Respondent's Record, Volume 2, Appendix B, Tab 9

29. The open-court principle is "inextricably tied to the rights guaranteed by s. 2(b)" because it "permits the public to discuss and put forward opinions and criticisms of court practices and proceedings". However, some information in the hands of a government institution is entitled to protection in order to prevent the impairment of that very principle and promote good governance. It must be shown by the Applicant that without the desired access to the redacted personal information, meaningful public discussion and criticism on matters of public interest would be substantially impeded.

> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, at para.1 and paras. 36, 37
> Respondent's Record, Volume 2, Appendix B, Tab 9
>
> *Canada (Information Commissioner) v. Canada (Minister of National Defence)* [2011] 2 S.C.R. 306 at para. 15
> Respondent's Record, Volume 2, Appendix B, Tab 2

30. The Supreme Court of Canada noted that "[d]etermining whether s. 2(b) of the *Charter* requires access to documents in government hands in a particular case is essentially a question of how far s. 2(b) protection extends. A question arises as to how the issue should be approached." The Supreme Court of Canada indicated that the question of access to government information is best approached by building on the methodology set out in *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927 (Irwin Toy Ltd.) .

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 SCR. 815, at para. 31
Respondent's Record, Volume 2, Appendix B, Tab 9

31. The *Irwin Toy Ltd.* framework involves three inquiries: (1) Does the activity in question have expressive content, thereby bringing it within the reach of s. 2(b) of the *Charter*? (2) Is there something in the method or location of that expression that would remove that protection? (3) If the activity is protected, does the state action infringe that protection, either in purpose or effect?

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 SCR. 815, at para. 32
Respondent's Record, Volume 2, Appendix B, Tab 9

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927
Respondent's Record, Volume 2, Appendix B, Tab 5

32. The *Irwin Toy Ltd* framework describes the circumstances under which section 2(b) of the *Charter* guarantees access to documents in government hands.

33. Subsection 3(a) of the *Privacy Act* defines "government institution" as any department or ministry of state of the Government of Canada, or any body or office, listed in the schedule. The *Privacy Act* does not make any distinction between a government institution acting as a quasi-judicial tribunal and any other government institution. Therefore, even documents filed with a quasi-judicial tribunal such as the Agency are documents in government hands.

Subsection 3(a) of the *Privacy Act,* R.S.C., 1985, c. P-21
Respondent's Record, Volume 1, Appendix A

Whether the Applicant meets the three-part inquiry test, as established in *Irwin Toy*, which would engage a protection under section 2(b) of the *Charter*

34. The Applicant has the burden of establishing that the three-part inquiries or /circumstances framework developed in *Irwin Toy Ltd.* are met.

First Inquiry: Does the activity in question have expressive content, thereby bringing it within the reach of section 2(b)?

35. For the first inquiry, the Applicant had to establish that the denial of access to the personal information in the documents he received from the Agency, effectively precludes meaningful commentary or, more particularly, that his demand for access to the redacted personal information furthers the purposes of s. 2(b) of the *Charter*.

> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, at paras.33, 34
> Respondent's Record, Volume 2, Appendix B, Tab 9
>
> *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927, at paras. 40-42
> Respondent's Record, Volume 2, Appendix B, Tab 5

36. The Applicant has not established and, in fact, has not argued that not having access to the redacted personal information contained in the documents he received from the Agency effectively precluded meaningful commentary or that meaningful public discussion and criticism on matters of public interest would be substantially impeded. The Agency submits that the Applicant has therefore failed the first inquiry.

Second Inquiry: Is there something in the method or location of that expression that would remove that protection?

37. The personal information found in the documents sought is protected by the *Privacy Act*. Therefore, even if the Applicant had established a *prima facie* case for the production of the unredacted documents in question, the Applicant's claim would have been defeated by the very factor that removes a s. 2 (b) *Charter* protection, i.e., the documents sought are protected by the *Privacy Act*. The Agency submits that the Applicant has therefore failed the second inquiry.

> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, at paras.38, 39
> Respondent's Record, Volume 2, Appendix B, Tab 9

Third Inquiry: If the activity is protected, does the state action infringe that protection, either in purpose or effect?

38. The Applicant has not established, nor argued, (1) that the activity, i.e., denial of access to the personal information, is protected by subsection 2(b) of the *Charter*; and (2) that even if the activity was protected, that the Agency's action, i.e., the redaction of personal information, infringed that protection. The Agency submits that Applicant has therefore failed the third inquiry.

> *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927, at paras. 47-53
> Respondent's Record, Volume 2, Appendix B, Tab 5

39. The Agency submits that the Applicant has not established that he meets inquiry one, inquiry two and inquiry three as developed by the Supreme Court of Canada in *Irwin Toy Ltd* .

and that, as a result, the protection found under subsection 2(b) of the *Charter* is not engaged.

Other Arguments of the Applicant

Paragraphs 8(2)(a), (b) and (m) of the *Privacy Act*

40. Paragraph 8(2)(a) of the *Privacy Act* provides that personal information may be disclosed provided that the purpose of the disclosure is the same as the purpose for which the personal information was obtained. The Agency submits that the Applicant's argument that the purpose for disclosing personal information to a person making a request for access to government documents is the same as the purpose for which the personal information was obtained, in particular, to adjudicate on complaints filed with the Agency, is unsupported.

41. The Applicant submits that disclosure is allowed in accordance with paragraph 8(2)(b) of the *Privacy Act* which provides that personal information may be disclosed for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure. However, the Applicant does not refer to any such Act of Parliament or any regulation as none exists. The Agency submits that the argument of the Applicant is therefore unsupported.

42. The Applicant submits that paragraph 8(2)(m) of the *Privacy Act* should apply because there is an overwhelming public interest in the transparency of the Agency's proceedings through openness and public access because of the role of the Agency as a quasi-judicial tribunal. The

Agency submits that if every quasi-judicial tribunal had to disclose personal information just because it is a quasi-judicial tribunal, the legislator would have drafted paragraph 8(2)(m) of the *Privacy Act* with an imperative "shall" as opposed to a permissive "may".

43. In support of his argument that the disclosure is permitted because of subparagraphs 8(2)(a), (b), and (m) of the *Privacy Act*, the Applicant refers to the case of *El-Helou v Courts Administration Service,* 2012 CanLII 30713 (CA PSDPT), a decision of the Public Servants Disclosure Protection Tribunal (PSDPT). As noted in that decision, the purpose of the *Public Servants Disclosure Protection Act* is to maintain and enhance public confidence in the integrity of public servants and as such, it requires the PSDPT to conduct a proceeding that is transparent in nature.

> *El-Helou v Courts Administration Service,* 2012 CanLII 30713 (CA PSDPT), at para. 70
> Applicant's Record, Volume 2, Appendix B, Tab 6

44. On the other hand, the purpose of the *Canada Transportation Act*, through the National Transportation Policy, is to ensure a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada.

> *Canada Transportation Act* (as amended), S.C. 1996, c. 10, s. 5
> Respondent's Record, Volume 1, Appendix A

45. The purpose of the PSDPT and the Agency and their respective enabling legislation are clearly different and, in that sense, the decision of the PSDPT in *El-Helou* can be distinguished. The Agency submits that the arguments of the Applicant regarding paragraphs 8(2)(a), (b), and (m) of the *Privacy Act* should be dismissed.

Subsection 69(2) of the *Privacy Act*

46. Contrary to the Applicant's position, the personal information of each applicant is put in a personal information bank. Accordingly, the personal information provided by each applicant is not information that is publicly available.

47. There is nothing in the *Privacy Act* supporting the argument of the Applicant that the Agency has the right to disclose personal information except in cases where the government institution, acting as an adjudicator, rules that certain documents filed for the purpose of a dispute proceeding were subject to a confidentiality order. Furthermore, the Applicant has provided no evidence to the contrary. The Agency submits that this argument of the Applicant should be rejected.

48. If a quasi-judicial tribunal, such as the Agency, applying the open court principle had a right to disclose personal information collected in its adjudication cases, just because of the application of that principle, there would be a provision in the *Privacy Act* to that effect.

Preliminary Objection of the Applicant: Affidavit

49. The Applicant is asking that the Honourable Court strike out or disregard the portions of the May 23, 2014 Affidavit of Ms. Patrice Bellerose on the basis that it contain arguments or legal conclusions, or an attempt to introduce legal opinions in the guise of evidence.

50. The Court may strike out all or part of an affidavit where prejudice is demonstrated.

> *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*,
> 2001 FCA 8, at para.18
> Respondent's Record, Volume 2, Appendix B, Tab 3

51. Courts have made it clear that in order to determine whether the facts deposed to are within the affiant's personal knowledge or are based on information and belief, regard may be had to the affiant's office or qualifications and whether it is probable that a person holding such office or qualifications would be aware of the particular facts.

> *Smith, Kline & French Laboratories Ltd v. Novopharm Ltd.*
> 53, N.R. 68 (Fed.C.A.), at page 6
> Respondent's Record, Volume 2, Appendix B, Tab 10

52. Ms. Bellerose is the Manager for the Access to Information and Privacy Section of the Agency and, as such, has extensive knowledge of the *Access to Information Act* and the *Privacy Act*.

> Affidavit of Patrice Bellerose sworn on May 23, 2014, at para. 1.
> Respondent's Record, Volume 1, Tab 1

53. Much of what is objected to by the Applicant in the affidavit tendered by the Agency can be said to constitute legislative facts because their purpose is to lend context to the claim. Legislative facts demonstrate the purpose and the background of the legislation, including its social, economic, and cultural context, and are subject to less stringent evidentiary requirements.

Native Council of Nova Scotia v. Canada (A.G.)
[2011] F.C.J. No. 19, at paras. 23, 25
Respondent's Record, Volume 2, Appendix B, Tab 7

54. The Applicant raises an argument concerning his freedom of expression right as per subsection 2(b) of the *Charter* and, among other things, the limitations put on that right by the *Privacy Act*. The Supreme Court of Canada has indicated that "[d]ecisions on issues such as freedom of expression must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. Because of the importance and impact that these decisions may have in the future, the careful preparation and presentation of a factual basis in most Charter cases is necessary. "

MacKay v. Manitoba, [1989] 2 S.C.R. 357, at para. 8
Respondent's Record, Volume 2, Appendix B, Tab 6

55. The Supreme Court of Canada also noted that "Charter decisions should not and must not be made in a factual vacuum. ... The presentation of facts is not, ..., a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported

hypotheses of an enthusiastic applicant."

MacKay v. Manitoba, [1989] 2 S.C.R. 357, at para. 9
Respondent's Record, Volume , Appendix B, Tab 6

56. The Agency submits that the Applicant not agreeing with the facts as set out in the Affidavit of Ms. Patrice Bellerose because they do not support his position before this Honorable Court does not mean that these facts are arguments or legal conclusions, as alleged.

57. The Applicant did not cross-examine Patrice Bellerose on her affidavit dated May 23, 2014, filed by the Agency for the purpose of its motion record.

58. The Applicant did not contest the statement of Patrice Bellerose that the Agency redacts personal information as per the *Privacy Act*, as a requirement.

Patrice Bellerose cross-examination on Affidavit filed
on July 29, 2014 with the Agency's Motion to quash
Applicant's Record, Volume 1, Tab 3, Tr. 182:9-21,
Tr. 194:9-25 and Tr. 195,196

59. The Applicant did not contest the fact that his request was treated by the Agency as an informal request for information even though the request of the Applicant was referred to by him as a request under subsection 2(b) of the *Charter.*

Patrice Bellerose cross-examination on Affidavit filed
on July 29, 2014 with the Agency's Motion to quash
Applicant's Record, Volume 1, Tab 3, Tr. 176:24-25,
Tr. 177-1-21, Tr. 182:1-21, and Tr. 193:21-25

60. The Agency submits that this Honorable Court should dismiss the Applicant's motion to strike parts of the Affidavit of Patrice Bellerose.

Costs

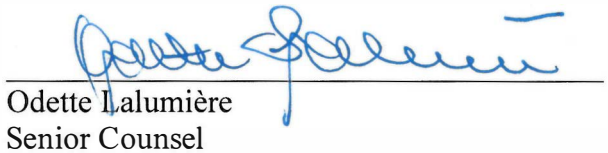
61. The Agency submits that, as a "government institution" included in the schedule of both the *Privacy Act* and the *Access to Information Act*, the head of the Agency has the obligation when dealing with requests to access documents in its possession, even if these requests are treated informally, to refuse to disclose personal information. In doing so, the Agency is simply fulfilling its responsibilities under the *Privacy Act*. For that reason, the Agency submits that costs should not be awarded against the Agency.

62. The Agency is not seeking any costs.

PART IV - ORDER SOUGHT

63. The Agency requests this Honorable Court dismiss the Application for Judicial Review by the Applicant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED. Dated at the City of Gatineau, in the Province of Quebec, this 13th day of November, 2014.



Odette Lalumière
Senior Counsel
Canadian Transportation Agency

PART V - LIST OF AUTHORITIES

Appendix A: Statutes and Regulations

Access to Information Act, R.S.C., 1985, c. A-1, s. 3

Canada Transportation Act, S.C. 1996, c. 10, s. 5

Privacy Act, R.S.C., 1985, c. P-21, s. 3, 4, 7, 8, 10, 69, 71

Appendix B: Authorities

AB v. Canada (Minister of Citizenship and Immigration), [2002] F.C.J. No. 610

Canada (Information Commissioner) v. Canada (Minister of National Defence) [2011] 2 S.C.R. 306

Canadian Tire Corp. Ltd. v. P.S. Partsource Inc., 2001 FCA 8

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190 (Applicant's Record, Vol. 2, App. B, Tab 5)

El-Helou v Courts Administration Service, 2012 CanLII 30713 (CA PSDPT) (Applicant's Record, Vol. 2, App. B, Tab 6)

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927

MacKay v. Manitoba, [1989] 2 S.C.R. 357

Native Council of Nova Scotia v. Canada (A.G.) [2011] F.C.J. No. 19

Nault v. Canada (Public Works and Government Services), 2011, F.C.A. 263

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 S.C.R. 815

Smith, Kline & French Laboratories Ltd v. Novopharm Ltd. 53, N.R. 68 (Fed.C.A.)

APPENDIX "A"

Statutes and Regulations

CANADA

CONSOLIDATION

CODIFICATION

Access to Information Act

Loi sur l'accès à l'information

R.S.C., 1985, c. A-1

L.R.C. (1985), ch. A-1

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An Act to extend the present laws of Canada that provide access to information under the control of the Government of Canada

Loi visant à compléter la législation canadienne en matière d'accès à l'information relevant de l'administration fédérale

SHORT TITLE

Short title

1. This Act may be cited as the *Access to Information Act*.

1980-81-82-83, c. 111, Sch. I "1".

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur l'accès à l'information.*

1980-81-82-83, ch. 111, ann. I « 1 ».

PURPOSE OF ACT

Purpose

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

OBJET DE LA LOI

Objet

2. (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

Complementary procedures

(2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

1980-81-82-83, c. 111, Sch. I "2"; 1984, c. 40, s. 79(F).

Étoffement des modalités d'accès

(2) La présente loi vise à compléter les modalités d'accès aux documents de l'administration fédérale; elle ne vise pas à restreindre l'accès aux renseignements que les institutions fédérales mettent normalement à la disposition du grand public.

1980-81-82-83, ch. 111, ann. I « 2 »; 1984, ch. 40, art. 79(F)

INTERPRETATION

Definitions

3. In this Act,

DÉFINITIONS

Définitions

3. Les définitions qui suivent s'appliquent à la présente loi.

"alternative format" « *support de substitution* »

"alternative format", with respect to a record, means a format that allows a person with a sensory disability to read or listen to that record;

« Commissaire à l'information » *"Information Commissioner"*

« Commissaire à l'information » Le commissaire nommé conformément à l'article 54.

"Court" « *Cour* »

"Court" means the Federal Court;

« Cour » La Cour fédérale.

« Cour » *"Court"*

"designated Minister" « *ministre désigné* »

"designated Minister" means a person who is designated as the Minister under subsection 3.2(1);

« déficience sensorielle » Toute déficience liée à la vue ou à l'ouïe.

« déficience sensorielle » *"sensory disability"*

"foreign state" « *État étranger* »

"foreign state" means any state other than Canada;

« document» Éléments d'information, quel qu'en soit le support.

« document » "*record*"

« État étranger» Tout État autre que le Canada.

« État étranger » "*foreign state*"

"government institution" « *institution fédérale* »

"government institution" means

(*a*) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and

(*b*) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the *Financial Administration Act*;

« institution fédérale »

a) Tout ministère ou département d'État relevant du gouvernement du Canada, ou tout organisme, figurant à l'annexe I;

b) toute société d'État mère ou filiale à cent pour cent d'une telle société, au sens de l'article 83 de la *Loi sur la gestion des finances publiques.*

« institution fédérale » "*government institution*"

"head" « *responsable d'institution fédérale* »

"head", in respect of a government institution, means

(*a*) in the case of a department or ministry of state, the member of the Queen's Privy Council for Canada who presides over the department or ministry, or

(*b*) in any other case, either the person designated under subsection 3.2(2) to be the head of the institution for the purposes of this Act or, if no such person is designated, the chief executive officer of the institution, whatever their title;

« ministre désigné» Personne désignée à titre de ministre en vertu du paragraphe 3.2(1).

« ministre désigné » "*designated Minister*"

« responsable d'institution fédérale»

a) Le membre du Conseil privé de la Reine pour le Canada sous l'autorité duquel est placé un ministère ou un département d'État;

b) la personne désignée en vertu du paragraphe 3.2(2) à titre de responsable, pour l'application de la présente loi, d'une institution fédérale autre que celles visées à l'alinéa *a*) ou, en l'absence d'une telle désignation, le premier dirigeant de l'institution, quel que soit son titre.

« responsable d'institution fédérale » "*head*"

"Information Commissioner" « *Commissaire à l'information* »

"Information Commissioner" means the Commissioner appointed under section 54;

"record" « *document* »

"record" means any documentary material, regardless of medium or form;

« support de substitution» Tout support permettant à une personne ayant une déficience sensorielle de lire ou d'écouter un document.

« support de substitution » "*alternative format*"

"sensory disability" « *déficience sensorielle* »

"sensory disability" means a disability that relates to sight or hearing;

"third party" « *tiers* »

"third party", in respect of a request for access to a record under this Act, means any person, group of persons or organization other than the person that made the request or a government institution.

« tiers» Dans le cas d'une demande de communication de document, personne, groupement ou organisation autres que l'auteur de la demande ou qu'une institution fédérale.

« tiers » "*third party*"

R.S., 1985, c. A-1, s. 3; 1992, c. 21, s. 1; 2002, c. 8, s. 183; 2006, c. 9, s. 141.

L.R. (1985), ch. A-1, art. 3; 1992, ch. 21, art. 1; 2002, ch. 8, art. 183; 2006, ch. 9, art. 141

For greater certainty

3.01 (1) For greater certainty, any provision of this Act that applies to a government institution that is a parent Crown corporation applies to any of its wholly-owned subsidiaries within the meaning of section 83 of the *Financial Administration Act*.

3.01 (1) Il est entendu que toute disposition de la présente loi qui s'applique à une institution fédérale qui est une société d'État mère s'applique également à ses filiales à cent pour cent au sens de l'article 83 de la *Loi sur la gestion des finances publiques.*

Précision

For greater certainty

(2) For greater certainty, the Canadian Race Relations Foundation and the Public Sector Pension Investment Board are parent Crown corporations for the purposes of this Act.

(2) Il est entendu que la Fondation canadienne des relations raciales et l'Office d'investissement des régimes de pensions du secteur

Précision

2006, c. 9, s. 142.

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

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International agreements respecting air services

(3) In the event of any inconsistency or conflict between an international agreement or convention respecting air services to which Canada is a party and the *Competition Act*, the provisions of the agreement or convention prevail to the extent of the inconsistency or conflict.

1996, c. 10, s. 4; 2007, c. 19, s. 1.

NATIONAL TRANSPORTATION POLICY

Declaration

5. It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when

(*a*) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;

(*b*) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;

(*c*) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;

(*d*) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and

(*e*) governments and the private sector work together for an integrated transportation system.

1996, c. 10, s. 5; 2007, c. 19, s. 2.

Conventions ou accords internationaux sur les services aériens

(3) En cas d'incompatibilité ou de conflit entre une convention internationale ou un accord international sur les services aériens dont le Canada est signataire et les dispositions de la *Loi sur la concurrence*, la convention ou l'accord l'emporte dans la mesure de l'incompatibilité ou du conflit.

1996, ch. 10, art. 4; 2007, ch. 19, art. 1.

POLITIQUE NATIONALE DES TRANSPORTS

Déclaration

5. Il est déclaré qu'un système de transport national compétitif et rentable qui respecte les plus hautes normes possibles de sûreté et de sécurité, qui favorise un environnement durable et qui utilise tous les modes de transport au mieux et au coût le plus bas possible est essentiel à la satisfaction des besoins de ses usagers et au bien-être des Canadiens et favorise la compétitivité et la croissance économique dans les régions rurales et urbaines partout au Canada. Ces objectifs sont plus susceptibles d'être atteints si :

a) la concurrence et les forces du marché, au sein des divers modes de transport et entre eux, sont les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;

b) la réglementation et les mesures publiques stratégiques sont utilisées pour l'obtention de résultats de nature économique, environnementale ou sociale ou de résultats dans le domaine de la sûreté et de la sécurité que la concurrence et les forces du marché ne permettent pas d'atteindre de manière satisfaisante, sans pour autant favoriser indûment un mode de transport donné ou en réduire les avantages inhérents;

c) les prix et modalités ne constituent pas un obstacle abusif au trafic à l'intérieur du Canada ou à l'exportation des marchandises du Canada;

d) le système de transport est accessible sans obstacle abusif à la circulation des personnes, y compris les personnes ayant une déficience;

e) les secteurs public et privé travaillent ensemble pour le maintien d'un système de transport intégré.

1996, ch. 10, art. 5; 2007, ch. 19, art. 2.

CANADA

CONSOLIDATION

CODIFICATION

Privacy Act

Loi sur la protection des renseignements personnels

R.S.C., 1985, c. P-21

L.R.C. (1985), ch. P-21

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R.S.C., 1985, c. P-21

L.R.C., 1985, ch. P-21

An Act to extend the present laws of Canada that protect the privacy of individuals and that provide individuals with a right of access to personal information about themselves

Loi visant à compléter la législation canadienne en matière de protection des renseignements personnels et de droit d'accès des individus aux renseignements personnels qui les concernent

SHORT TITLE

Short title

1. This Act may be cited as the *Privacy Act*.

1980-81-82-83, c. 111, Sch. II "1".

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur la protection des renseignements personnels.*

1980-81-82-83, ch. 111, ann. II « 1 »

PURPOSE OF ACT

Purpose

2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.

1980-81-82-83, c. 111, Sch. II "2".

OBJET DE LA LOI

Objet

2. La présente loi a pour objet de compléter la législation canadienne en matière de protection des renseignements personnels relevant des institutions fédérales et de droit d'accès des individus aux renseignements personnels qui les concernent.

1980-81-82-83, ch. 111, ann. II « 2 »

INTERPRETATION

Definitions

3. In this Act,

"administrative purpose" « *fins administratives* »

"administrative purpose", in relation to the use of personal information about an individual, means the use of that information in a decision making process that directly affects that individual;

"alternative format" « *support de substitution* »

"alternative format", with respect to personal information, means a format that allows a person with a sensory disability to read or listen to the personal information;

"Court" « *Cour* »

"Court" means the Federal Court;

"designated Minister" « *ministre désigné* »

"designated Minister" means a person who is designated as the Minister under subsection 3.1(1);

"government institution" « *institution fédérale* »

"government institution" means

DÉFINITIONS

Définitions

3. Les définitions qui suivent s'appliquent à la présente loi.

« Commissaire à la protection de la vie privée » "*Privacy Commissioner*"

« Commissaire à la protection de la vie privée » Le commissaire nommé en vertu de l'article 53.

« Cour » "*Court*"

« Cour » La Cour fédérale.

« déficience sensorielle » "*sensory disability*"

« déficience sensorielle » Toute déficience liée à la vue ou à l'ouïe.

« fichier de renseignements personnels » "*personal information bank*"

« fichier de renseignements personnels » Tout ensemble ou groupement de renseignements personnels défini à l'article 10.

« fins administratives » "*administrative purpose*"

« fins administratives » Destination de l'usage de renseignements personnels concernant un individu dans le cadre d'une décision le touchant directement.

(*a*) any department or ministry of state of the Government of Canada, or any body or office, listed in the schedule, and

(*b*) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the *Financial Administration Act*;

"head" « *responsable d'institution fédérale* »

"head", in respect of a government institution, means

(*a*) in the case of a department or ministry of state, the member of the Queen's Privy Council for Canada who presides over the department or ministry, or

(*b*) in any other case, either the person designated under subsection 3.1(2) to be the head of the institution for the purposes of this Act or, if no such person is designated, the chief executive officer of the institution, whatever their title;

"personal information" « *renseignements personnels* »

"personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

(*a*) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,

(*b*) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(*c*) any identifying number, symbol or other particular assigned to the individual,

(*d*) the address, fingerprints or blood type of the individual,

(*e*) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

(*f*) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

« institution fédérale » "*government institution*"

« institution fédérale »

a) Tout ministère ou département d'État relevant du gouvernement du Canada, ou tout organisme, figurant à l'annexe;

b) toute société d'État mère ou filiale à cent pour cent d'une telle société, au sens de l'article 83 de la *Loi sur la gestion des finances publiques*.

« ministre désigné » "*designated Minister*"

« ministre désigné » Personne désignée à titre de ministre en vertu du paragraphe 3.1(1).

« renseignements personnels » "*personal information*"

« renseignements personnels » Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :

a) les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;

b) les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;

c) tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;

d) son adresse, ses empreintes digitales ou son groupe sanguin;

e) ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;

f) toute correspondance de nature, implicitement ou explicitement, privée ou confidentielle envoyée par lui à une institution fédérale, ainsi que les réponses de l'institution dans la mesure où elles révèlent le contenu de la correspondance de l'expéditeur;

g) les idées ou opinions d'autrui sur lui;

h) les idées ou opinions d'un autre individu qui portent sur une proposition de subvention, de récompense ou de prix à lui octroyer par une institution, ou subdivision de celle-ci, visée à l'alinéa *e*), à l'exclusion du nom

(*g*) the views or opinions of another individual about the individual,

(*h*) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (*e*), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

(*i*) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include

(*j*) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

(*k*) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,

(*l*) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual where it appears with other information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include

j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :

(i) le fait même qu'il est ou a été employé par l'institution,

(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,

(iii) la classification, l'éventail des salaires et les attributions de son poste,

(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi,

(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;

k) un individu qui, au titre d'un contrat, assure ou a assuré la prestation de services à une institution fédérale et portant sur la nature de la prestation, notamment les conditions du contrat, le nom de l'individu ainsi que les idées et opinions personnelles qu'il a exprimées au cours de la prestation;

l) des avantages financiers facultatifs, notamment la délivrance d'un permis ou d'une licence accordés à un individu, y compris le nom de celui-ci et la nature précise de ces avantages;

m) un individu décédé depuis plus de vingt ans.

« responsable d'institution fédérale »
"*head*"

a) Le membre du Conseil privé de la Reine pour le Canada sous l'autorité duquel est placé un ministère ou un département d'État;

b) la personne désignée en vertu du paragraphe 3.1(2) à titre de responsable, pour l'application de la présente loi, d'une institu-

vidual and the exact nature of the benefit, and

(*m*) information about an individual who has been dead for more than twenty years;

"personal information bank" *«fichier de renseignements personnels »*

"personal information bank" means a collection or grouping of personal information described in section 10;

"Privacy Commissioner" *« Commissaire à la protection de la vie privée »*

"Privacy Commissioner" means the Commissioner appointed under section 53;

"sensory disability" *« déficience sensorielle »*

"sensory disability" means a disability that relates to sight or hearing.

R.S., 1985, c. P-21, s. 3; 1992, c. 1, s. 144(F), c. 21, s. 34; 2002, c. 8, s. 183; 2006, c. 9, s. 181.

For greater certainty

3.01 (1) For greater certainty, any provision of this Act that applies to a government institution that is a parent Crown corporation applies to any of its wholly-owned subsidiaries within the meaning of section 83 of the *Financial Administration Act*.

For greater certainty

(2) For greater certainty, the Canadian Race Relations Foundation and the Public Sector Pension Investment Board are parent Crown corporations for the purposes of this Act.

2006, c. 9, s. 182.

DESIGNATION

Power to designate Minister

3.1 (1) The Governor in Council may designate a member of the Queen's Privy Council for Canada to be the Minister for the purposes of any provision of this Act.

Power to designate head

(2) The Governor in Council may, by order, designate a person to be the head of a government institution, other than a department or ministry of state, for the purposes of this Act.

2006, c. 9, s. 182.

COLLECTION, RETENTION AND DISPOSAL OF PERSONAL INFORMATION

Collection of personal information

4. No personal information shall be collected by a government institution unless it relates directly to an operating program or activity of the institution.

1980-81-82-83, c. 111, Sch. II "4".

tion fédérale autre que celles visées à l'alinéa *a*) ou, en l'absence d'une telle désignation, le premier dirigeant de l'institution, quel que soit son titre.

« support de substitution » *"alternative format"*

« support de substitution » Tout support permettant à une personne ayant une déficience sensorielle de lire ou d'écouter des renseignements personnels.

L.R. (1985), ch. P-21, art. 3; 1992, ch. 1, art. 144(F), ch. 21, art. 34; 2002, ch. 8, art. 183; 2006, ch. 9, art. 181.

Précision

3.01 (1) Il est entendu que toute disposition de la présente loi qui s'applique à une institution fédérale qui est une société d'État mère s'applique également à ses filiales à cent pour cent au sens de l'article 83 de la *Loi sur la gestion des finances publiques*.

Précision

(2) Il est entendu que la Fondation canadienne des relations raciales et l'Office d'investissement des régimes de pensions du secteur public sont des sociétés d'État mères pour l'application de la présente loi.

2006, ch. 9, art. 182.

DÉSIGNATION

Désignation d'un ministre

3.1 (1) Le gouverneur en conseil peut désigner tout membre du Conseil privé de la Reine pour le Canada à titre de ministre pour l'application de toute disposition de la présente loi.

Désignation du responsable d'une institution fédérale

(2) Il peut aussi désigner, par décret, toute personne à titre de responsable d'une institution fédérale — autre qu'un ministère ou un département d'État — pour l'application de la présente loi.

2006, ch. 9, art. 182.

COLLECTE, CONSERVATION ET RETRAIT DES RENSEIGNEMENTS PERSONNELS

Collecte des renseignements personnels

4. Les seuls renseignements personnels que peut recueillir une institution fédérale sont ceux qui ont un lien direct avec ses programmes ou ses activités.

1980-81-82-83, ch. 111, ann. II « 4 ».

Personal information to be collected directly

5. (1) A government institution shall, wherever possible, collect personal information that is intended to be used for an administrative purpose directly from the individual to whom it relates except where the individual authorizes otherwise or where personal information may be disclosed to the institution under subsection 8(2).

Origine des renseignements personnels

5. (1) Une institution fédérale est tenue de recueillir auprès de l'individu lui-même, chaque fois que possible, les renseignements personnels destinés à des fins administratives le concernant, sauf autorisation contraire de l'individu ou autres cas d'autorisation prévus au paragraphe 8(2).

Individual to be informed of purpose

(2) A government institution shall inform any individual from whom the institution collects personal information about the individual of the purpose for which the information is being collected.

Mise au courant de l'intéressé

(2) Une institution fédérale est tenue d'informer l'individu auprès de qui elle recueille des renseignements personnels le concernant des fins auxquelles ils sont destinés.

Exception

(3) Subsections (1) and (2) do not apply where compliance therewith might

(*a*) result in the collection of inaccurate information; or

(*b*) defeat the purpose or prejudice the use for which information is collected.

1980-81-82-83, c. 111, Sch. II "5"

Exceptions

(3) Les paragraphes (1) et (2) ne s'appliquent pas dans les cas où leur observation risquerait :

a) soit d'avoir pour résultat la collecte de renseignements inexacts;

b) soit de contrarier les fins ou de compromettre l'usage auxquels les renseignements sont destinés.

1980-81-82-83, ch. 111, ann. II « 5 »

Retention of personal information used for an administrative purpose

6. (1) Personal information that has been used by a government institution for an administrative purpose shall be retained by the institution for such period of time after it is so used as may be prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the information.

Conservation des renseignements personnels utilisés à des fins administratives

6. (1) Les renseignements personnels utilisés par une institution fédérale à des fins administratives doivent être conservés après usage par l'institution pendant une période, déterminée par règlement, suffisamment longue pour permettre à l'individu qu'ils concernent d'exercer son droit d'accès à ces renseignements.

Accuracy of personal information

(2) A government institution shall take all reasonable steps to ensure that personal information that is used for an administrative purpose by the institution is as accurate, up-to-date and complete as possible.

Exactitude des renseignements

(2) Une institution fédérale est tenue de veiller, dans la mesure du possible, à ce que les renseignements personnels qu'elle utilise à des fins administratives soient à jour, exacts et complets.

Disposal of personal information

(3) A government institution shall dispose of personal information under the control of the institution in accordance with the regulations and in accordance with any directives or guidelines issued by the designated minister in relation to the disposal of that information.

1980-81-82-83, c. 111, Sch. II "6".

Retrait des renseignements personnels

(3) Une institution fédérale procède au retrait des renseignements personnels qui relèvent d'elle conformément aux règlements et aux instructions ou directives applicables du ministre désigné.

1980-81-82-83, ch. 111, ann. II « 6 ».

PROTECTION OF PERSONAL INFORMATION

PROTECTION DES RENSEIGNEMENTS PERSONNELS

Use of personal information

7. Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except

Usage des renseignements personnels

7. À défaut du consentement de l'individu concerné, les renseignements personnels relevant d'une institution fédérale ne peuvent servir à celle-ci :

(*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or

(*b*) for a purpose for which the information may be disclosed to the institution under subsection 8(2).

1980-81-82-83, c. 111, Sch. II "7".

a) qu'aux fins auxquelles ils ont été recueillis ou préparés par l'institution de même que pour les usages qui sont compatibles avec ces fins;

b) qu'aux fins auxquelles ils peuvent lui être communiqués en vertu du paragraphe 8(2).

1980-81-82-83, ch. 111, ann. II « 7 ».

Disclosure of personal information

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

Communication des renseignements personnels

8. (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.

Where personal information may be disclosed

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

(*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;

(*b*) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

(*c*) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information;

(*d*) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;

(*e*) to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed;

(*f*) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the council of the Westbank First Nation, the council of a participating First Nation — as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act* —, the government of a foreign state, an international organization of states or an international organization

Cas d'autorisation

(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :

a) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;

b) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;

c) communication exigée par *subpoena*, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de renseignements;

d) communication au procureur général du Canada pour usage dans des poursuites judiciaires intéressant la Couronne du chef du Canada ou le gouvernement fédéral;

e) communication à un organisme d'enquête déterminé par règlement et qui en fait la demande par écrit, en vue de faire respecter des lois fédérales ou provinciales ou pour la tenue d'enquêtes licites, pourvu que la demande précise les fins auxquelles les renseignements sont destinés et la nature des renseignements demandés;

f) communication aux termes d'accords ou d'ententes conclus d'une part entre le gouvernement du Canada ou l'un de ses organismes et, d'autre part, le gouvernement d'une province ou d'un État étranger, une or-

established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;

(*g*) to a member of Parliament for the purpose of assisting the individual to whom the information relates in resolving a problem;

(*h*) to officers or employees of the institution for internal audit purposes, or to the office of the Comptroller General or any other person or body specified in the regulations for audit purposes;

(*i*) to the Library and Archives of Canada for archival purposes;

(*j*) to any person or body for research or statistical purposes if the head of the government institution

(i) is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and

(ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates;

(*k*) to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada;

(*l*) to any government institution for the purpose of locating an individual in order to collect a debt owing to Her Majesty in right of Canada by that individual or make a payment owing to that individual by Her Majesty in right of Canada; and

(*m*) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or

ganisation internationale d'États ou de gouvernements, le conseil de la première nation de Westbank, le conseil de la première nation participante — au sens du paragraphe 2(1) de la *Loi sur la compétence des premières nations en matière d'éducation en Colombie-Britannique* — ou l'un de leurs organismes, en vue de l'application des lois ou pour la tenue d'enquêtes licites;

g) communication à un parlementaire fédéral en vue d'aider l'individu concerné par les renseignements à résoudre un problème;

h) communication pour vérification interne au personnel de l'institution ou pour vérification comptable au bureau du contrôleur général ou à toute personne ou tout organisme déterminé par règlement;

i) communication à Bibliothèque et Archives du Canada pour dépôt;

j) communication à toute personne ou à tout organisme, pour des travaux de recherche ou de statistique, pourvu que soient réalisées les deux conditions suivantes :

(i) le responsable de l'institution est convaincu que les fins auxquelles les renseignements sont communiqués ne peuvent être normalement atteintes que si les renseignements sont donnés sous une forme qui permette d'identifier l'individu qu'ils concernent,

(ii) la personne ou l'organisme s'engagent par écrit auprès du responsable de l'institution à s'abstenir de toute communication ultérieure des renseignements tant que leur forme risque vraisemblablement de permettre l'identification de l'individu qu'ils concernent;

k) communication à tout gouvernement autochtone, association d'autochtones, bande d'Indiens, institution fédérale ou subdivision de celle-ci, ou à leur représentant, en vue de l'établissement des droits des peuples autochtones ou du règlement de leurs griefs;

l) communication à toute institution fédérale en vue de joindre un débiteur ou un créancier de Sa Majesté du chef du Canada et de recouvrer ou d'acquitter la créance;

(ii) disclosure would clearly benefit the individual to whom the information relates.

m) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :

(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,

(ii) l'individu concerné en tirerait un avantage certain.

Personal information disclosed by Library and Archives of Canada

(3) Subject to any other Act of Parliament, personal information under the custody or control of the Library and Archives of Canada that has been transferred there by a government institution for historical or archival purposes may be disclosed in accordance with the regulations to any person or body for research or statistical purposes.

Communication par Bibliothèque et Archives du Canada

(3) Sous réserve des autres lois fédérales, les renseignements personnels qui relèvent de Bibliothèque et Archives du Canada et qui y ont été versés pour dépôt ou à des fins historiques par une institution fédérale peuvent être communiqués conformément aux règlements pour des travaux de recherche ou de statistique.

Copies of requests under paragraph (2)(*e*) to be retained

(4) The head of a government institution shall retain a copy of every request received by the government institution under paragraph (2)(*e*) for such period of time as may be prescribed by regulation, shall keep a record of any information disclosed pursuant to the request for such period of time as may be prescribed by regulation and shall, on the request of the Privacy Commissioner, make those copies and records available to the Privacy Commissioner.

Copie des demandes faites en vertu de l'al. (2)*e*)

(4) Le responsable d'une institution fédérale conserve, pendant la période prévue par les règlements, une copie des demandes reçues par l'institution en vertu de l'alinéa (2)*e*) ainsi qu'une mention des renseignements communiqués et, sur demande, met cette copie et cette mention à la disposition du Commissaire à la protection de la vie privée.

Notice of disclosure under paragraph (2)(*m*)

(5) The head of a government institution shall notify the Privacy Commissioner in writing of any disclosure of personal information under paragraph (2)(*m*) prior to the disclosure where reasonably practicable or in any other case forthwith on the disclosure, and the Privacy Commissioner may, if the Commissioner deems it appropriate, notify the individual to whom the information relates of the disclosure.

Avis de communication dans le cas de l'al. (2)*m*)

(5) Dans le cas prévu à l'alinéa (2)*m*), le responsable de l'institution fédérale concernée donne un préavis écrit de la communication des renseignements personnels au Commissaire à la protection de la vie privée si les circonstances le justifient; sinon, il en avise par écrit le Commissaire immédiatement après la communication. La décision de mettre au courant l'individu concerné est laissée à l'appréciation du Commissaire.

Definition of "Indian band"

(6) In paragraph (2)(*k*), "Indian band" means

(*a*) a band, as defined in the *Indian Act*;

(*b*) a band, as defined in the *Cree-Naskapi (of Quebec) Act*, chapter 18 of the Statutes of Canada, 1984;

(*c*) the Band, as defined in the *Sechelt Indian Band Self-Government Act*, chapter 27 of the Statutes of Canada, 1986; or

(*d*) a first nation named in Schedule II to the *Yukon First Nations Self-Government Act*.

Définition de « bande d'Indiens »

(6) L'expression « bande d'Indiens » à l'alinéa (2)*k*) désigne :

a) soit une bande au sens de la *Loi sur les Indiens*;

b) soit une bande au sens de la *Loi sur les Cris et les Naskapis du Québec*, chapitre 18 des Statuts du Canada de 1984;

c) soit la bande au sens de la *Loi sur l'autonomie gouvernementale de la bande indienne sechelte*, chapitre 27 des Statuts du Canada de 1986;

Definition of "aboriginal government"

(7) The expression "aboriginal government" in paragraph (2)(*k*) means

(*a*) Nisga'a Government, as defined in the Nisga'a Final Agreement given effect by the *Nisga'a Final Agreement Act*;

(*b*) the council of the Westbank First Nation;

(*c*) the Tlicho Government, as defined in section 2 of the *Tlicho Land Claims and Self-Government Act*;

(*d*) the Nunatsiavut Government, as defined in section 2 of the *Labrador Inuit Land Claims Agreement Act*;

(*e*) the council of a participating First Nation as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act*;

(*f*) the Tsawwassen Government, as defined in subsection 2(2) of the *Tsawwassen First Nation Final Agreement Act*;

(*g*) a Maanulth Government, within the meaning of subsection 2(2) of the *Maanulth First Nations Final Agreement Act*; or

(*h*) Sioux Valley Dakota Oyate Government, within the meaning of subsection 2(2) of the *Sioux Valley Dakota Nation Governance Act*.

Définition de « gouvernement autochtone »

(7) L'expression « gouvernement autochtone » à l'alinéa (2)*k*) s'entend :

a) du gouvernement nisga'a, au sens de l'Accord définitif nisga'a mis en vigueur par la *Loi sur l'Accord définitif nisga'a*;

b) du conseil de la première nation de Westbank;

c) du gouvernement tlicho, au sens de l'article 2 de la *Loi sur les revendications territoriales et l'autonomie gouvernementale du peuple tlicho*;

d) du gouvernement nunatsiavut, au sens de l'article 2 de la *Loi sur l'Accord sur les revendications territoriales des Inuit du Labrador*;

e) du conseil de la première nation participante, au sens du paragraphe 2(1) de la *Loi sur la compétence des premières nations en matière d'éducation en Colombie-Britannique*;

f) du gouvernement tsawwassen, au sens du paragraphe 2(2) de la *Loi sur l'accord définitif concernant la Première Nation de Tsawwassen*;

g) de tout gouvernement maanulth, au sens du paragraphe 2(2) de la *Loi sur l'accord définitif concernant les premières nations maanulthes*;

h) du gouvernement de l'oyate dakota de Sioux Valley, au sens du paragraphe 2(2) de la *Loi sur la gouvernance de la nation dakota de Sioux Valley*.

Definition of "council of the Westbank First Nation"

(8) The expression "council of the Westbank First Nation" in paragraphs (2)(*f*) and (7)(*b*) means the council, as defined in the Westbank First Nation Self-Government Agreement given effect by the *Westbank First Nation Self-Government Act*.

R.S., 1985, c. P-21, s. 8; R.S., 1985, c. 20 (2nd Supp.), s. 13, c. 1 (3rd Supp.), s. 12; 1994, c. 35, s. 39; 2000, c. 7, s. 26; 2004, c. 11, s. 37, c. 17, s. 18; 2005, c. 1, ss. 106, 109, c. 27, ss. 21, 25; 2006, c. 10, s. 33; 2008, c. 32, s. 30; 2009, c. 18, s. 23; 2014, c. 1, s. 19.

Définition de « conseil de la première nation de Westbank »

(8) L'expression « conseil de la première nation de Westbank» aux alinéas (2)*f*) et (7)*b*) s'entend du conseil au sens de l'Accord d'autonomie gouvernementale de la première nation de Westbank mis en vigueur par la *Loi sur l'autonomie gouvernementale de la première nation de Westbank*.

L.R. (1985), ch. P-21, art. 8; L.R. (1985), ch. 20 (2e suppl.), art. 13, ch. 1 (3e suppl.), art. 12; 1994, ch. 35, art. 39; 2000, ch. 7, art. 26; 2004, ch. 11, art. 37, ch. 17, art. 18; 2005, ch. 1, art. 106 et 109, ch. 27, art. 21 et 25; 2006, ch. 10, art. 33; 2008, ch. 32, art. 30; 2009, ch. 18, art. 23; 2014, ch. 1, art. 19.

Record of disclosures to be retained

9. (1) The head of a government institution shall retain a record of any use by the institution of personal information contained in a personal information bank or any use or purpose for which that information is disclosed by the institution where the use or purpose is not included in the statements of uses and purposes set forth pursuant to subparagraph 11(1)(*a*)(iv) and subsection 11(2) in the index referred to in section 11, and shall attach the record to the personal information.

Limitation

(2) Subsection (1) does not apply in respect of information disclosed pursuant to paragraph 8(2)(*e*).

Record forms part of personal information

(3) For the purposes of this Act, a record retained under subsection (1) shall be deemed to form part of the personal information to which it is attached.

Consistent uses

(4) Where personal information in a personal information bank under the control of a government institution is used or disclosed for a use consistent with the purpose for which the information was obtained or compiled by the institution but the use is not included in the statement of consistent uses set forth pursuant to subparagraph 11(1)(*a*)(iv) in the index referred to in section 11, the head of the government institution shall

(*a*) forthwith notify the Privacy Commissioner of the use for which the information was used or disclosed; and

(*b*) ensure that the use is included in the next statement of consistent uses set forth in the index.

1980-81-82-83, c. 111, Sch. II "9"; 1984, c. 21, s. 89.

Relevé

9. (1) Le responsable d'une institution fédérale fait un relevé des cas d'usage, par son institution, de renseignements personnels versés dans un fichier de renseignements personnels, ainsi que des usages ou fins auxquels ils ont été communiqués par son institution si ceux-ci ne figurent pas parmi les usages et fins énumérés dans le répertoire prévu au paragraphe 11(1), en vertu du sous-alinéa 11(1)*a*)(iv) et du paragraphe 11(2); il joint le relevé aux renseignements personnels.

Exception

(2) Le paragraphe (1) ne s'applique pas aux renseignements communiqués en vertu de l'alinéa 8(2)*e*).

Appartenance du relevé aux renseignements personnels

(3) Le relevé mentionné au paragraphe (1) devient lui-même un renseignement personnel qui fait partie des renseignements personnels utilisés ou communiqués.

Usages compatibles

(4) Dans les cas où des renseignements personnels versés dans un fichier de renseignements personnels relevant d'une institution fédérale sont destinés à un usage, ou communiqués pour un usage, compatible avec les fins auxquelles les renseignements ont été recueillis ou préparés par l'institution, mais que l'usage n'est pas l'un de ceux qui, en vertu du sous-alinéa 11(1)*a*)(iv), sont indiqués comme usages compatibles dans le répertoire visé au paragraphe 11(1), le responsable de l'institution fédérale est tenu :

a) d'aviser immédiatement le Commissaire à la protection de la vie privée de l'usage qui a été fait des renseignements ou pour lequel ils ont été communiqués;

b) de faire insérer une mention de cet usage dans la liste des usages compatibles énumérés dans l'édition suivante du répertoire.

1980-81-82-83, ch. 111, ann. II « 9 »; 1984, ch. 21, art. 89.

PERSONAL INFORMATION BANKS

FICHIERS DE RENSEIGNEMENTS PERSONNELS

Personal information to be included in personal information banks

10. (1) The head of a government institution shall cause to be included in personal information banks all personal information under the control of the government institution that

(*a*) has been used, is being used or is available for use for an administrative purpose; or

(*b*) is organized or intended to be retrieved by the name of an individual or by an identi-

Renseignements personnels versés dans les fichiers de renseignements personnels

10. (1) Le responsable d'une institution fédérale veille à ce que soient versés dans des fichiers de renseignements personnels tous les renseignements personnels qui relèvent de son institution et qui :

a) ont été, sont ou peuvent être utilisés à des fins administratives;

fying number, symbol or other particular assigned to an individual.

Exception for Library and Archives of Canada

(2) Subsection (1) does not apply in respect of personal information under the custody or control of the Library and Archives of Canada that has been transferred there by a government institution for historical or archival purposes.

R.S., 1985, c. P-21, s. 10; R.S., 1985, c. 1 (3rd Supp.), s. 12; 2004, c. 11, s. 38.

PERSONAL INFORMATION INDEX

Index of personal information

11. (1) The designated Minister shall cause to be published on a periodic basis not less frequently than once each year, an index of

(*a*) all personal information banks setting forth, in respect of each bank,

(i) the identification and a description of the bank, the registration number assigned to it by the designated Minister pursuant to paragraph 71(1)(*b*) and a description of the class of individuals to whom personal information contained in the bank relates,

(ii) the name of the government institution that has control of the bank,

(iii) the title and address of the appropriate officer to whom requests relating to personal information contained in the bank should be sent,

(iv) a statement of the purposes for which personal information in the bank was obtained or compiled and a statement of the uses consistent with those purposes for which the information is used or disclosed,

(v) a statement of the retention and disposal standards applied to personal information in the bank, and

(vi) an indication, where applicable, that the bank was designated as an exempt bank by an order under section 18 and the provision of section 21 or 22 on the basis of which the order was made; and

(*b*) all classes of personal information under the control of a government institution that are not contained in personal information banks, setting forth in respect of each class

b) sont marqués de façon à pouvoir être retrouvés par référence au nom d'un individu ou à un numéro, symbole ou autre indication identificatrice propre à cet individu.

Exception : Bibliothèque et Archives du Canada

(2) Le paragraphe (1) ne s'applique pas aux renseignements personnels qui relèvent de Bibliothèque et Archives du Canada et qui y ont été versés par une institution fédérale pour dépôt ou à des fins historiques.

L.R. (1985), ch. P-21, art. 10; L.R. (1985), ch. 1 (3e suppl.), art. 12; 2004, ch. 11, art. 38.

RÉPERTOIRE DE RENSEIGNEMENTS PERSONNELS

Publication du répertoire

11. (1) Le ministre désigné fait publier, selon une périodicité au moins annuelle, un répertoire :

a) d'une part, de tous les fichiers de renseignements personnels, donnant, pour chaque fichier, les indications suivantes :

(i) sa désignation, son contenu, la cote qui lui a été attribuée par le ministre désigné, conformément à l'alinéa 71(1)*b*), ainsi que la désignation des catégories d'individus sur qui portent les renseignements personnels qui y sont versés,

(ii) le nom de l'institution fédérale de qui il relève,

(iii) les titre et adresse du fonctionnaire chargé de recevoir les demandes de communication des renseignements personnels qu'il contient,

(iv) l'énumération des fins auxquelles les renseignements personnels qui y sont versés ont été recueillis ou préparés de même que l'énumération des usages, compatibles avec ces fins, auxquels les renseignements sont destinés ou pour lesquels ils sont communiqués,

(v) l'énumération des critères qui s'appliquent à la conservation et au retrait des renseignements personnels qui y sont versés,

(vi) s'il y a lieu, le fait qu'il a fait l'objet d'un décret pris en vertu de l'article 18 et la mention de la disposition des articles 21 ou 22 sur laquelle s'appuie le décret;

b) d'autre part, de toutes les catégories de renseignements personnels qui relèvent

in good faith in a newspaper or any other periodical publication or in a broadcast is privileged.

1980-81-82-83, c. 111, Sch. II "67".

de la vie privée dans le cadre de la présente loi, ainsi que les relations qui en sont faites de bonne foi par la presse écrite ou audio-visuelle.

1980-81-82-83, ch. 111, ann. II « 67 ».

OFFENCES

INFRACTIONS

Obstruction

68. (1) No person shall obstruct the Privacy Commissioner or any person acting on behalf or under the direction of the Commissioner in the performance of the Commissioner's duties and functions under this Act.

Entrave

68. (1) Il est interdit d'entraver l'action du Commissaire à la protection de la vie privée ou des personnes qui agissent en son nom ou sous son autorité dans l'exercice des pouvoirs et fonctions qui lui sont conférés en vertu de la présente loi.

Offence and punishment

(2) Every person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars.

1980-81-82-83, c. 111, Sch. II "68".

Infraction et peine

(2) Quiconque contrevient au présent article est coupable d'une infraction et passible, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de mille dollars.

1980-81-82-83, ch. 111, ann. II « 68 ».

EXCLUSIONS

EXCLUSIONS

Act does not apply to certain materials

69. (1) This Act does not apply to

(*a*) library or museum material preserved solely for public reference or exhibition purposes; or

(*b*) material placed in the Library and Archives of Canada, the National Gallery of Canada, the Canadian Museum of History, the Canadian Museum of Nature, the National Museum of Science and Technology, the Canadian Museum for Human Rights or the Canadian Museum of Immigration at Pier 21 by or on behalf of persons or organizations other than government institutions.

Non-application de la loi

69. (1) La présente loi ne s'applique pas aux documents suivants :

a) les documents de bibliothèque ou de musée conservés uniquement à des fins de référence ou d'exposition pour le public;

b) les documents déposés à Bibliothèque et Archives du Canada, au Musée des beaux-arts du Canada, au Musée canadien de l'histoire, au Musée canadien de la nature, au Musée national des sciences et de la technologie, au Musée canadien des droits de la personne ou au Musée canadien de l'immigration du Quai 21 par des personnes ou organisations extérieures aux institutions fédérales ou pour ces personnes ou organisations.

Sections 7 and 8 do not apply to certain information

(2) Sections 7 and 8 do not apply to personal information that is publicly available.

R.S., 1985, c. P-21, s. 69; R.S., 1985, c. 1 (3rd Supp.), s. 12; 1990, c. 3, s. 32; 1992, c. 1, s. 143(E); 2004, c. 11, s. 39; 2008, c. 9, s. 10; 2010, c. 7, s. 9; 2013, c. 38, s. 18.

Non-application des art. 7 et 8

(2) Les articles 7 et 8 ne s'appliquent pas aux renseignements personnels auxquels le public a accès.

L.R. (1985), ch. P-21, art. 69; L.R. (1985), ch. 1 (3e suppl.), art. 12; 1990, ch. 3, art. 32; 1992, ch. 1, art. 143(A); 2004, ch. 11, art. 39; 2008, ch. 9, art. 10; 2010, ch. 7, art. 9; 2013, ch. 38, art. 18.

Canadian Broadcasting Corporation

69.1 This Act does not apply to personal information that the Canadian Broadcasting Corporation collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose.

2006, c. 9, s. 188.

Société Radio-Canada

69.1 La présente loi ne s'applique pas aux renseignements personnels que la Société Radio-Canada recueille, utilise ou communique uniquement à des fins journalistiques, artistiques ou littéraires.

2006, ch. 9, art. 188.

GENERAL

DISPOSITIONS GÉNÉRALES

Duties and functions of designated Minister

71. (1) Subject to subsection (2), the designated Minister shall

(*a*) cause to be kept under review the manner in which personal information banks are maintained and managed to ensure compliance with the provisions of this Act and the regulations relating to access by individuals to personal information contained therein;

(*b*) assign or cause to be assigned a registration number to each personal information bank;

(*c*) prescribe such forms as may be required for the operation of this Act and the regulations;

(*d*) cause to be prepared and distributed to government institutions directives and guidelines concerning the operation of this Act and the regulations; and

(*e*) prescribe the form of, and what information is to be included in, reports made to Parliament under section 72.

Responsabilités du ministre désigné

71. (1) Sous réserve du paragraphe (2), le ministre désigné est responsable :

a) du contrôle des modalités de tenue et de gestion des fichiers de renseignements personnels dans le but d'en assurer la conformité avec la présente loi et ses règlements pour ce qui est de l'accès des individus aux renseignements personnels qui y sont versés;

b) de l'attribution d'une cote à chacun des fichiers de renseignements personnels;

c) de l'établissement des formulaires nécessaires à la mise en œuvre de la présente loi et de ses règlements;

d) de la rédaction des directives nécessaires à la mise en œuvre de la présente loi et de ses règlements et de leur diffusion auprès des institutions fédérales;

e) de la détermination de la forme et du fond des rapports au Parlement visés à l'article 72.

Exception for Bank of Canada

(2) Anything that is required to be done by the designated Minister under paragraph (1)(*a*) or (*d*) shall be done in respect of the Bank of Canada by the Governor of the Bank of Canada.

Exception dans le cas de la Banque du Canada

(2) Les responsabilités du ministre désigné définies aux alinéas (1)*a*) et *d*) incombent, dans le cas de la Banque du Canada, au gouverneur de celle-ci.

Review of existing and proposed personal information banks

(3) Subject to subsection (5), the designated Minister shall cause to be kept under review the utilization of existing personal information banks and proposals for the creation of new banks, and shall make such recommendations as he considers appropriate to the heads of the appropriate government institutions with regard to personal information banks that, in the opinion of the designated Minister, are under-utilized or the existence of which can be terminated.

Contrôle des fichiers existants ou à constituer

(3) Sous réserve du paragraphe (5), le ministre désigné exerce un contrôle sur l'utilisation des fichiers existants de renseignements personnels ainsi que sur les projets de constitution de nouveaux fichiers et présente aux responsables des institutions fédérales en cause ses recommandations quant aux fichiers qui, à son avis, sont utilisés d'une manière insuffisante ou dont l'existence ne se justifie plus.

Establishment and modification of personal information banks

(4) Subject to subsection (5), no new personal information bank shall be established and no existing personal information banks shall be substantially modified without approval of the designated Minister or otherwise than in accordance with any term or condition on which such approval is given.

Constitution ou modification de fichiers

(4) Sous réserve du paragraphe (5), la constitution de nouveaux fichiers de renseignements personnels de même que toute modification importante des fichiers existants sont subordonnées à l'approbation du ministre désigné et à l'observation des conditions qu'il stipule.

Application of subsections (3) and (4)

(5) Subsections (3) and (4) apply only in respect of personal information banks under the control of government institutions that are de-

Application des par. (3) et (4)

(5) Les paragraphes (3) et (4) ne s'appliquent qu'aux fichiers de renseignements personnels relevant des institutions fédérales qui

partments as defined in section 2 of the *Financial Administration Act*.

sont des ministères au sens de l'article 2 de la *Loi sur la gestion des finances publiques*.

Delegation to head of government institution

(6) The designated Minister may authorize the head of a government institution to exercise and perform, in such manner and subject to such terms and conditions as the designated Minister directs, any of the powers, functions and duties of the designated Minister under subsection (3) or (4).

1980-81-82-83, c. 111, Sch. II "71".

(6) Le ministre désigné peut, selon les modalités et dans les limites qu'il fixe, déléguer au responsable d'une institution fédérale les pouvoirs et fonctions que lui confèrent les paragraphes (3) et (4).

1980-81-82-83, ch. 111, ann. II « 71 ».

Délégation au responsable d'une institution fédérale

Report to Parliament

72. (1) The head of every government institution shall prepare for submission to Parliament an annual report on the administration of this Act within the institution during each financial year.

72. (1) À la fin de chaque exercice, chacun des responsables d'une institution fédérale établit pour présentation au Parlement le rapport d'application de la présente loi en ce qui concerne son institution.

Rapports au Parlement

Tabling of report

(2) Every report prepared under subsection (1) shall be laid before each House of Parliament within three months after the financial year in respect of which it is made or, if that House is not then sitting, on any of the first fifteen days next thereafter that it is sitting.

(2) Dans les trois mois suivant la fin de chaque exercice, les rapports visés au paragraphe (1) sont déposés devant chaque chambre du Parlement ou, si elle ne siège pas, dans les quinze premiers jours de séance ultérieurs.

Remise des rapports

Reference to Parliamentary committee

(3) Every report prepared under subsection (1) shall, after it is laid before the Senate and the House of Commons, under subsection (2), be referred to the committee designated or established by Parliament for the purpose of subsection 75(1).

1980-81-82-83, c. 111, Sch. II "72".

(3) Les rapports déposés conformément au paragraphe (2) sont renvoyés devant le comité désigné ou constitué par le Parlement en application du paragraphe 75(1).

1980-81-82-83, ch. 111, ann. II « 72 ».

Renvoi en comité

Delegation by the head of a government institution

73. The head of a government institution may, by order, designate one or more officers or employees of that institution to exercise or perform any of the powers, duties or functions of the head of the institution under this Act that are specified in the order.

1980-81-82-83, c. 111, Sch. II "73"

73. Le responsable d'une institution fédérale peut, par arrêté, déléguer certaines de ses attributions à des cadres ou employés de l'institution.

1980-81-82-83, ch. 111, ann. II « 73 ».

Pouvoir de délégation du responsable d'une institution

Protection from civil proceeding or from prosecution

74. Notwithstanding any other Act of Parliament, no civil or criminal proceedings lie against the head of any government institution, or against any person acting on behalf or under the direction of the head of a government institution, and no proceedings lie against the Crown or any government institution, for the disclosure in good faith of any personal information pursuant to this Act, for any consequences that flow from that disclosure, or for the failure to give any notice required under this Act if reasonable care is taken to give the required notice.

1980-81-82-83, c. 111, Sch. II "74".

74. Nonobstant toute autre loi fédérale, le responsable d'une institution fédérale et les personnes qui agissent en son nom ou sous son autorité bénéficient de l'immunité en matière civile ou pénale, et la Couronne ainsi que les institutions fédérales bénéficient de l'immunité devant toute juridiction, pour la communication de renseignements personnels faite de bonne foi dans le cadre de la présente loi ainsi que pour les conséquences qui en découlent; ils bénéficient également de l'immunité dans les cas où, ayant fait preuve de la diligence nécessaire, ils n'ont pu donner les avis prévus par la présente loi.

1980-81-82-83, ch. 111, ann. II « 74 ».

Immunité

Court File No.:A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

RECORD OF THE RESPONDENT
CANADIAN TRANSPORTATION AGENCY
VOLUME 1

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Court File No.: A-218-14

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CANADIAN TRANSPORTATION AGENCY
VOLUME 2
(Appendix B – Book of Authorities)

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AB, applicant, and
The Minister of Citizenship and Immigration, respondent

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Court File No. IMM-1683-01

Federal Court of Canada - Trial Division
Toronto, Ontario

O'Keefe J.

Heard: January 24, 2002.
Judgment: April 26, 2002.

(72 paras.)

Counsel:

Patricia Wells, for the applicant.
Stephen Gold, for the respondent.

REASONS FOR ORDER AND ORDER

1 **O'KEEFE J.**:-- This is an application for judicial review pursuant to subsection 18.1 of the Federal Court Act, R.S.C. 1985, c. F-7, as amended, in respect of the decision of the Immigration and Refugee Board, Convention Refugee Determination Division (the "Board"), (date of decision not given), communicated to the applicant by telephone on March 22, 2001, wherein the Board decided to release the applicant's Personal Information Form, as well as the transcript, reasons and exhibits from the applicant's refugee hearing and submit them into evidence at the hearing of another refugee claimant.

2 The applicant seeks:

1. An order setting aside the decision of the Board;
2. A declaration that the Board's decision to release the applicant's confidential information as intended is unlawful;
3. An order to prohibit or restrain the Board from releasing the applicant's confidential information without the applicant's consent;
4. In the alternative, an order prohibiting the Board from releasing the applicant's confidential information except in accordance with such directions as the Court considers to be appropriate, as to the procedure to be followed to protect the confidentiality of the applicant's information in accordance with fairness and natural justice.

Background

3 The applicant, AB, is a citizen of Peru.

4 The applicant is a high-profile athlete who has competed on behalf of Peru in many international sporting events, including the Olympics. The applicant came to Canada in 1999 to compete in the Pan-American Games in Winnipeg as a member of Peru's wrestling team. The applicant made a refugee claim, based on his fear of persecution by the government of Peru.

5 The applicant was determined by the Board to be a Convention refugee on January 28, 2001. Reasons were issued for the Board's decision.

6 Another member of the Peruvian wrestling team at the same Pan-American Games, Luis Enrique Bazan Sale ("Luis Bazan"), also made a refugee claim. At the time of application, Luis Bazan's claim had not been determined.

7 The applicant claims not to know Luis Bazan well.

8 The applicant was informed by letter dated February 19, 2001, that the Board intended to disclose material from his case, including the Personal Information Form, transcript, reasons and ex-

hibits, into evidence at the hearing of Luis Bazan. The applicant was invited to submit to the Board any objections in writing.

9 By way of letters dated March 6, 2001 and March 16, 2001, the applicant submitted objections to the disclosure of his refugee file.

10 The letter dated March 6, 2001 includes the following objections:

> I submit that my client's and his family's security will be put at risk if all the information proposed to be disclosed to Mr. Bazan is disclosed to him. I also submit that it will result in an injustice if that information is disclosed.
>
> On the question of security, the same Board has already found that my client has a well-founded fear of being persecuted in his country, which is Mr. Bazan's country too. It has also found that my client enjoys a high profile in their common country, and the evidence showed that the press has taken a great deal of interest in my client's situation in Canada. The Board has found that his government views my client as a possible leftist sympathizer and that the same government tolerates human rights abuses when it comes to such persons, and for that reason he is at risk in Peru.
>
> The evidence shows that my client's common-law wife and children remain in Peru, and that they have already been approached by the media in an attempt to find out more information about my client.
>
> I submit that disclosing confidential information relating to the basis of my client's refugee claim will open the door to that same information's being made available to the press and the government of his own country, and will therefore place my client's family at risk for the same reasons the Board has found my client to be at risk.
>
> In addition to the risk of physical harm or harassment, I submit it will result in an injustice to release information of a personal nature to someone unrelated to my client, and who has no obligation himself to keep that information confidential. The right to privacy and the right not to have that privacy interfered with is considered a "second level" right in refugee law (on the same level as the right to be free from arbitrary detention).

11 Despite the applicant's stated objections, the Board decided to release the applicant's Personal Information Form, as well as the transcript, reasons and exhibits from the applicant's refugee hearing and submitted them into evidence at the hearing of refugee claimant Luis Bazan. This decision was communicated to the applicant by telephone on March 22, 2001.

12 By letter to the Board dated April 4, 2001, the applicant's counsel wrote:

> I have twice asked the Board for its reasons for its decision, with no response as yet. If the Board intends to proceed to disclose my client's information to Mr.

> Bazan before I have received reasons, I ask that I be notified so that I may apply to the Court for the appropriate injunction.

13 It appears that the Board has already disclosed the information to Luis Bazan.

14 By letter to the Court dated April 20, 2001, the Board indicated that since there was no statutory requirement, no formal reasons were given for the decision denying the request that confidential material from the file of the applicant should not be submitted into evidence at the hearing of the refugee claim of Luis Bazan. The letter further stated that the following endorsement appears in the file:

> Both claimants: (1) are wrestlers from the same team (2) are from the same school from '95-'99 (3) defected at the same time & place (4) claimants fearing because of their alleged involvement with Shining Path (5) trained at the same training centre (6) travelled all over on same dates, same places, same teams (7) their claims both refer to attendance at student meetings. Therefore claims "appear clearly linked"

Applicant's Submission

15 The applicant submits that the type of disclosure at issue in this case has not been judicially reviewed and decided before.

16 The applicant submits that the Board seeks to disclose the applicant's personal information, without consent, to a third party (a refugee claimant) who is neither a government department or official, nor bound by any undertaking or obligation to keep the applicant's information confidential.

17 The applicant submits that disclosing the personal information of one refugee to others not only violates the claimant's rights to privacy, but also could put that claimant and family members at risk should sensitive personal information be communicated to third parties, including the media, in the country of origin.

18 The applicant submits that the applicant is not related to Luis Bazan and has limited knowledge of his personal life. The applicant has not been asked by Luis Bazan to give evidence at the hearing of his claim.

19 The applicant submits that the applicant had a reasonable expectation of privacy for the information that he submitted in connection with his refugee claim. The applicant submits that as a rule, refugee claimant personal information is kept confidential, and that the disclosure of confidential information will be the exception.

20 The applicant submits that the Board erred in law in making the decision to release the applicant's personal information, and specifically the Board erred in interpreting the Privacy Act, R.S.C. 1985, c. P -21.

21 The applicant submits that the applicant's rights to privacy are engaged under Article 12 of the Universal Declaration of Human Rights, United Nations, Resolution 217 A (III), 10 December 1948. For ease of reference, Article 12 is reproduced below.

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

22 The applicant submits that the applicant's rights under section 7 of the Charter are being compromised. For ease of reference, section 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11, is reproduced below.

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

23 The applicant submits that the provision in paragraph 8(2)(a) of the Privacy Act, supra must be interpreted so as to protect the confidentiality of an individual's personal information to the greatest extent possible.

24 The applicant submits that paragraphs 8(2)(c) to (k) limit disclosure to specified third parties, almost all of whom are government institutions who are bound by rules to protect the individual's privacy.

25 The applicant submits that the Privacy Act, supra does not place the onus on the individual to show that there might be harm or injustice caused by the proposed disclosure. Rather, the individual's privacy interest must be safeguarded.

26 The applicant submits that in Igbinosun v. M.C.I. (1994) 87 F.T.R. 131, McGillis J. found that disclosure of the refugee claimant's name to a foreign police force in order to ascertain whether he had a criminal record, was for a use consistent with the purpose for which the information was collected. The applicant submits that it was significant that no personal information aside from the claimant's name was disclosed to the police force. The applicant submits that had the claimant's entire Personal Information Form been disclosed to the police force, the Court response would have been different.

27 The applicant submits that even if the Board were of the opinion that some information contained in the applicant's refugee claim was relevant to Luis Bazan's claim, the Board must still follow a procedure which protects to the greatest extent possible, the confidentiality of the applicant.

Respondent's Submissions

28 The respondent submits that the personal circumstances and background of the applicant and Luis Bazan, his teammate, were strikingly similar. The Board has a responsibility to ensure that decisions are consistent and that all relevant evidence is considered. The respondent submits that the use of the applicant's evidence at the refugee hearing of his teammate was a "consistent use" under paragraph 8(2)(a) of the Privacy Act, supra. The respondent submits that as such, consent from the applicant was not required before the disclosure could be made.

29 The respondent submits that paragraph 8(2)(a) of the Privacy Act, supra gives a tribunal the statutory authority to disclose personal information for a use consistent with the purpose for which the information was obtained. The respondent submits that the use of the applicant's evidence at the refugee hearing of his teammate was a "consistent use" under paragraph 8(2)(a).

30 The respondent submits that the Personal Information Form instructed the applicant that the information provided is not absolutely confidential and that the applicant was required to list any objections to the disclosure on the form. The respondent submits that the applicant failed to make any objections based on the stated criteria relating to endangerment or injustice.

31 The respondent submits that jurisprudence supports a broad and inclusive interpretation of "consistent use" in paragraph 8(2)(a) of the Privacy Act, supra. The applicant submits that in Rahman v. M.C.I. [1994] F.C.J. No. 2041 (QL) (T.D.) at paragraph 10, this Court held that "the purpose for which the information was collected may be expressed as general immigration purposes, or more specifically, as admissibility and refuge determination purposes."

32 The respondent submits that in Igbinosun v. M.C.I., supra at paragraph 6, this Court held that disclosure to a third party was in accordance with paragraph 8(2)(a) of the Privacy Act, supra because the applicant provided information generally for "immigration purposes".

33 The respondent submits that applying this broad interpretation, it is a "consistent use" when the Refugee Division uses information obtained for the applicant's refugee hearing during the subsequent hearing of the applicant's teammate. The respondent submits that injustice could result if each refugee claim were to be considered in isolation. The respondent submits that it is appropriate that disclosure is made only where two or more refugee claims are closely linked.

34 The respondent submits that two claims as similar as the applicant's and his teammate's would ideally be joined pursuant to subsection 10(1) of the Convention Refugee Determination Division Rules, SOR/93-45. The respondent submits that the presence of this subsection in the Rules supports the authority and the propriety of the Board, under paragraph 8(2)(a) of the Privacy Act, supra to consider evidence from other refugee claims where two or more claims are closely linked.

35 The respondent submits that the Privacy Commission concluded that using the personal information from one refugee claim to determine the refugee claim of another concerned individual is a consistent use of the information in appropriate circumstances.

36 The respondent submits that subsection 69(3) of the Immigration Act, supra gives the Board the statutory authority to consider and implement any measures to ensure the confidentiality of proceedings. The respondent submits that the fact the Board chose not to restrict disclosure of any personal information in this particular case does not demonstrate that the procedure is flawed.

37 The respondent submits that the applicant was allowed to make submissions in accordance with the principles of procedural fairness. The respondent submits that by way of written submissions to the Board, the applicant did not demonstrate that the use of his personal information at another refugee hearing would endanger any person or cause an injustice. Accordingly, the respondent submits that the applicant's materials have already been disclosed to Luis Bazan.

38 The respondent submits that the hearing of Luis Bazan will be in camera, and therefore any evidence used at the teammate's refugee hearing which refers to the applicant would not be made public.

39 The respondent notes that the applicant has made his personal information public by filing this judicial review without bringing a motion to treat the applicant's refugee record as confidential.

Issues

40 I propose to deal with the issues as framed by the applicant.

1. Is the Board's decision to disclose the applicant's personal information unlawful, in that the disclosure was for a purpose and to an extent not permitted under the Privacy Act, supra?

2. Was the procedure followed by the Board in deciding whether the applicant's evidence would be used at another refugee hearing in accordance with the principles of natural justice and procedural fairness?

Relevant Statutory Provisions, Regulations and Rules

41 The relevant sections of the Privacy Act, supra state:

2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.
3. In this Act,

...

"head", in respect of a government institution, means

(a) in the case of a department or ministry of state, the member of the Queen's Privy Council for Canada presiding over that institution, or
(b) in any other case, the person designated by order in council pursuant to this paragraph and for the purposes of this Act to be the head of that institution;

"personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,
(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
(c) any identifying number, symbol or other particular assigned to the individual,
(d) the address, fingerprints or blood type of the individual,
(e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,
(f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,
(g) the views or opinions of another individual about the individual,
(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institu-

tion or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but, for the purposes of sections 7, 8 and 26 and section 19 of the Access to Information Act, does not include

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,
(ii) the title, business address and telephone number of the individual,
(iii) the classification, salary range and responsibilities of the position held by the individual,
(iv) the name of the individual on a document prepared by the individual in the course of employment, and
(v) the personal opinions or views of the individual given in the course of employment,

(k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,

(l) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and

(m) information about an individual who has been dead for more than twenty years;

7. Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except

(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or

(b) for a purpose for which the information may be disclosed to the institution under subsection 8(2).

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

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;

(b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

...

(j) to any person or body for research or statistical purposes if the head of the government institution

(i) is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and

(ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates;

...

(m) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or

(ii) disclosure would clearly benefit the individual to whom the information relates.

* * *

2. La présente loi a pour objet de compléter la législation canadienne en matière de protection des renseignements personnels relevant des institutions fédérales et de droit d'accès des individus aux renseignements personnels qui les concernent.

3. Les définitions qui suivent s'appliquent à la présente loi.

...

"responsable d'institution fédérale"

a) Le membre du Conseil privé de la Reine pour le Canada sous l'autorité de qui est placé un ministère ou un département d'État;

b) la personne désignée par décret, conformément au présent alinéa, en qualité de responsable, pour l'application de la présente loi, d'une institution fédérale autre que celles mentionnées à l'alinéa a).

"renseignements personnels" Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment:

a) les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;
b) les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;
c) tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;
c) tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;
d) son adresse, ses empreintes digitales ou son groupe sanguin;
e) ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;
f) toute correspondance de nature, implicitement ou explicitement, privée ou confidentielle envoyée par lui à une institution fédérale, ainsi que les réponses de l'institution dans la mesure où elles révèlent le contenu de la correspondance de l'expéditeur;
g) les idées ou opinions d'autrui sur lui;
h) les idées ou opinions d'un autre individu qui portent sur une proposition de subvention, de récompense ou de prix à lui octroyer par une institution, ou subdivision de celle-ci, visée à l'alinéa e), à l'exclusion du nom de cet autre individu si ce nom est mentionné avec les idées ou opinions;
i) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la Loi sur l'accès à l'information, les renseignements personnels ne comprennent pas les renseignements concernant:

j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment:

(i) le fait même qu'il est ou a été employé par l'institution,
(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,

(iii) la classification, l'éventail des salaires et les attributions de son poste,
(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi,
(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;

k) un individu qui, au titre d'un contrat, assure ou a assuré la prestation de services à une institution fédérale et portant sur la nature de la prestation, notamment les conditions du contrat, le nom de l'individu ainsi que les idées et opinions personnelles qu'il a exprimées au cours de la prestation;
l) des avantages financiers facultatifs, notamment la délivrance d'un permis ou d'une licence accordés à un individu, y compris le nom de celui-ci et la nature précise de ces avantages;
m) un individu décédé depuis plus de vingt ans.

7. À défaut du consentement de l'individu concerné, les renseignements personnels relevant d'une institution fédérale ne peuvent servir à celle-ci:

a) qu'aux fins auxquelles ils ont été recueillis ou préparés par l'institution de même que pour les usages qui sont compatibles avec ces fins;
b) qu'aux fins auxquelles ils peuvent lui être communiqués en vertu du paragraphe 8(2).

8. (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.

(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants:

a) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;
b) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;

...

j) communication à toute personne ou à tout organisme, pour des travaux de recherche ou de statistique, pourvu que soient réalisées les deux conditions suivantes:

(i) le responsable de l'institution est convaincu que les fins auxquelles les renseignements sont communiqués ne peuvent être normalement

atteintes que si les renseignements sont donnés sous une forme qui permette d'identifier l'individu qu'ils concernent,

(ii) la personne ou l'organisme s'engagent par écrit auprès du responsable de l'institution à s'abstenir de toute communication ultérieure des renseignements tant que leur forme risque vraisemblablement de permettre l'identification de l'individu qu'ils concernent;

...

m) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution:

(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,

(ii) l'individu concerné en tirerait un avantage certain.

42 The relevant sections of the Immigration Act, supra states as follows:

69.(2) Subject to subsections (3) and (3.1), proceedings before the Refugee Division shall be held in the presence of the person who is the subject of the proceedings, wherever practicable, and be conducted in camera or, if an application therefor is made, in public.

(3) Where the Refugee Division is satisfied that there is a serious possibility that the life, liberty or security of any person would be endangered by reason of any of its proceedings being held in public, it may, on application therefor, take such measures and make such order as it considers necessary to ensure the confidentiality of the proceedings.

(3.1) Where the Refugee Division considers it appropriate to do so, it may take such measures and make such order as it considers necessary to ensure the confidentiality of any hearing held in respect of any application referred to in subsection (3).

82.1 (1) An application for judicial review under the Federal Court Act with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court - Trial Division.

* * *

(3.1), la section du statut tient ses séances à huis clos ou, sur demande en ce sens, en public, et dans la mesure du possible en présence de l'intéressé.

(3) S'il lui est démontré qu'il y a une sérieuse possibilité que la vie, la liberté ou la sécurité d'une personne soit mise en danger par la publicité des débats, la section du statut peut, sur demande en ce sens, prendre toute mesure ou rendre toute ordonnance qu'elle juge nécessaire pour en assurer la confidentialité.

(3.1) La section du statut peut aussi, si elle l'estime indiqué, prendre toute mesure ou rendre toute ordonnance qu'elle juge nécessaire pour assurer la confidentialité de la demande.

82.1 (1) La présentation d'une demande de contrôle judiciaire aux termes de la Loi sur la Cour fédérale ne peut, pour ce qui est des décisions ou ordonnances rendues, des mesures prises ou de toute question soulevée dans le cadre de la présente loi ou de ses textes d'application - règlements ou règles - se faire qu'avec l'autorisation d'un juge de la Section de première instance de la Cour fédérale.

43 The relevant sections of the Convention Refugee Determination Divisions Rules, supra state:

10. (1) An Assistant Deputy Chairperson or coordinating member may order that two or more claims or applications be processed jointly where the Assistant Deputy Chairperson or coordinating member believes that no injustice is thereby likely to be caused to any party.
22. (1) A person who makes an application pursuant to subsection 69(2) of the Act shall do so in writing to the Refugee Division and shall file it at the registry.
(2) The Refugee Division shall notify the parties forthwith of the application referred to in subrule (1).

22.(3) An application that is made pursuant to subsection 69(3) of the Act in response to an application referred to in subrule (1) shall be made to the Refugee Division in writing and filed at the registry.

(4) Subject to any measure taken or any order made pursuant to subsection 69(3.1) of the Act, the Refugee Division shall notify the person referred to in subrule (1) and every party forthwith of the application referred to in subrule (3).
28. (1) Every application that is not provided for in these Rules shall be made by a party to the Refugee Division by motion, unless, where the application is made during a hearing, the members decide that, in the interests of justice, the application should be dealt with in some other manner.

* * *

10. (1) Un vice-président adjoint ou un membre coordonnateur peut ordonner que deux ou plusieurs revendications ou demandes soient traitées conjointement, s'il estime qu'une telle mesure ne risque pas de causer d'injustice aux parties.
22. (1) La personne qui fait une demande en application du paragraphe 69(2) de la Loi la présente par écrit à la section du statut et la dépose au greffe.
(2) La section du statut notifie sans délai les parties de la demande visée au paragraphe (1).
(3) Toute demande faite, en application du paragraphe 69(3) de la Loi, en réponse à une demande visée au paragraphe (1) est présentée par écrit à la section du statut et déposée au greffe.

(4) Sous réserve de toute mesure prise ou de toute ordonnance rendue en application du paragraphe 69(3.1) de la Loi, la section du statut notifie sans délai la personne visée au paragraphe (1) et toutes les parties de la demande visée au paragraphe (3).

28. (1) Toute demande d'une partie qui n'est pas prévue par les présentes règles est présentée à la section du statut par voie de requête, sauf si elle est présentée au cours d'une audience et que les membres décident d'une autre façon de procéder dans l'intérêt de la justice.

Analysis and Decision

44 The applicant raised a preliminary issue at the commencement of the hearing of this matter. That issue was his request for a confidentiality order pursuant to Rule 151 of the Federal Court Rules, 1998, which reads:

151. (1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

* * *

151. (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.

(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

45 The applicant seeks an order that the Court records be sealed in this judicial review application and that access to the Court records be prohibited without leave of the Court. In addition, the applicant requests an order that the style of case be amended so that the applicant's name reads as "AB" when the decision is rendered.

46 The application for judicial review was filed on April 3, 2001. The respondent raised the fact that the applicant himself made the information public by filing the application for judicial review which in turn, resulted in the Board filing its record in the Court. This record contains the very information that the applicant wishes to have made confidential. The record was filed in the Court on November 23, 2001. The respondent has raised in its memorandum of fact and law filed on June 21, 2001 that the applicant had made his personal information public by filing the application for leave and for judicial review. The applicant filed his affidavit in support of the application for leave and for judicial review on May 22, 2001. That affidavit had attached to it as exhibits, the applicant's Personal Information Form, a copy of the transcript of the Board hearing and a copy of the Board's decision which is the majority of the information sought to be made confidential.

47 I am of the opinion that I am unable to grant an order pursuant to Rule 151 of the Federal Court Rules, 1998 as by the wording of the Rule, I only have jurisdiction to grant an order of confidentiality with respect to material "to be filed". The material that I am being asked to order to be

treated as confidential was filed in May, 2001 and November, 2001. The motion for a confidentiality order was not made until the date of the hearing which was January 24, 2002. The motion for a confidentiality order is therefore dismissed.

48 In the alternative, if I have the jurisdiction to issue the confidentiality order, I am not prepared to issue the order. The material sought to be made confidential has been on the public record since May, 2001 as well, the information has also been revealed to the applicant in the other case. I am of the opinion that in the circumstances of this case, a confidentiality order should not issue. I adopt the reasoning of Gibson, J. of this Court in Canada (Minister of Citizenship and Immigration) [1999] F.C.J. No. 51 (QL) which he stated at paragraph 11 of the decision:

> To justify a derogation from the principle of open and accessible court proceedings, and I am satisfied that that principle extends to open and accessible court records, Rule 151(2) requires that the Court must be satisfied that the material sought to be protected from access should be treated as confidential. The extract from Pacific Press (supra), makes it clear that the onus on an applicant such as the respondent here to so satisfy the Court is a heavy one. I simply am not satisfied that the respondent has met that onus on the facts before me. Any undertaking of confidentiality given by the Minister is not binding on this Court. The respondent has provided no special reasons to justify protection of his personal information on the records of this Court. His reliance on the words on the form provided for his use, the desire to which he attests to keep his affairs private and the fact that his personal information is before this Court not by reason of his own initiative provide a basis for sympathy for the respondent's position. But those considerations do not discharge the onus on him to justify a confidentiality order.

49 I am prepared however, to issue an order amending the style of cause so that the applicant's name reads as "AB".

Issue 1

Is the Board's decision to disclose the applicant's personal information unlawful, in that the disclosure was for a purpose and to an extent not permitted under the Privacy Act, supra?

50 The respondent entered an affidavit of David Tyndale, which included a letter from the Privacy Commission as Exhibit A. The letter from the Privacy Commission states, in part:

> It was pointed out to the complainants that this as [sic] only a recognition that there may be some circumstances where the use of the personal information from one refugee might be appropriate. This was definitely not intended as a blanket endorsement for all refugee hearings. As you know, each and every Privacy Act complaint received by this office is dealt with on its own merits.
>
> For instance, in a previous specific complaint investigated by this office, the Privacy Commissioner found that the Immigration and Refugee Board's introduction of one individual's personal information into the refugee hearing of another individual was a "consistent use" under section 8(2)(a) of the Privacy Act. [omitted s. 8(2)(a) citation] In that particular case, a refugee claimant gave evidence at

> his own refugee claim hearing, but gave contradictory evidence about his curriculum vitae when he agreed to be called as a witness in a subsequent hearing for another individual. The Immigration and Refugee Board introduced his file into the second hearing to challenge the credibility of the witness.

51 The example cited by the Privacy Commission demonstrates that a "consistent use" under section 8(2)(a) of the Privacy Act, supra includes demonstrating that an individual is providing contradictory evidence as a witness in a second refugee hearing than he provided during his own refugee hearing. In that case, the individual concerned brought his own personal information into question at the second refugee hearing by testifying about the same information provided at his hearing (although in a contradictory manner). That situation is clearly distinguishable from the present case where the applicant claims to hardly know the other refugee claimant and has no intention of participating in that claimant's hearing.

52 As the Privacy Commission recognized, paragraphs 8(2)(a) and (b) are definitely not intended as a blanket endorsement for personal information of refugees to be shared at all refugee hearings. Moreover, each case must be dealt with on its own merits.

53 The applicant's Personal Information Form contains the following standard wording on the front page:

> The confidentiality of the information contained in this form is protected by federal legislation and can be released only under the terms of that legislation.
>
> The Refugee Division may make inquiries concerning information provided in this form.
>
> Moreover, this form and the information it contains may be used as evidence at the hearings of other claimants who are related to you or whose claims appear to be closely linked to yours. Should you have a reasonable objection to this use please state it below. The Refugee Division will consider your objection based on whether the use of your form and information would endanger the life, liberty or security of any person or would be likely to cause an injustice.

In the space provided under the above wording, the applicant wrote:

> Requests for disclosure will be considered on a case-by-case basis. Otherwise, consent is denied.

54 According to the wording on the Personal Information Form and according to the notice sent to the applicant, the Board will consider objections to the release of personal information based on whether the use of the information:

1. Would endanger the life, liberty or security of any person; or
2. Would be likely to cause an injustice.

55 Is this an appropriate test for the Board to use in the context of a Rule 28 motion to determine whether the Board can use personal information of a previous refugee claimant without that claimant's permission?

56 Part (b) of the Board's test uses similar wording to the test described in Rule 28(9). Rule 28 does not specifically mention privacy or confidentiality of proceedings, but it is the catch-all provision of the Rules which may be interpreted as appropriate to be applied in this situation. Part (a) of the Board's test uses similar wording to the test described in subsection 69(3) of the Immigration Act, supra. Subsection 69(3) states:

> 69.(3) Where the Refugee Division is satisfied that there is a serious possibility that the life, liberty or security of any person would be endangered by reason of any of its proceedings being held in public, it may, on application therefor, take such measures and make such order as it considers necessary to ensure the confidentiality of the proceedings.
>
> * * *
>
> 69.(3) S'il lui est démontré qu'il y a une sérieuse possibilité que la vie, la liberté ou la sécurité d'une personne soit mise en danger par la publicité des débats, la section du statut peut, sur demande en ce sens, prendre toute mesure ou rendre toute ordonnance qu'elle juge nécessaire pour en assurer la confidentialité.

57 Although the test provided in subsection 69(3) can be helpful and instructive to the Board in determining whether to release personal information from a refugee claimant's record, subsection 69(3) is not directly applicable to the situation at hand. Subsection 69(3) provides a mechanism to ensure confidentiality of proceedings where the Board's proceedings are being held in public. In the instant case, at issue is the confidentiality of the record of a refugee claimant after the Board has concluded proceedings and made a final determination with respect to that refugee claimant. I do not find that subsection 69(3) provides any authority in this situation.

58 Under Rule 28, the Board has been given broad discretion to make decisions relating to the determination of Convention refugees. However, in my view, it is not clear that this broad discretion was intended to authorize the disclosure of personal information that would otherwise be protected under the Privacy Act, supra.

59 The preamble to subsection 8(2) of the Privacy Act, supra states:

> 8.(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed ...
>
> * * *
>
> 8.(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants : ...

60 I am of the view that the record of the applicant's refugee claim qualifies as personal information under the control of a government institution. As such, unless the consent of the individual concerned is granted (as required under subsection 8(1)), one of the paragraphs in subsection 8(2) must be invoked to justify the disclosure. Paragraph 8(2)(a) continues as follows:

> 8.(2)(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;
>
> * * *
>
> 8.(2)(a) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;

61 In this case, the purpose for which the information was obtained was the determination of the applicant's claim for Convention refugee status. In order for the disclosure of the applicant's personal information to be justified under this section, the use of that information must be a use consistent with the purpose for which the information was collected. I do not find that the determination of the refugee claim of the other applicant is consistent with the purpose of determining the applicant's claim for Convention refugee status.

62 Paragraph 8(2)(b) continues as follows:

> 8(2)(b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;
>
> * * *
>
> 8(2)(b) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;

63 Counsel has not directed me to any Act of Parliament or any regulation made thereunder that authorizes the disclosure of the applicant's personal information contained in his refugee record, therefore paragraph 8(2)(b) does not apply. As described above, provisions from the Convention Refugee Determination Division Rules and the Immigration Act, supra have been considered but do not provide satisfactory authority for the disclosure of this personal information.

64 Paragraphs 8(2)(c) through (i) are not applicable to the situation at hand. Paragraph (j) continues as follows:

> 8(2)(j) to any person or body for research or statistical purposes if the head of the government institution
>
> (i) is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and
>
> (ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates;
>
> * * *

8(2)j) communication à toute personne ou à tout organisme, pour des travaux de recherche ou de statistique, pourvu que soient réalisées les deux conditions suivantes :

(i) le responsable de l'institution est convaincu que les fins auxquelles les renseignements sont communiqués ne peuvent être normalement atteintes que si les renseignements sont donnés sous une forme qui permette d'identifier l'individu qu'ils concernent,
(ii) la personne ou l'organisme s'engagent par écrit auprès du responsable de l'institution à s'abstenir de toute communication ultérieure des renseignements tant que leur forme risque vraisemblablement de permettre l'identification de l'individu qu'ils concernent;

65 Paragraph 8(2)(j) is not applicable as the disclosure concerned is not to a person for research or statistical purposes. Subparagraph (ii) is useful to the extent that it indicates that personal information is sufficiently prized under the Privacy Act, supra to warrant protection that includes obtaining a written undertaking to prevent subsequent disclosure.

66 Paragraph 8(2)(m) continues as follows:

8.(2)(m) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or
(ii) disclosure would clearly benefit the individual to whom the information relates.

* * *

8.(2)m) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :

(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,
(ii) l'individu concerné en tirerait un avantage certain.

67 Subparagraph 8(2)(m)(ii) does not apply in the case at hand since the disclosure of the applicant's refugee record to a subsequent refugee claimant would not clearly benefit the applicant. Subparagraph 8(2)(m)(i) would only apply if the head of the institution provides an opinion that the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure. The head of the institution is a defined term in the Privacy Act, supra, and in this situation, it refers to the Minister of Citizenship and Immigration. There is no indication that the Minister of Citizenship and Immigration has engaged in weighing the interests in subparagraph 8(2)(m)(i), so this provision does not apply to authorize the disclosure of the applicant's personal information.

68 In conclusion on this issue, I find that the Board's decision to release the applicant's personal information to another refugee claimant, under the circumstances of this case, is not permitted under the Privacy Act, supra.

Issue 2

Was the procedure followed by the Board in deciding whether the applicant's evidence would be used at another refugee hearing in accordance with the principles of natural justice and procedural fairness?

69 Because of my finding on Issue 1, it is not necessary to make a finding with respect to Issue 2 but I will make a few brief comments with respect to the procedure followed by the Board. No procedure is set out by the Convention Refugee Determination Division Rules for the disclosure of personal information. Consequently, Rule 28 applies. For ease of reference, Rule 28(1) and (9) are reproduced:

> 28. (1) Every application that is not provided for in these Rules shall be made by a party to the Refugee Division by motion, unless, where the application is made during a hearing, the members decide that, in the interests of justice, the application should be dealt with in some other manner.
>
> ...
>
> (9) The Refugee Division, on being satisfied that no injustice is likely to be caused, may dispose of a motion without a hearing.
>
> * * *
>
> 28. (1) Toute demande d'une partie qui n'est pas prévue par les présentes règles est présentée à la section du statut par voie de requête, sauf si elle est présentée au cours d'une audience et que les membres décident d'une autre façon de procéder dans l'intérêt de la justice.
>
> ...
>
> (9) La section du statut peut statuer sur la requête sans tenir d'audience si elle est convaincue qu'il ne risque pas d'en résulter d'injustice.

70 To me, it appears that the Board has complied with Rule 28 of the Convention Refugee Determination Division Rules and in so doing, the Board complied with the principles of natural justice and procedural fairness.

71 The application for judicial review is allowed and the decision of the Board to release the applicant's confidential information is set aside. It is declared that the Board's decision to release the applicant's confidential information is unlawful and the Board is prohibited from further releasing the applicant's confidential information without the applicant's consent.

ORDER

72 IT IS ORDERED that:

> 1. The decision of the Board to release the applicant's confidential information is set aside.

2. It is declared that the Board's decision to release the applicant's confidential information as described is unlawful.
3. The Board is prohibited and restrained from further releasing the applicant's confidential information without the applicant's consent.
4. The style of cause is amended so that the applicant's name reads as "AB".
5. The application for judicial review is allowed.

O'KEEFE J.

cp/ci/d/qlklc

Tab 2

Indexed as:

Canada (Information Commissioner) v. Canada (Minister of National Defence)

Information Commissioner of Canada, Appellant;
v.
Minister of National Defence, Respondent, and
Canadian Civil Liberties Association, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists, Interveners.
And
Information Commissioner of Canada, Appellant;
v.
Prime Minister of Canada Respondent, and
Canadian Civil Liberties Association, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists, Interveners.
And
Information Commissioner of Canada, Appellant;
v.
Minister of Transport Canada Respondent, and
Canadian Civil Liberties Association, Canadian Newspaper Association,
[page307]
Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists, Interveners.
And
Information Commissioner of Canada, Appellant;
v.
Commissioner of the Royal Canadian Mounted Police, Respondent, and
Canadian Civil Liberties Association, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists, Interveners.

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[2011] A.C.S. no 25

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2011 SCC 25

File Nos.: 33300, 33299, 33296, 33297.

Supreme Court of Canada

Heard: October 7, 2010;
Judgment: May 13, 2011.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

(112 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Catchwords:

Access to information -- Access to records -- Request for Ministers' records located in ministerial offices -- Whether records "under control of government institution" as provided in legislation -- Access to Information Act, R.S.C. 1985, c. A-1, ss. 3, 4(1).

Access to information -- Exemptions -- Privacy -- Personal information -- Request for Prime Minister's agenda -- Whether agenda constitutes "personal information" as defined in legislation -- If so, whether agenda should nonetheless be disclosed because Prime Minister is "officer" of government institution -- Access [page308] to Information Act, R.S.C. 1985, c. A-1, s. 19(1) -- Privacy Act, R.S.C. 1985, c. P-21, s. 3.

Summary:

These appeals bring together four applications by the Information Commissioner of Canada for judicial review of refusals to disclose certain records, requested almost a decade ago, under the *Access to Information Act*. The first three applications concern refusals to disclose records located within the offices of then Prime Minister Chrétien, then Minister of Defence Eggleton, and then Minister of Transport Collenette, respectively. The fourth application concerns the refusal to disclose those parts of the Prime Minister's agenda in the possession of the RCMP and PCO. The applications judge refused disclosure on the first three applications, but ordered it on the fourth. The Federal Court of Appeal overturned his decision on the fourth application only.

Held: The appeals should be dismissed.

Per McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.: Any refusal to disclose requested documents is subject to independent review by the courts on a standard of correctness. In turn, the standard of appellate review of the applications judge's decision on questions of statutory interpretation is also correctness. However, the standard of review of his

decision on whether the requested documents were in fact under the control of the government institution is one of deference, provided the decision is not premised on a wrong legal principle and absent palpable and overriding error.

On the first three applications, the applications judge's reasons demonstrate that he conducted a full analysis of the statutes guided by well-established principles of statutory interpretation. At the conclusion of his analysis, the applications judge held that the words in s. 4(1) of the *Access to Information Act* mean that the PMO and the relevant ministerial offices are not part of the "government institution" for which they are responsible. The Federal Court of Appeal rightly held that the applications judge's analysis contains no error. The meaning of "government institution" is clear. No contextual consideration warrants the Court interpreting Parliament to have intended that [page309] the definition of "government institution" include ministerial offices.

The question then becomes whether the requested records held within the respective ministerial offices are nonetheless "under the control" of their related government institutions within the meaning of s. 4(1) of the Act. The word "control" is an undefined term in the statute. As the applications judge made clear, the word must be given a broad and liberal meaning in order to create a meaningful right of access to government information. While physical control over a document will obviously play a leading role in any case, it is not determinative of the issue of control. Thus, if the record requested is located in a Minister's office, this does not end the inquiry. Rather, this is the point at which a two-step inquiry commences. Step one acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. If the record requested relates to a departmental matter, however, the inquiry into control continues. Under step two, all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. There is no presumption of inaccessibility for records in a minister's office. Further, this test does not lead to the wholesale hiding of records in ministerial offices. Rather, it is crafted to answer the concern. In addition, Parliament has included strong investigatory provisions that guard against intentional acts to hinder or obstruct an individual's right to access.

Applying this test to the material before him, the applications judge concluded that none of the requested records was in the control of a government institution. The conclusions he reached on the issue of control were open to him on the record and entitled to deference.

[page310]

On the fourth application, it is agreed that the Prime Minister's agendas in the possession of the RCMP and the PCO were under the control of a "government institution". Records under the control of these institutions must be disclosed, subject to certain statutory exemptions. Section 19(1) of the *Access to Information Act* prohibits the head of a government institution from releasing any record that contains personal information as defined in s. 3 of the *Privacy Act*. However, s. 3(*j*) creates an exception by allowing for the disclosure of personal information where such information pertains to an individual who is or was an officer or employee of a government institution and where the information relates to the position or function of the individual. The applications judge held that the Prime Minister was an officer of PCO. In doing so, he relied upon the definitions of public officer

found in the *Financial Administration Act* and the *Interpretation Act*. The Federal Court of Appeal rightly held that the applications judge erred in relying upon these definitions. It would be inconsistent with Parliament's intention to interpret the *Privacy Act* in a way that would include the Prime Minister as an officer of a government institution. Had Parliament intended the Prime Minister to be treated as an "officer" of the PCO pursuant to the *Privacy Act*, it would have said so expressly. Thus, the relevant portions of the Prime Minister's agenda under the control of the RCMP and the PCO fall outside the scope of the access to information regime.

Per LeBel J.: Ministers' offices are not listed in Schedule I of the Act, and accordingly they should not be considered "government institutions". Nonetheless, this conclusion cannot be the basis for an implied exception for political records. The fact that Ministers' offices are separate and different from government institutions does not mean that a government institution cannot control a record that is not in its premises. If a government institution controls a record in a Minister's office, the record falls within the scope of the Act. If it falls within the scope of the Act, the head of the government institution must facilitate access to it on the basis of the two-part control test as stated in the reasons of Charron J. If the record holder is the Minister, the fact that his or her office is not part of the government institution he or she oversees may weigh in the balance. The reality that Ministers wear many hats must also be taken into account. A Minister is a member of Cabinet who is accountable to Parliament for the administration [page311] of a government department, but is usually also a Member of Parliament in addition to being a member of a political party for which he or she performs various functions and, finally, a private person. It is conceivable that many records will not fall neatly into one category or another. The head of a government institution is responsible for determining whether such hybrid documents should be disclosed. The first step in the assessment is to consider whether the records fall within the scope of the Act. If they do, the head must then perform the second step of the assessment process: to determine whether the records fall under any of the exemptions provided for in the Act. Depending on which exemption applies, the head may or may not have the discretion to disclose the document.

A presumption that a Minister's records are beyond the scope of the Act would upset the balance between the head's discretionary powers and the Commissioner's powers of investigation. Such an interpretation of the Act would effectively leave the head of a government institution with the final say as to whether a given document was under the institution's control and would run counter to the purpose of the Act, according to which decisions on the disclosure of government information must be reviewed independently. This is crucial to the intended balance between access to information and good governance.

In the circumstances in which the records at issue in the first three applications were created and managed, a government institution would not have a reasonable expectation of obtaining them. These documents were therefore not under the control of a government institution. As for the records in the possession of the RCMP and PCO, even though they were under the control of a government institution, the heads of those institutions had an obligation to refuse to disclose them.

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By Charron J.

Referred to: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; [page312]

Tele-Mobile Co. v. Ontario, 2008 SCC 12, [2008] 1 S.C.R. 305; *Francis v. Baker*, [1999] 3 S.C.R. 250; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Canada Post Corp. v. Canada (Minister of Public Works)*, [1993] 3 F.C. 320; *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110; *Privacy Commissioner (Can.) v. Canada Labour Relations Board* (2000), 257 N.R. 66; *Rubin v. Canada (Minister of Foreign Affairs and International Trade)*, 2001 FCT 440, 204 F.T.R. 313; *Canada (Attorney General) v. Information Commissioner (Can.)*, 2001 FCA 25, 268 N.R. 328; *Canada Post Corp. v. Canada (Minister of Public Works)*, 2004 FCA 286, 328 N.R. 98; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403.

By LeBel J.

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History and Disposition:

APPEALS from a judgment of the Federal Court of Appeal (Richard C.J. and Sexton and Sharlow JJ.A.), 2009 FCA 175, 393 N.R. 51, [2009] F.C.J. No. 692 (QL), 2009 CarswellNat 1521, affirming in part a judgment of Kelen J., 2008 FC 766, [2009] 2 F.C.R. 86, 326 F.T.R. 237, 87 Admin. L.R. (4) 1, [2008] F.C.J. No. 939 (QL), 2008 CarswellNat 1979. Appeals dismissed.

APPEAL from a judgment of the Federal Court of Appeal (Richard C.J. and Sexton and Sharlow JJ.A.), 2009 FCA 181, 393 N.R. 54, 310 D.L.R. (4) 748, [2009] F.C.J. No. 693 (QL), 2009 CarswellNat 1523, reversing in part a judgment of Kelen J., 2008 FC 766, [2009] 2 F.C.R. 86, 326 F.T.R. 237, 87 Admin. L.R. (4) 1, [2008] F.C.J. No. 939 (QL), 2008 CarswellNat 1979. Appeal dismissed.

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Ryder Gilliland, for the intervener the Canadian Civil Liberties Association.

Paul Schabas, for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian [page314] Media Lawyers Association and the Canadian Association of Journalists.

The judgment of McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

CHARRON J.:--

1. Overview

1 These appeals bring together four applications by the Information Commissioner of Canada for judicial review of refusals to disclose certain records to a person who requested them under the *Access to Information Act*, R.S.C. 1985, c. A-1. The records, requested almost a decade ago, generally consist of agendas, notes and emails relating to the activities of then-Prime Minister Jean Chrétien, then-Minister of National Defence Art Eggleton, and then-Minister of Transport David Collenette.

2 The first three applications concern refusals to disclose records located within the offices of the Prime Minister, the Minister of National Defence, and the Minister of Transport, respectively. Each record holder, jointly called the "Government" in these appeals, takes the position that his office is not subject to the *Access to Information Act*. The fourth application concerns the refusal to disclose those

parts of the Prime Minister's agenda in the possession of the Royal Canadian Mounted Police ("RCMP") and the Privy Council Office ("PCO"). The record holders in this application agree that they are subject to the Act; they argue, however, that the information contained in the requested records is exempt from disclosure under s. 19(1) of the *Access to Information Act*, as it constitutes "personal information" within the meaning of s. 3 of the *Privacy Act*, R.S.C. 1985, c. P-21.

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3 The requester has the right, under s. 4 of the *Access to Information Act*, to be given access to "any record under the control of a government institution". On the first three applications, there is no issue that, by definition, "government institution" includes the PCO, the Department of National Defence, and the Department of Transport. The question is whether each government institution includes the office of the Minister who presides over it. In other words: Is the Prime Minister's office ("PMO") part of the PCO? Is the office of the Minister of National Defence part of the Department of National Defence? Is the office of the Minister of Transport part of the Department of Transport?

4 Following a detailed analysis, Kelen J. of the Federal Court of Canada answered no to each question, holding that the respective entities were separate (2008 FC 766, [2009] 2 F.C.R. 86). In his view, the words of the statute read in their ordinary sense, in context, and harmoniously with the scheme of the Act and the intention of Parliament made this clear. Expert evidence on the functioning of government also supported this interpretation. He concluded that "no contextual consideration could warrant the Court interpreting Parliament to have intended the PMO to be part of the PCO for the purposes of the Act. The same is true with respect to ministers' offices not being part of the respective government institutions" (para. 77). In a brief oral judgment, Sharlow J.A., speaking for the Federal Court of Appeal, upheld Kelen J.'s interpretation of the statute on this point (2009 FCA 175, 393 N.R. 51 ("Decision 1")), and again in 2009 FCA 181, 393 N.R. 54 ("Decision 2").

5 As the ministerial entities were held to be separate, a second question arose: Are the records requested, despite being physically located in [page316] the respective offices of the Prime Minister, the Minister of National Defence, or the Minister of Transport, nonetheless "under the control" of the related government institution within the meaning of s. 4 of the *Access to Information Act*?

6 After surveying the jurisprudence, Kelen J. concluded that no single factor is determinative of whether a record is under the control of a government institution. However, the relevant factors could usefully be distilled into a two-part test that asks: (1) whether the contents of the document relate to a departmental matter; and (2) whether the government institution could reasonably expect to obtain a copy of the document upon request. If both questions are answered in the affirmative, the document is under the control of the government institution. Kelen J. considered the contents of the records and the circumstances in which they were created, and concluded that none of the records requested was under the control of the related government institution. The Federal Court of Appeal agreed with the control test proposed by Kelen J. It also upheld his decision regarding the requested records, stating that it was open to him to come to this conclusion "by drawing reasonable inferences from the evidence before him, as he did" (Decision 1, at para. 9).

7 Thus, the answers provided by the courts below on the meaning of "government institution" and "control" effectively disposed of the first three applications in favour of the Government.

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8 In the fourth application, there is no dispute that the RCMP and the PCO are government institutions and that, subject to any exemption under the *Access to Information Act*, records under their control must be disclosed. While a number of exemptions were at issue in first instance, the question on this appeal is whether the records [page317] requested consist of "personal information" within the meaning of s. 19(1) of the *Access to Information Act*. This provision prohibits the head of a government institution from disclosing "any record ... that contains personal information as defined in section 3 of the *Privacy Act*". Under this provision, "personal information" "means information about an identifiable individual that is recorded in any form".

9 The parties agree that the Prime Minister's agenda falls within the general definition of "personal information". However, s. 3 "personal information" (*j*) of the *Privacy Act* creates an exception by excluding from the scope of protection such information which pertains to "an individual who is or was an officer or employee of a government institution" and the information "relates to the position or functions of the individual". The exception seemingly reflects the view that federal officers or employees are entitled to less protection when the information requested relates to their position or function within the government. It is this exception that is arguably at play in the fourth application: the disclosure issue turns on the question of whether the Prime Minister is an "officer" of the PCO within the meaning of s. 3 "personal information" (*j*) of the *Privacy Act*.

10 Kelen J. held that the Prime Minister was an "officer" of the PCO. In a separate judgment, the Federal Court of Appeal overturned his decision, finding that the conclusion reached in the related appeals about the separate nature of the PMO from the PCO governed here as well. Sharlow J.A. held that it would be "inconsistent with the intention of Parliament to interpret the *Privacy Act* in a way that would include the Prime Minister within the scope [page318] of the phrase 'officer of a government institution'" in s. 3 (Decision 2, at para. 8).

11 The Commissioner appeals from the dismissal of each application. She urges the Court to hold that, as "heads" presiding over departments, the Prime Minister and the Ministers are part of these "government institutions" within the meaning of the *Access to Information Act*, when exercising *departmental functions.* Similarly, she argues that the Prime Minister is an "officer" of the PCO. Alternatively, if ministerial offices are held to be separate entities, the Commissioner argues that any record *relating to a departmental matter* is presumptively under the "control" of the government institution over which the Minister presides, regardless of its creation or location within the ministerial office. Thus, any such record must be disclosed, unless it is specifically exempt under the Act.

12 While the Commissioner raises some specific issues regarding the interpretation in the courts below in support of her position, her arguments are grounded primarily in broad principles of constitutional law, political theory, democratic accountability, and ministerial responsibility. I note at the outset that these principles unquestionably form part of the context in which the *Access to Information Act* operates. The position advanced by the Commissioner also reflects a policy of democratic governance which Parliament could choose to adopt. However, as Kelen J. aptly noted in the introduction to his judgment:

> The question for the Court is not whether the documents should be accessible to the public under Canada's "freedom to information" law, but whether the documents are currently accessible to the public under Canada's existing law. The Court does not [page319] legislate or change the law; it interprets the existing law (para. 3).

17

13 Much as the courts below have concluded, it is my view that the interpretation advanced by the Commissioner on the meaning of "government institution", "control" and "officer" cannot be sustained under the existing statutes at issue. As the Government rightly argues, such interpretation would dramatically expand the access to information regime in Canada, a result that can only be achieved by Parliament.

14 I would dismiss the appeals.

2. The Legislative Scheme

15 As this Court recently stated, "[a]ccess to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance" (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, *per* McLachlin C.J. and Abella J., at para. 1). These general principles are reflected in the federal access regime under the *Access to Information Act*. The purpose of the statute is expressly stated as follows:

> **2.** (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

16 Thus, the statute expressly recognizes that information in the hands of government institutions "should be available to the public", but the right to access it is subject to "necessary exceptions". [page320] Before discussing the provisions at issue, I will briefly describe the legislative scheme.

17 The right to "be given access to any record under the control of a government institution" is provided under s. 4(1). This broad right of access is expressly subject to other provisions of the *Access to Information Act*, but supersedes "any other Act of Parliament". What constitutes a "government institution" for the purposes of the statute is key to these appeals. The definition is set out in s. 3 and will be discussed more fully below.

18 The process for accessing government information begins when a member of the public makes a request in writing for a record to a government institution (s. 6). The head of the government institution who receives a request must give written notice to the person who has requested the records as to whether or not access will be given in whole or in part within a reasonable time limit (ss. 7 to 9). Where the government institution refuses to give access to the records requested, it is required to provide notice to the requester that the records do not exist, or to expressly state the exemption it is relying upon in refusing to provide access to the records (ss. 10(1) to (3)). Further, the government institution must inform the requester of his or her "right to make a complaint to the Information Commissioner about the refusal" (s. 10(1)).

19 If the requester elects to exercise this right and makes a complaint, the Commissioner is entitled to commence an investigation if she is "satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act" (s. 30(3)). Once the

Commissioner commences an investigation, the *Access to Information Act* grants her significant investigatory powers (s. 36). If the Commissioner concludes that the complaint is well founded, a report is sent to the head of the government institution containing the findings of the investigation and any recommendations the Commissioner considers appropriate; the report [page321] may also include a request to be notified of any action taken to implement the recommendations or reasons why no such action has been or is proposed to be taken (s. 37(1)).

20 If the government institution elects not to comply with the Commissioner's recommendations, the individual requesting the record may apply for judicial review pursuant to s. 41 of the *Access to Information Act*. The Commissioner may also apply for judicial review of the government's decision with the consent of the individual who initially requested the records (s. 42). The latter is what occurred here. The Government refused to disclose the information, and the requester complained to the Commissioner. Following her investigation, the Commissioner found the complaints to be well founded and made recommendations accordingly. The recommendations were not implemented by the Government, and the Commissioner brought these four applications for judicial review.

3. Judicial Review in the Courts Below

21 The four applications for judicial review were combined in one hearing before the Federal Court. Before reviewing the relevant material, Kelen J. determined the appropriate standard of review in accordance with the principles set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Under *Dunsmuir*, courts may usefully first inquire whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be given to a particular category of questions. Second, where the first inquiry proves unfruitful, courts proceed to analyze the factors that make it possible to identify the proper standard of review (para. 62). Kelen J. ended the inquiry at the first step, holding that this Court's decision in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66 ("*RCMP*"), determined in a satisfactory manner [page322] that the questions raised in these four applications should be reviewed on a "correctness" standard (para. 36).

22 The standard for judicial review of refusals by government institutions to disclose any requested documents under the *Access to Information Act* is not at issue in these appeals. Kelen J. rightly concluded that this Court authoritatively determined the matter in *RCMP*. Determining the appropriate standard of review requires courts to discern the intention of the legislature. Of particular note here is the fact that Parliament expressly states in s. 2(1) that one of the purposes of the *Access to Information Act* is to ensure that "decisions on the disclosure of government information should be reviewed independently of government". Moreover, the burden is put on the government to demonstrate on judicial review that it is authorized to refuse to disclose the records that were requested (s. 48). If the court concludes that the head of the institution does not have the legal authority to refuse to disclose the relevant records, the court may substitute its own decision and order the disclosure of the documents, subject to any conditions it may elect to impose (s. 49).

23 In turn, Kelen J.'s decision is subject to appellate review in accordance with the principles set out in *Housen v. Nikolaisen*, 2002 SCC 33; [2002] 2 S.C.R. 235, at paras. 8-9 and 31-36. His decision on questions of statutory interpretation is reviewable on a standard of correctness. His decision on whether the requested documents were in fact under the control of the government institution, provided it is not premised on a wrong legal principle and absent palpable and overriding error, is entitled to deference. Although not expressly stated, it is apparent from reading both judgments in the Federal Court of Appeal below that Sharlow J.A. reviewed Kelen J.'s decision in accordance with the proper standard of appellate review. I will review the decisions under appeal using the same approach.

[page323]

4. Analysis

4.1 *Issue 1: Is the Office of the Prime Minister, or a Minister, a "Government Institution" Within the Meaning of the Access to Information Act?*

24 Subsection 4(1) of the *Access to Information Act* reads as follows:

> **4.** (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is
>
> (*a*) a Canadian citizen, or
>
> (*b*) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,
>
> has a right to and shall, on request, be given access to any record under the control of a government institution.

25 Under s. 3 of the Act:

> "government institution" means
>
> (*a*) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and
>
> (*b*) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the *Financial Administration Act*;

26 Schedule I sets out a list of entities that are government institutions for the purposes of the *Access to Information Act*. This list includes the PCO, the Department of National Defence, the Department of Transport, and the RCMP. However, the PMO, the office of the Minister of National Defence and the office of the Minister of Transport are *not* expressly listed in Schedule I. The term "government institution" is similarly defined under the *Privacy Act*. The question becomes whether Parliament intended to implicitly include ministerial offices within the *Access to Information Act*.

[page324]

27 The proper approach to statutory interpretation has been articulated repeatedly and is now well entrenched. The goal is to determine the intention of Parliament by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of

the Act and the object of the statute. In addition to this general roadmap, a number of specific rules of construction may serve as useful guideposts on the court's interpretative journey. Kelen J. instructed himself accordingly (paras. 43-49). He then conducted the following analysis:

- First, Kelen J. considered evidence from political scientists about how government actually works to determine the ordinary meaning of the term "government institution" according to the experts. He held that this evidence demonstrated that the PMO and the relevant ministerial offices are not part of the "government institution" for which they are responsible (paras. 50-52).
- Second, he noted that pursuant to s. 3 of the statute, the Minister is the "head" of his or her department. This fact supported the argument that the Ministers' offices and the PMO are part of their respective departments. However, he found that the PMO and the Ministers also have many other functions unrelated to the respective departments for which they are responsible (paras. 53-56).
- Third, he considered Hansard debates from 1981, which made it clear that Parliament intended that the *Access to Information Act* apply to information, in any form, held by *specified* government institutions. While the Commissioner agrees that Parliament did not intend the Act to apply to political documents, no exemption or exclusion for such political records is provided for in the Act. Kelen J. therefore reasoned that an interpretation of "government institution" that included the PMO and offices of the Ministers would dramatically extend the right of access. Parliament would not have intended such a "dramatic [page325] result" without express wording to that effect (paras. 57-60).
- Fourth, following the enactment of the *Access to Information Act*, the Information Commissioner's 1988-1989 Report to Parliament indicated that Ministers' offices were *not* subject to the provisions of the Act. The Commissioner adopted the same view in 1991, and again in 1997. These original interpretations confirm that the office of the Information Commissioner itself understood the intent of Parliament was not to include the PMO or a Minister's office in the government institutions listed in Schedule I of the Act (paras. 61-65).
- Fifth, since the time the Commissioner publicly urged Parliament to amend the legislation to clarify that the PMO and ministerial offices are subject to the Act, Parliament amended the Act several times, including recent amendments as part of the 2006 *Federal Accountability Act*, S.C. 2006, c. 9, and has not chosen to make this amendment. While Parliament's intention may not always be inferred from legislative silence, in this case, the silence is clear and constitutes relevant evidence of legislative intent: *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, at para. 42 (paras. 66-67).
- Sixth, the Latin maxim of statutory interpretation *expressio unius est exclusio alterius* ("to express one thing is to exclude another") supports the Government's view. If Parliament had intended to include the PMO and Ministers' offices in Schedule I, it would have referred to them expressly (para. 68).

- Seventh, the evidence at trial demonstrated that there have been many Ministers without a portfolio since Confederation. If the *Access to Information Act* was intended to apply to the offices of Ministers, the Act would not apply to a Minister without a portfolio because he or she [page326] would not have a corresponding "government institution" set out in Schedule I. Such a result is absurd (para. 69).
- Eighth, the internal structure of the Act also provides insight on this question. Sections 21(1)(*a*), (*b*), (2)(*b*) and 26 of the *Access to Information Act* demonstrate that Parliament distinguished between a "government institution" and "a minister of the Crown". When drafting legislation, Parliament is assumed to have used words precisely and carefully, and so Parliament intended the terms to have different meanings (paras. 70-73).
- Ninth, provisions of the *Library and Archives of Canada Act*, S.C. 2004, c. 11, also draw a distinction between governmental records and ministerial records. The principle of consistent expression in statutory interpretation means that Parliament distinguishes between a "ministerial record" and a "departmental record" (paras. 74-76).

28 At the conclusion of his analysis, Kelen J. held that the words in s. 4(1) of the *Access to Information Act* mean that the PMO and the relevant ministerial offices are *not* part of the "government institution" for which they are responsible. That is, the PMO cannot be interpreted as part of the PCO, the office of the Minister of National Defence is not part of the Department of National Defence, and the office of the Minister of Transport is not part of the Department of Transport.

29 The Commissioner presents very little argument on any of the above-noted points. As I understand her submissions, she has only two specific complaints about the approach adopted by Kelen J. and affirmed by the Federal Court of Appeal. First, she argues that the applications judge erred in his use of expert evidence as an interpretative aid. Second, and somewhat related to the first point, she argues that the Federal Court of Appeal erred in relying on a non-existing "constitutional convention" for distinguishing between ministerial offices and their respective government departments. I [page327] will therefore deal specifically with these two arguments.

4.1.1 The Use of Expert Evidence

30 After setting out the relevant principles of statutory interpretation, Kelen J. briefly considered the evidence tendered from "experts in government machinery" (para. 50). In particular, he examined the evidence of Mr. Nicholas d'Ombrain, Mr. Justice John Gomery, and a reference relied upon by Mr. d'Ombrain from the Honourable Robert Gordon Robertson, Clerk of the Privy Council and Secretary to the Cabinet from 1963 to 1975. Kelen J. summarized the gist of this evidence as follows, at paras. 50-51:

> While the two entities work closely together on some matters, the PMO is responsible for many matters unrelated to the PCO. The same is true with respect to the relationship between a minister's office and the department over which the minister presides.

> Accordingly, the evidence demonstrates that in the ordinary sense of the words in subsection 4(1) of the Act, the PMO and the relevant ministerial offices are not part of the "government institution" for which they are responsible.

31 The Commissioner submits that reliance upon such expert evidence to interpret the *Access to Information Act* constitutes an error of law. She maintains that it was entirely appropriate for her office to consider expert political science evidence at the investigatory stage. However, opinion evidence is inadmissible in the courtroom to prove the ordinary meaning of legislative terms, "as the interpretation and articulation of domestic law lies at the very heart of the judicial function" (A.F., at para. 110). She contends that this approach confirms that both courts below "viewed the central issue of the reach of a 'government institution' as a question of fact, to be determined primarily if not entirely on the basis of expert evidence" (para. 112). She argues further that the courts below "did not at any point seek to determine what was included within a 'government institution' as a matter of law"; rather, they simply accepted the "assertion that a ministerial office is separate from [page328] the department over which the Minister presides" (para. 112).

32 In response, the Government first observes that the Commissioner's position on this point is "particularly curious", as the expert evidence generated by the Commissioner's office and compiled for her investigation was used extensively to support her recommendations and then placed in the record before the Federal Court (R.F., at para. 103). In any event, the Government submits that expert evidence can be properly used as an interpretative aid in discerning the ordinary meaning of words by Parliament when such evidence is relevant and reliable: *Francis v. Baker*, [1999] 3 S.C.R. 250, at para. 35; and *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 47. Further, Kelen J.'s reasons demonstrate that the expert evidence played a limited role in his analysis. He did not rely on any expert opinion on the meaning of the words used by Parliament as contended, given that no such opinion was tendered by the witnesses. He considered this evidence, rather, to situate the interpretative exercise in its proper context, an approach which was then correctly upheld by the Federal Court of Appeal.

33 I agree with the Government. No objection was raised in respect of this evidence in first instance, not surprisingly in my view, as consideration of expert evidence in the context of these applications was entirely appropriate. It is also apparent from Kelen J.'s reasons that he merely relied upon the expert evidence tendered by both parties to better appreciate the day-to-day workings of the government and to situate his interpretation of the *Access to Information Act* within its proper context. Further, Kelen J.'s meticulous analysis of the law belies any contention that he "viewed the central issue of the reach of a 'government institution' as a question of fact" [page329] (A.F., at para. 112). His reasons demonstrate, rather, that he conducted a full analysis of the text, guided by well-established principles of statutory interpretation. I see no merit to the Commissioner's argument on the alleged misuse of expert evidence.

4.1.2 Alleged Reliance on a Non-Existing Constitutional Convention

34 Along the same lines, the Commissioner takes issue with Sharlow J.A.'s characterization of the distinction between ministerial offices and their respective government departments as a "well understood convention" (Decision 1, at para. 7; Decision 2, at para. 7). The Commissioner focuses a significant portion of her argument on the legal criteria for a constitutional convention and takes the position that none is met here. She therefore argues that this phrase demonstrates that the Federal

Court of Appeal "erroneously accorded constitutional weight to a disputed, ill-defined and inconsistently followed practice" (A.F., at para. 116).

35 The Government responds that the Commissioner used the term "convention" in her material in the courts below simply to describe an understanding of the roles and duties of Ministers and government institutions. The Government submits that, similarly, when Sharlow J.A. used the phrase "well understood convention", it is clear from the context that she was simply referring to the day-to-day workings or "conventions" of government.

36 Again, I agree with the Government on this point. I find no support at all in the record for the suggestion that Sharlow J.A. was actually referring to constitutional conventions in their legal sense.

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4.1.3 "Function-Based" Approach Advocated by the Information Commissioner

37 Except for the above-noted specific complaints about the use of expert evidence and the reliance on government "conventions", the Commissioner's arguments are grounded primarily in broad principles of constitutional law, political theory, democratic accountability, and ministerial responsibility. The Commissioner expounds on these principles in considerable detail and submits that "the right of access and apparatus created by [the *Access to Information Act* was] meant [by Parliament] to be integrated into these legal rules" and "to function as a supplementary mechanism to ensure accountability for the exercise of executive power" (A.F., at para. 102). She therefore urges the Court to adopt a "function-based analysis" so as to create a dividing line between a Minister's departmental functions on the one hand and non-departmental functions on the other. She explains in her factum that this "analysis is easily translated into the scheme" of the *Access to Information Act* in respect of the ministerial offices at issue in the following manner (A.F., at para. 150):

> ... a record is subject to [the *Access to Information Act*], regardless of its physical form or location, where it was created by or on behalf of a Minister to document or give effect to a Minister's exercise of departmental powers, duties or functions, or relies directly on departmental staff in order to exercise the Minister's departmental powers, duties or functions. By contrast, the record is not subject to [the *Access to Information Act*] if it is created by the Minister or exempt staff for political or non-departmental purposes. Similarly, if the Minister or exempt staff receive information from departmental staff, and then generate further records for political, non-departmental purposes, the additions are not subject to [the *Access to Information Act*].

38 The Commissioner further submits that a similar analysis could be adopted in relation to Ministers of State "[t]o the extent that a Minister of State exercises the powers, duties and functions of a department", and also "in relation to government institutions other than departments that fall within [page331] the portfolio responsibilities of a given Minister (or Minister of State)" (A.F., at paras. 152-53).

39 The Government submits that the "function-based" approach advocated by the Commissioner renders the list of institutions detailed in Schedule I essentially meaningless. Her approach is entirely focused on the nature and content of the record and, as such, conflates the issue of defining "government institution" with the issue of how one determines which entity has "control" of a specific record. Moreover, although the Commissioner recognizes that political and non-departmental matters would not be subject to release under the Act, the statute provides no exemption for such records. Her attempt to remedy this deficiency by conceptually building it into a function-based definition of "government institution" goes "well beyond any concept of statutory interpretation recognized by this or any other Court" (R.F., at para. 129).

40 I agree with the Government. None of the broad principles relied upon by the Commissioner is contentious in these appeals. In my respectful view, nor are they particularly helpful in answering the questions of statutory interpretation at issue. For example, the Commissioner relies heavily on the quasi-constitutional characterization of the *Access to Information Act*. (See *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, where the Court affirmed this status in respect of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), and the *Privacy Act* (paras. 23-25).) She argues that, as such, the purpose of the Act becomes of paramount importance in the interpretative exercise, and that the legislation should be interpreted broadly in order to best promote the principles of responsible government and democratic accountability. While I agree that the *Access to Information Act* may be considered quasi-constitutional in nature, thus highlighting its important purpose, this does not alter the general principles of statutory interpretation. The fundamental difficulty with the [page332] Commissioner's approach to the interpretation of the term "government institution" is that she avoids any direct reference to the legislative provision at issue. The Court cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted.

41 It is important to recall that Parliament's statement of purpose in s. 2 of the Act recognizes that exceptions to public accessibility are "necessary". For example, in s. 21, Parliament has recognized the need for confidential advice to be sought by and provided to a Minister and, consequently, records in a government institution offering such advice are exempt from disclosure at the discretion of the head of the institution. The advice provided to a Minister may come from a variety of sources and may pertain to a broad range of matters, including matters relating to the department over which the Minister presides. Some of these matters may have a political dimension and some may not. Similarly, the policy rationale for excluding the Minister's office altogether from the definition of "government institution" can be found in the need for a private space to allow for the full and frank discussion of issues. As the Government rightly submits: "It is the process of being able to deal with the distinct types of information, including information that involves political considerations, rather than the specific contents of the records" that Parliament sought to protect by not extending the right of access to the Minister's office (R.F., at para. 82). Of course, not all documents in a Minister's office are excluded from the scope of the Act. As we shall see, despite its physical location in a ministerial office, any document which is "under the control" of the related, or any other, government institution is subject to disclosure.

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42 The functional approach advocated by the Commissioner not only creates the problem identified by Kelen J. that some Ministers would be covered by the Act, whereas others would not. It also

ignores the practical difficulty of carving out a political class exemption when none is provided in the Act. If a Minister's office is a government institution, all records under its control would be subject to release under the Act, unless expressly exempted or excluded by the Act. The proposal of carving out "political" documents based on an analysis of their content is easier said than done. As the Government notes, "records in a Minister's office are not neatly arranged into clearly defined 'political', 'constituent' and 'departmental' piles. The intermingling of these issues and facts is what makes the Minister's office unique. The simplistic approach of 'carving out' political records is unrealistic" (R.F., at para. 88).

43 Of course, Parliament could have opted for a different access scheme. However, it did not. Kelen J.'s interpretative analysis contains no error. The meaning of "government institution" is clear. In my view, the courts below rightly concluded that no contextual consideration warrants the Court interpreting Parliament to have intended that the definition of "government institution" include ministerial offices. I would not give effect to this ground of appeal.

4.2 *Issue 2: Are the Records Requested, Despite Their Physical Location in the Respective Ministerial Offices, "Under the Control" of the Related Government Institution Within the Meaning of Section 4 of the Access to Information Act?*

44 In light of my conclusion regarding the first issue, the question then becomes whether the requested records held within the respective [page334] ministerial offices are nonetheless "under the control" of their related government institutions within the meaning of s. 4(1) of the Act. Kelen J. concluded that they were not, and the Federal Court of Appeal upheld his decision. The Commissioner appeals from this conclusion.

45 None of the Commissioner's arguments is directed at the findings of fact made by Kelen J. regarding the particular records requested. The success of the Commissioner's appeal on this point is dependent, rather, on whether the Court accepts her proposed test for determining what constitutes "control" for the purposes of access under the Act. As I will explain, the test for control proposed by the Commissioner is entirely focussed on the function or content of the record and, in substance, is essentially the same as the test she proposes for defining a "government institution". Consequently, much for the reasons stated above, the Commissioner's interpretation of the word "control" cannot be sustained as it finds no support in the wording of the Act.

46 First, I will review the control test adopted by the courts below.

47 The word "control" is an undefined term in the statute. Its meaning has been judicially considered in a number of cases, and Kelen J. turned to this jurisprudence for guidance. In particular, he reviewed the following cases: *Canada Post Corp. v. Canada (Minister of Public Works)*, [1993] 3 F.C. 320 (T.D.); *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110 (C.A.); *Privacy Commissioner (Can.) v. Canada Labour Relations Board* (2000), 257 N.R. 66 (F.C.A.); *Rubin v. Canada (Minister of Foreign Affairs and International Trade)*, 2001 FCT 440, 204 F.T.R. 313; *Canada (Attorney General) v. Information Commissioner (Can.)*, 2001 FCA 25, 268 N.R. 328; and *Canada Post Corp. v. Canada (Minister of Public Works)*, 2004 FCA 286, 328 N.R. 98. From this jurisprudence, Kelen J. gleaned [page335] a number of principles, which I will paraphrase as follows.

48 As "control" is not a defined term in the Act, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should

be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are "under the control of a government institution", courts have considered "ultimate" control as well as "immediate" control, "partial" as well as "full" control, "transient" as well as "lasting" control, and "*de jure*" as well as "*de facto*" control. While "control" is to be given its broadest possible meaning, it cannot be stretched beyond reason. Courts can determine the meaning of a word such as "control" with the aid of dictionaries. The *Canadian Oxford Dictionary* defines "control" as "the power of directing, command (under the control of)" (2001, at p. 307). In this case, "control" means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document, even if it is only on a "partial" basis, a "transient" basis, or a "*de facto*" basis. The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the Act (paras. 91-95).

49 In applying these principles to the records at issue, Kelen J. articulated the following test, at para. 93:

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> Upon review by the Court, if the content of a document in the PMO or the offices of the Ministers of National Defence and Transport relates to a departmental matter, and the circumstances in which the document came into being show that the deputy minister or other senior officials in the department could request and obtain a copy of that document to deal with the subject-matter, then that document is under the control of the government institution. [Emphasis deleted.]

50 The Federal Court of Appeal agreed with this test, holding that, in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request? (Decision 1, at paras. 8-9).

51 As I understand her arguments, the Commissioner does not take issue with any of the principles Kelen J. gleaned from his review of the relevant jurisprudence. Indeed, she substantially adopts these principles in her factum at para. 168 and rightly so. Those principles should inform the analysis. Her complaint lies, rather, with how these principles were distilled into the two-step inquiry described above. She submits that the courts below have erred in law by essentially reducing the legal inquiry concerning "control" to two seemingly simple factual questions - whether the record relates to a departmental matter and whether senior members of the departmental staff could request and obtain a copy of the record. She submits that these factual indicia can be too easily manipulated by government actors to avoid releasing documents that validly fall within the scope of the Act. In particular, she submits that the "mechanism of a hypothetical 'request'" under step two of the test is weak and unacceptable as it "inappropriately relies on past practices and prevalent expectations, rather than the legal relationships at issue" (A.F., at para. 169). Put more colloquially, she argues that if this Court adopts the control test articulated in the courts below, the Minister's office may effectively

[page337] become a "black hole" used to shield certain sensitive documents that properly fall within the ambit of the *Access to Information Act* (A.F., at para. 162).

52 I agree with the Commissioner that it would be an error to interpret the words "under the control" in a manner that allowed government actors to turn the Minister's office into a "black hole" to shelter sensitive records that should otherwise be produced to the requester in accordance with the law. However, as I will explain, I am not persuaded that the courts below erred as she contends. In essence, the Commissioner's complaint on this ground of appeal is based on the same criticism of the institutional distinction between the Minister and the department over which he or she presides argued under the first ground. This is readily apparent from the alternative test that she proposes. In order to counter the "black hole" problem, the Commissioner urges the Court to hold that a record in a Minister's office is under the control of the corresponding government institution when the following two conditions are met:

> (a) the record was obtained or generated by the Minister or on his or her behalf; and
>
> (b) the record documents or gives effect to the Minister's exercise of departmental powers, duties or functions, or relies directly on departmental staff in order to exercise the Minister's departmental powers, duties or functions. [A.F., at para. 172]

53 As the Government rightly responds, the test for control proposed by the Commissioner effectively eliminates the need to consider the definition of "government institution". As the Government puts it in its factum: "If the function [page338] or content of the record determines control, then it does not matter if the record is in a government institution or a Minister's Office, as they are the same entity for the purposes of determining 'control'" (R.F., at para. 179). I agree. A decision on the issue of control based almost exclusively on the content of the record would have the effect of extending the reach of the Act into the Minister's office where, as discussed earlier, Parliament has chosen not to go.

54 Further, the Commissioner's argument on the deficiency of the control test crafted by the courts below presupposes that the two-part distillation of the test, particularly as articulated by the Federal Court of Appeal, is not intended to fully capture the principles upon which the test was crafted. I do not read the judgments below as having that effect. As Kelen J. made clear, the notion of control must be given a broad and liberal meaning in order to create a meaningful right of access to government information. While physical control over a document will obviously play a leading role in any case, it is not determinative of the issue of control. Thus, if the record requested is located in a Minister's office, this does not end the inquiry. The Minister's office does not become a "black hole" as contended. Rather, this is the point at which the two-step inquiry commences. Where the documents requested are not in the physical possession of the government institution, the inquiry proceeds as follows.

55 Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that [page339] the *Access to Information Act* is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.

56 Under step two, *all* relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include

the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the *Access to Information Act* (A.F., at para. 169). The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably *should* be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.

57 My colleague LeBel J. agrees with this control test, but takes exception to the creation of "an implied presumption that the public does not have a right of access to records in a Minister's office" (para. 76). With respect, his concern is founded on a misinterpretation of these reasons. There is no presumption of inaccessibility. As LeBel J. rightly notes, at para. 91:

> The fact that Ministers' offices are separate and different from government institutions does not mean that a government institution cannot control a record [page340] that is not in its premises. If a government institution controls a record in a Minister's office, the record falls within the scope of the Act. If it falls within the scope of the Act, the head must facilitate access to it on the basis of the procedure and the limits specified in the Act.

58 I agree. Conversely, if a document is under the control of the Minister's office and *not* under the control of the related, or any other, government institution, it does not fall within the purview of the *Access to Information Act*. If one views this result as creating a factual "presumption of inaccessibility", or alternatively an implied exemption for political records, in my respectful view, it is a consequence that inevitably flows from the fact that Ministers' offices are not government institutions within the meaning of the Act, a conclusion with which LeBel J. agrees.

59 Thus, the test articulated by the courts below, properly applied, does not lead to the wholesale hiding of records in ministerial offices. Rather, it is crafted to answer the concern. In addition, as the Government rightly notes, Parliament has included strong investigatory provisions that guard against intentional acts to hinder or obstruct an individual's right to access. My colleague reviews some of these investigatory powers. It is true, as he points out, that the statutory power to enter any "government institution" would not allow the Commissioner to enter a Minister's office. However, again here, it seems to me that this result inevitably flows from the limited scope of the term "government institution" and must be taken to have been intended by Parliament. I disagree with my colleague that this limitation on the Commissioner's powers effectively leaves the Minister as head of the government institution with the final say as to whether a given document is under the control of a government institution (para. 109). The Commissioner has significant powers of investigation that include the authority to "summon and enforce the appearance of persons", including Ministers, "and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems [page341] requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record": s. 36(1)(*a*). Further, as an additional safeguard, any refusal to disclose requested records is subject to independent review by the courts on a standard of correctness.

60 In the result, I agree with the Federal Court of Appeal that the two questions posed by Kelen J. were adequate to determine whether the records requested in the three applications at issue were

under the control of a government institution. It is also clear from his detailed analysis that he considered all relevant factors on an objective basis, as discussed above. Applying this test to the material before him, he concluded that none of the requested records was in the control of a government institution. In brief, he disposed of the first three applications on the following bases.

61 First, the Prime Minister's agendas were not under the control of the PCO. The agendas were created by the Prime Minister's exempt staff and were always in possession of the Prime Minister or his exempt staff. No "government institution" had physical possession of the records or the right to obtain them.

62 Second, the Minister of Transport's unabridged and abridged agendas were not under the control of a government institution. The unabridged agendas were always in the possession of the Minister's office and were not provided to the Deputy Minister or anyone else in the government institution. The abridged agendas were in the possession of the government institution for a limited time, but were not kept after the relevant date and there was no expectation that the Minister's office would provide the agendas for a second time.

63 Third, the notebooks held in the Minister of National Defence's office were not under the control of the Department of National Defence. They were [page342] created and maintained by exempt staff for their personal use and would not have been produced to government officials. While the Minister relied upon his exempt staff for taking notes of meetings, he himself never looked at the notes. The emails also were not under the control of the Department of National Defence. They did not contain substantive information about departmental matters.

64 As stated earlier, the Commissioner presents virtually no argument in respect of the findings of fact made by Kelen J. I agree with the Federal Court of Appeal that the conclusions reached by Kelen J. on the issue of control were open to him on the record and entitled to deference.

65 I would not give effect to the second ground of appeal on the issue of control. Consequently, I would dismiss the Commissioner's appeals on the first three applications with costs.

66 On the fourth application, it is agreed that the Prime Minister's agendas in the possession of the RCMP and the PCO were under the control of a "government institution" for the purposes of the *Access to Information Act*. Therefore, this brings us to the final issue.

4.3 *Issue 3: Are the Prime Minister's Agendas at Issue Exempt or Excluded From Disclosure Pursuant to Section 19 of the Access to Information Act and Section 3(j) of the Privacy Act?*

67 The definition of "government institution" is the same under both the *Access to Information Act* and the *Privacy Act*. The RCMP and the PCO are specifically listed in Schedule I and, [page343] as such, are government institutions. Records under their control must be disclosed, subject to certain statutory exemptions. Section 19(1) of the *Access to Information Act* prohibits the head of a government institution from releasing any record that contains "personal information as defined in section 3 of the *Privacy Act*". However, s. 3(*j*) creates an exception by allowing for the disclosure of personal information where such information pertains to "an individual who is or was an officer or employee of a government institution" and where the information in question "relates to the position or functions of the individual". In short, the s. 3(*j*) exception will apply, and those parts of the Prime

Minister's agenda that relate to his job must be disclosed, if the Prime Minister is an "officer ... of a government institution".

68 Under both statutes, the "head" of a government institution includes "in the case of a department or ministry of state, the member of the Queen's Privy Council for Canada". The Prime Minister is the head of the PCO under this definition. The term "officer", however, is not defined. The question is whether the Prime Minister as "head" of a government institution is also an "officer" of that institution.

69 Kelen J. held that he was. In reaching this conclusion, he relied upon the definition of "public officer" found in the *Financial Administration Act*, R.S.C. 1985, c. F-11, s. 2, which includes "a minister of the Crown and any person employed in the federal public administration". He also relied on the definition of "public officer" in the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 2, which includes "any person in the federal public administration who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or on whom a duty is imposed by or under an enactment" (para. 107).

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70 The Federal Court of Appeal reversed this finding, holding that Kelen J. "erred in law in importing into the *Privacy Act* the definitions of 'public officer' from statutes dealing with different subjects that use that term in different contexts" (Decision 2, at para. 5). In its view, "[t]he same understanding about the special governmental role of the Prime Minister" discussed in the first three applications "would have formed part of the foundation for the drafting of the *Privacy Act*" (para. 8). The Federal Court of Appeal concluded that it would be inconsistent with Parliament's intention to interpret the *Privacy Act* in a way that would include the Prime Minister as an officer of a government institution.

71 I agree with the Federal Court of Appeal that Kelen J. erred in relying on the definition of "public officer" in two other statutes. It is clear that the definition of "public officer" found in the *Financial Administration Act* is a broad definition which deals with an unrelated subject and operates in a different context. The definition contained in the *Interpretation Act* could arguably be relevant, as s. 3(1) states: "Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act". However, I find no support for incorporating the definition of "public officer" in this context. First, while there may be overlap between the two terms, the term "public officer" used in the *Interpretation Act* is simply not the same as the term "officer ... of a government institution" used in the *Privacy Act*. Second, the definition "public officer" is contained in the list of definitions under s. 2 of the *Interpretation Act*, which is expressly stated to apply "[i]n this Act". The definition is not repeated in the definitions contained in s. 35, which conversely, apply "[i]n every enactment". Finally, the *Interpretation Act* itself differentiates between a "public officer" and a "minister of the Crown" (see, e.g., s. 24). In my view, the Federal Court of Appeal rightly concluded that the meaning of "officer of a [page345] government institution" must be ascertained in its proper context.

72 In effect, the Commissioner's position on this issue follows the same rationale underlying her arguments on the other grounds of appeal. She argues in favour of a function-based approach in order to interpret the term "officer", according to which a Minister would be considered an officer of a government institution when exercising powers in relation to the institution, and not an officer of a

government institution when exercising powers unrelated to the institution. The problem with this approach, however, is that there is nothing in either statute suggesting that a person might be an officer for some purposes and not for others.

73 Nor is there any support in either statute for finding that a Minister is intended to be an "officer" of the government institution simply because he is the "head" of that institution. In fact, s. 73 of the *Access to Information Act* suggests the opposite, given that it provides that the "head" of the government institution may delegate powers and duties under the Act to one or more "officers or employees" of the government institution. A distinction is therefore drawn between "head" and "officer" in that provision. Further, as noted earlier in discussing the definition of "government institution", s. 21 of the *Access to Information Act* also makes a distinction between "officer", "employee", and "minister".

74 Finally, as this Court explained in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (*per* La Forest J. in dissent but not on this point), and reiterated in *RCMP*, the *Access to Information [page346] Act* and the *Privacy Act* are to be read together as a seamless code. The interpretation of Kelen J. and the Commissioner would create discordance between the two statutes. Under the *Access to Information Act*, a Minister or Prime Minister would not be part of a government institution, while under the *Privacy Act*, he would be considered an "officer" of the government institution. I agree with the Federal Court of Appeal. Had Parliament intended the Prime Minister to be treated as an "officer" of the PCO pursuant to the *Privacy Act*, it would have said so expressly. Applying s. 3(*j*) of the *Privacy Act* to the relevant portions of the Prime Minister's agenda under the control of the RCMP and the PCO, I conclude that they fall outside the scope of the access to information regime.

75 I would therefore dismiss the Commissioner's appeal on the fourth application with costs.

The following are the reasons delivered by

LeBEL J.:--

1. Overview

76 I agree with Charron J.'s conclusions and with much of what she says in her reasons, including her findings on the applicable standard of review and on the use of expert evidence, and the control test she proposes. I also agree with my colleague's view that a Minister's office is not a "government institution" for the purposes of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("the Act"). Nonetheless, in my opinion, this conclusion cannot be the basis for an implied exception for political records. The legal relationship between a Minister's office and the government institution for which the Minister is responsible may have some bearing on whether or not the institution in question controls a [page347] requested record. However, that relationship does not give rise to an implied presumption that the public does not have a right of access to records in a Minister's office.

77 As my colleague points out, at para. 41, s. 2 of the *Access to Information Act* indicates that exceptions to the public's right of access must be "necessary". Moreover, such exceptions must be "limited and specific" according to the Act. If the Act does not specifically exempt political records, the right of access is presumed to apply to them. For the reasons that follow, I disagree with my colleague and with the Government that this presumption, which follows from a plain reading of the Act, "would dramatically expand the access to information regime in Canada" (see para. 13).

2.

Purpose of the *Access to Information Act*: To Strike a Balance Between Democracy and Efficient Governance

78 As my colleague points out in para. 15, this Court recently stated that access to government information "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance" (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, *per* McLachlin C.J. and Abella J., at para. 1).

79 Access to information legislation embodies values that are fundamental to our democracy. In *Criminal Lawyers' Association*, this Court recognized that where access to government information is essential, it is protected by the right to freedom of expression under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* as a derivative right. Statutes that protect *Charter* rights [page348] have often been found to have quasi-constitutional status (see, e.g., *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at paras. 21-23, but also *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, and *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345). One such statute is the *Privacy Act*, R.S.C. 1985, c. P-21, which, as has often been stated, must be read together with the *Access to Information Act* as a "seamless code" (see *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66, at para. 22, and *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441, at para. 2).

80 Moreover, this Court's position is consistent with the view that access to information legislation creates and safeguards certain values - transparency, accountability and governance - that are essential to making democracy workable (see M. W. Drapeau and M.-A. Racicot, *Federal Access to Information and Privacy Legislation Annotated 2011* (2010); at p. v). Before the advent of modern government, the mechanisms that embodied these values were subsumed in the doctrine of ministerial responsibility, according to which Ministers were accountable to Parliament for their actions. The sovereign Parliament, and only Parliament, was responsible for holding governments to account (J. F. McEldowney, "Accountability and Governance: Managing Change and Transparency in Democratic Government" (2008), 1 *J.P.P.L.* 203, at pp. 203-4).

81 As McEldowney observes, the growing complexity of modern government has entailed unprecedented delegation of parliamentary powers to the executive branch of government. In this context, "[t]he complexity and variety of bodies involved in decision-making has contributed to a gap in our system of accountability" (p. 209). In Canada, access to information legislation was enacted to respond to and deal with the rising [page349] power of administrative agencies (see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 60-61; see also G. J. Levine, *The Law of Government Ethics: Federal, Ontario and British Columbia* (2007), at pp. 109-10).

82 This being said, in access to information matters, the Court has consistently sought to ensure a degree of government accountability to Canadian citizens, while at the same time accepting that rights of access and the values they safeguard must be balanced against the interests of efficient governance (see *Criminal Lawyers' Association*, at para. 1, and *Dagg*, at paras. 45-57). This balance has been struck in access to information legislation by means of a presumption of a right of access - as opposed to a presumption that access should be refused - to all records, subject to exceptions that are specified in the legislation.

83 In *Criminal Lawyers' Association*, this Court reaffirmed that the right of access to government documents is not absolute (para. 35; see also *Rubin v. Canada (Clerk of the Privy Council)*, [1996] 1 S.C.R. 6). There is no constitutional right of access. The right is created by statute and is subject to specific exceptions provided for in the statute. Though the right must be interpreted liberally, exceptions to it must be interpreted narrowly, as is suggested by s. 2 of the Act, which requires that exceptions be not only "specific", but "limited". Accordingly, it is imperative that exemptions be limited to those provided for in ss. 13 to 26; qualifying words should not be read into the Act (see *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110 (C.A.)).

3. To Protect "Full and Frank Discussion" in a Minister's Office Without Excluding Ministers' Offices From the Scope of the Act

84 "[P]olitical records" are not explicitly exempt from disclosure under the *Access to Information Act*. They are records that pertain to [page350] a Minister's activities as a member of a political party, as opposed to his or her duties as a member of Cabinet who is accountable to Parliament for the administration of a government department. In line with the interpretative approach adopted by this Court in *Criminal Lawyers' Association*, we must conclude that the right of access can be presumed to apply to political records but that it is subject to any of the statutory exceptions that apply. These exceptions reflect the complexity of the various functions of Ministers of the Crown in a modern parliamentary democracy.

85 I agree completely with my colleague that this interpretative approach must be reconciled with "the need for a private space to allow for the full and frank discussion of issues" (para. 41). I also agree with her that in s. 21 of the Act, Parliament has recognized "the need for confidential advice to be sought by and provided to a Minister and [that], consequently, records in a government institution offering such advice are exempt from disclosure at the discretion of the head of the institution" (para. 41). I would contend, however, that the structure of the Act and the inclusion of s. 21 already address this concern explicitly.

86 As a result, I disagree with the assertion that the need for a full and frank discussion justifies excluding Ministers' offices from the scope of the Act. To read such a broad exemption into the Act is not "necessary" within the meaning of s. 2, because the concern is already addressed explicitly. In my view, to read this exclusion into the Act is to deviate from the approach adopted by the Court in *Criminal Lawyers' Association*, as outlined above.

87 The conclusion that a Minister's office is not a government institution flows from the modern approach to statutory interpretation, which my colleague describes as a "general roadmap", at para. 27. But I feel it necessary to distance myself from the findings of Kelen J., which my colleague draws [page351] on as "useful guideposts" for her interpretation (para. 27).

88 More specifically, I take issue with Kelen J.'s interpretation of Parliament's silence regarding political records (2008 FC 766, [2009] 2 F.C.R. 86, at paras. 57-60). On the basis of that silence, Kelen J. reasoned that an interpretation of the term "government institution" that included Ministers' offices would dramatically extend the right of access. I cannot agree with this view.

89 As I mentioned above, this Court's approach has been that access to information legislation creates a general right of access to which there are necessary exceptions that must be limited and specific. If the legislature is silent with respect to a given class of documents, such as political records, courts must assume, *prima facie* at least, that the documents in question are not exempt. Whether access can indeed be obtained as requested is a different matter for which it is necessary to

design an appropriate control test. Therefore, it cannot be inferred from the legislature's silence that political records were not intended to be disclosed at all. Politics and administration are sometimes intertwined in our democratic system. As a result, the contents of ministerial records may straddle the two worlds of politics and pure administration, if it is even possible to draw so sharp a distinction between the different roles of Ministers in Canada's political system. On this basis, the much bolder inference that Ministers' offices are presumptively excluded from the purview of the *Access to Information Act* is also incorrect.

90 Kelen J. also concluded that all ministerial records are presumptively excluded on the basis that the *Library and Archives of Canada Act*, S.C. 2004, c. 11, differentiates "government records" from "ministerial records". Government records and ministerial records are indeed different. In s. 2 of the *Library and Archives of Canada Act*, a "government record" is defined as "a record that is [page352] under the control of a government institution". On the other hand, a "ministerial record" is a record

> of a member of the Queen's Privy Council for Canada who holds the office of a minister and that pertains to that office, other than a record that is of a personal or political nature or that is a government record.

91 With respect, the fact that these two kinds of records are treated differently in the *Library and Archives of Canada Act* does not mean that ministerial records are presumptively outside the scope of the *Access to Information Act*. My position on the legal relationship between a Minister's office and the government institution for which the Minister is responsible flows from a plain reading of the Act. As my colleague mentions, Ministers' offices are not listed in Schedule I of the Act, and I accordingly agree with her that they should not be considered "government institutions" for the purposes of the Act. This being said, it does not follow that Ministers' offices are presumptively excluded from the scope of the Act. The fact that Ministers' offices are separate and different from government institutions does not mean that a government institution cannot control a record that is not in its premises. If a government institution controls a record in a Minister's office, the record falls within the scope of the Act. If it falls within the scope of the Act, the head must facilitate access to it on the basis of the procedure and the limits specified in the Act.

92 The *Access to Information Act* applies to records. Ministers' offices remain within the scope of the Act inasmuch as they possess "record[s] under the control of a government institution" (s. 4). The right of access is presumed to apply to such records unless they fall under a specific exemption.

93 In my view, the presumption that the Act applies to Ministers' offices does not expand the right of access at all. Any requested record that is [page353] located in a Minister's office is subject to the two-part control test proposed by my colleague.

94 For this purpose, the "head" of the government institution must determine, first, whether the requested record relates to a departmental matter. In other words, does the record contain government information? This first stage of the test, "a useful screening device" (para. 55), will exclude all documents, such as political records (e.g. plans for a party fundraiser), that do not relate to a departmental matter.

95 Second, the head of the government institution must determine whether the institution could reasonably expect to obtain a copy of the record upon request. As my colleague proposes, this stage of the test requires an objective analysis to determine whether that expectation is reasonable in which all relevant factors, including the content of the record, the circumstances in which it was created and the legal relationship between the government institution and the record holder, are taken into account

(para. 56). If the record holder is the Minister, the fact that his or her office is not part of the government institution he or she oversees may weigh in the balance; it does not, however, create a presumption of an exception to the right of access.

4. Question of "Hybrid" Records

96 The *Access to Information Act* is of course not applied in a vacuum. The reality that Ministers wear many hats must be taken into account in doing so. Thus, a Minister is a member of Cabinet who is accountable to Parliament for the administration of a government department, but is usually also a Member of Parliament in addition to being a member of a political party for which he or she performs various functions and, finally, a private person. Records connected with these different functions may blend into each other in the course of regular business.

[page354]

97 As I mentioned above, the right of access is presumed to apply to "political records", but such records are unlikely to be under the control of a government institution if they do not relate to a departmental matter. At the other end of the spectrum are records that relate to departmental matters and are under the control of a government institution. I will refer to the latter as "government records" for the purposes of this discussion. If requested, government records should be disclosed under the *Access to Information Act*.

98 It is conceivable, however, that many records will not fall neatly into one category or another. For example, departmental matters are sometimes decided on the basis of political priorities. Documents in which departmental targets are assessed in light of political aims would fall into a grey area. I will refer to such documents as "hybrid records".

99 The *Access to Information Act* provides for the existence of this grey area, at least to some extent. Thus, s. 25 provides for the severance of part of a record. Where a Minister is authorized to refuse to disclose a record, the Minister can redact the exempted portions of the document, but must disclose the portions that are not exempted.

100 In addition, s. 21(1) provides that, subject to specific exceptions in s. 21(2), a Minister has a very broad authorization to refuse to disclose a requested record that contains any of the following:

> **21.** (1) ...
>
> (*a*) advice or recommendations developed by or for a government institution or a minister of the Crown,
>
> (*b*) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,
>
> (*c*) positions or plans developed for the purpose of negotiations carried on or to be carried on by [page355] or on behalf of the Government of Canada and considerations relating thereto, or

190

(*d*) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation,

if the record came into existence less than twenty years prior to the request.

Section 21(2) reads as follows:

21... .

(2) Subsection (1) does not apply in respect of a record that contains

(*a*) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or

(*b*) a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown at the time the report was prepared.

101 Section 21 covers many of the circumstances in which certain kinds of hybrid records that contain information relating to departmental matters are produced (see s. 21(1)(*a*)). Section 21(1) is specifically designed to cover material produced in the course of *full and frank discussions*, such as deliberations in which directors, officers or employees of a government institution participate together with a Minister or a Minister's staff (see s. 21(1)(*b*)).

5. Investigatory Powers of the Commissioner

102 Though the head of a government institution has a broad discretion to either disclose or retain hybrid records, the Information Commissioner is given equally broad investigatory powers in s. 36 of the *Access to Information Act*. These powers can act as a check on the Minister's discretion. As I mentioned above, Parliament has sought to strike a balance between access rights and efficient governance. On the one hand, through s. 21 and the [page356] general structure of the Act, Parliament has created a space in which Ministers may review and debate issues in private. On the other hand, through s. 36 and the general structure of the Act, Parliament has ensured that this private space is not abused.

103 The Commissioner has the same power to summon witnesses and compel them to give evidence as a superior court of record (s. 36(1)(*a*)), and also has the power to administer oaths (s. 36 (1)(*b*)), and to receive and accept such evidence as the Commissioner sees fit (s. 36(1)(*c*)). The Commissioner may also enter any premises of a government institution for the purposes of an investigation, as well as converse with persons and examine documents in those premises (s. 36(1) (*d*)). However, since a Minister's office is not a government institution for the purposes of the Act, the Commissioner does not have the power to enter one.

104 Importantly, pursuant to s. 36(2), the Commissioner has the power to examine "any record to which this Act applies that is under the control of a government institution". In light of the above reasoning, records located in a Minister's office can fall within the ambit of this provision. Section 36 (2) is crucial to the balance Parliament intended to strike. Indeed, it is the first mechanism, prior to

judicial review, for applying the principle that "decisions on the disclosure of government information should be reviewed independently of government" (s. 2).

105 Under s. 21, the head of a government institution is responsible for determining whether requested hybrid documents located in a Minister's office should be disclosed. The first step in the assessment is to consider whether the records fall within the scope of the Act: for this purpose, the head must perform the control test we propose. If the requested documents are found to fall within the scope of the Act, the head must then perform the second step of the assessment process: to determine [page357] whether the requested records fall under any of the exemptions provided for in the Act, including in s. 21. Depending on which exemption applies, the head may or may not have the discretion to disclose the document.

106 The purpose of the Commissioner's investigatory powers is to determine whether the head of a government institution has complied with the Act in performing his or her duties. This includes an inquiry into whether the head has conducted the correct analysis at both stages.

107 If a head claims to have refused access on the basis that the requested document was not under the control of a government institution, then the Commissioner may exercise only his or her powers under s. 36(1)(*a*) to (*c*). If the evidence garnered under those subsections leads the Commissioner to believe that the documents are likely under the control of a government institution, he or she may examine them to ascertain whether the control test was applied properly.

108 If the Commissioner is entitled to inquire into whether the head applied the control test properly, the Commissioner may require access to some documents that are ultimately outside the scope of the Act. This does not broaden the public's right of access. Section 35(1) of the Act provides that "[e]very investigation of a complaint ... by the Information Commissioner shall be conducted in private." Further, in the course of an investigation, parties affected by the investigation have a right to make representations (s. 35(2)). Following an investigation, the Commissioner cannot compel the head of a government institution to disclose the documents in question; rather, the Commissioner may only make recommendations to the head (s. 37). Finally, anyone who has been refused access to such records after an investigation is entitled to apply for judicial review of the decision (s. 41).

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109 With respect, I am of the view that a presumption that a Minister's records are beyond the scope of the Act would upset the balance between the head's discretionary powers and the Commissioner's powers of investigation. My colleague's analysis involves a presumption that the Commissioner would have no power whatsoever to examine records located in a Minister's office. The Commissioner's power would be limited to summoning witnesses and compelling them to give evidence concerning such records. Even if that evidence led the Commissioner to suspect that the control test had not been applied properly, the Commissioner would not be able to examine the documents to confirm his or her suspicions. Such an interpretation of the Act would effectively leave the head of a government institution with the final say as to whether a given document was under the institution's control and would run counter to the purpose of the Act as outlined in s. 2, according to which decisions on the disclosure of government information must be reviewed independently. In my opinion, the presumption of an exception to the right of access that my colleague proposes would significantly weaken the Commissioner's powers of investigation, which are crucial to the intended balance between access to information and good governance.

6. Application to the Records at Issue

110 I agree with my colleague that, in the circumstances in which the records at issue in the first three applications were created and managed, a government institution would not have a reasonable expectation of obtaining them and that these documents were therefore not under the control of a government institution.

111 As for the records in the possession of the Privy Council Office and the Royal Canadian Mounted Police, I agree with my colleague that, even though they were under the control of a government institution, they were subject to s. 19 of the *Access to Information Act* and the heads of [page359] those institutions accordingly had an obligation to refuse to disclose them.

112 For these reasons, I would dismiss the appeals.

Appeals dismissed with costs.

Solicitors:

Solicitor for the appellant: Information Commissioner of Canada, Ottawa.

Solicitor for the respondents: Attorney General of Canada, Ottawa.

Solicitors for the interveners: Blake, Cassels & Graydon, Toronto.

Tab 3

Indexed as:

Canadian Tire Corp. v. P.S. Partsource Inc.

Between
Canadian Tire Corporation, Limited, appellant, and
P.S. Partsource Inc., respondent

[2001] F.C.J. No. 181

[2001] A.C.F. no 181

2001 FCA 8

2001 CAF 8

200 F.T.R. 94

267 N.R. 135

11 C.P.R. (4th) 386

103 A.C.W.S. (3d) 474

Docket A-434-00

Federal Court of Appeal
Toronto, Ontario

Richard C.J. and Rothstein and Malone JJ.A.

Heard: February 1, 2001.
Judgment: February 8, 2001.

(19 paras.)

Trademarks, names and designs -- Trademarks -- Practice -- Evidence, affidavits -- Content of.

This was an appeal by Canadian Tire Corp. from an order of a Motions Judge which dismissed Canadian Tire's appeal from an order of a Prothonotary. Canadian Tire brought a motion to strike

out a paragraph in an affidavit filed on behalf of P.S. Partsource Inc., in a trade-marks action, on the ground that it was not based on the personal knowledge of the deponent. In the paragraph in question, the deponent swore that Partsource had received 60 to 70 phone calls from its customers concerning the subject of the litigation. There was nothing in the affidavit to suggest that the deponent himself received all of these phone calls. Canadian Tire argued that the paragraph was hearsay and ought to have been struck. The Motions Judge concluded that the issue of the admissibility of evidence was better left to the trial judge to determine.

HELD: Appeal allowed. The paragraph in question was struck from the affidavit. Rule 81 of the Federal Court Rules required that affidavits be confined to facts within the personal knowledge of the deponent. The Rule admitted of no exceptions to that requirement. The facts stated in the paragraph at issue were not those with which the deponent had first hand knowledge, therefore, the statements were hearsay. In order to allow the admission of hearsay evidence, Partsource would have to have brought a motion under Rule 55 to have the matter resolved in advance of trial, but it did not do so. The paragraph in question went to a controversial issue and would have resulted in prejudice to Canadian Tire if not struck.

Statutes, Regulations and Rules Cited:

Federal Court Act, s. 46(1)(a).

Federal Court Rules, 1998, Rules 55, 81(1).

Trade-marks Act, ss. 57, 59(3).

Counsel:

John S. McKeown, for the appellant.
Christine Pallotta, for the respondent.

The judgment of the Court was delivered by

MALONE J.A.:--

FACTS

1 This is an appeal from an order of a Motions Judge of the Trial Division which dismissed an appeal from an order of a Prothonotary. The Prothonotary had dismissed a motion made by the

Appellant, Canadian Tire Corporation Limited ("CTC"), to strike out a paragraph in an affidavit filed on behalf of the respondent, P.S. Partsource Inc. ("Partsource"), on the ground that it was not based on personal knowledge.

2 The affidavit was filed in proceedings commenced by Partsource under section 57 of the Trade-marks Act to expunge certain of CTC's trade marks. Under subsection 59(3) of the Trade-marks Act, unless the Court otherwise directs, the matter is to proceed on the basis of evidence adduced by affidavit. Such proceedings are final, as opposed to interlocutory, as the eventual Court order will determine the substantive rights of the parties.

3 Paragraph 9 of the affidavit of Philip Bish, sworn April 11, 2000, provides as follows:

> Within a few weeks of the respondent's announcement in the fall of 1999, the applicant received at least 60 to 70 inquiries about it from its customers. These were customers who expressed a belief, contrary to the fact, that the new business announced by Canadian Tire Corporation was part of the applicant's business, or was affiliated with the applicant. For example, some customers asked what parts they would now be able to get from the new stores. Some said they saw the announcement and looked up Partsource in the phone book and called us for information on what parts they could get.

4 By notice of motion, CTC sought an order striking out paragraph 9 of the Bish affidavit on the basis that it was not based on personal knowledge as required by rule 81(1) of the Federal Court Rules, 1998. Rule 81(1) provides:

> 81. (1) Affidavits shall be confined to facts within the personal knowledge of the deponent, except on motions in which statements as to the deponent's belief, with the grounds therefor, may be included.
>
> * * *
>
> 81. (1) Les affidavits se limitent aux faits don't le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête, auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

5 In dismissing CTC's motion, the Prothonotary gave no reasons. The Motions Judge dismissed the appeal from the decision of the Prothonotary for the following reasons:

> "(a) First, this paragraph is not said to be made on information and belief and the statements which it contains may or may not be hearsay. It depends upon the purpose for which they are introduced. If they are introduced simply to prove that the statements were made, no hearsay is involved.

(b) Second, to rule on admissibility now deprives the trial judge to consider [sic] paragraph 9 in its entire context, whether the new principled approach on hearsay evidence has application with the appropriate weight to be give to such evidence. Justice Gibson adopted this view, to which I subscribe, in Eli Lilly and Co. v. Apotex Inc. (1997), 75 C.P.R. (3d) 312.

(c) Third, it is an established principle that as a Court will not usually make an a priori ruling on admissibility; it takes an obvious case which is not the situation here."

ANALYSIS

6 Rule 81 of the Federal Court Rules, 1998 requires that, except on motions, affidavits be confined to facts within the personal knowledge of the deponent. This rule reflects the general rule of evidence relating to hearsay. The requirement for personal knowledge by the deponent means that the deponent has his own knowledge of the facts asserted and has not obtained that knowledge from others. It also means that he cannot recount out-of-court statements made by others.

7 Paragraph 9 says that "the applicant received at least 60 to 70 inquiries ...". The applicant is Partsource Corporation, Limited. Mr. Bish does not say he took the calls himself, although he refers to himself in the first person in other parts of his affidavit. On its face, the facts in paragraph 9 are not stated to be facts of which Mr. Bish has firsthand knowledge.

8 Counsel for Partsource argued that it may have been Mr. Bish who took the calls. If so, why didn't he say so? At best, for Partsource, the question of who took the calls is unclear. Partsource cannot take advantage of an ambiguity of its own making. As it is framed in paragraph 9, Mr. Bish's statement is hearsay being offered in a proceeding that is final in nature and contrary to rule 81.

9 The first reason of the Motions Judge to dismiss the motion brought by CTC is that paragraph may have been offered only to establish that telephone calls were made. Accordingly, even if paragraph 9 was limited to an attempt to establish that statement were made, as opposed to proving the truth of the statements, it would still be hearsay in these circumstances, where it is not clearly established that the deponent personally received the telephone calls..

10 However, the information in paragraph 9 was not offered only to prove that statements were made. The paragraph recounts, in summary form, what the callers said. This is obviously an attempt to demonstrate actual confusion on the part of the callers. This evidence is clearly hearsay.

11 As to his second reason, the Motions Judge left for the Trial Judge the issue of whether the new "principled" approach for admitting hearsay evidence might justify an exception to rule 81. In R. v. Khan, [1990] 2 S.C.R. 531; R. v. Smith, [1992] 2 S.C.R. 915, the Supreme Court has recognized that hearsay evidence may be admitted if it is demonstrated that the evidence is reliable and that its admission is necessary.

12 Before dealing with whether the question should have been left to the Trial Judge, I would observe that as worded, except on motions, rule 81(1) admits of no exceptions to the requirement that affidavits shall be confined to facts within the personal knowledge of the deponent. Nonetheless, prior decisions indicate that hearsay evidence may be admitted according to the "principled" approach. (See Ethier v. Canada (R.C.M.P. Commissioner), [1993] 2 F.C. 659 (C.A.)).

13 Rule 81(1) is a rule of practice and procedure in the Court. It is made under the authority of paragraph 46(1)(a) of the Federal Court Act which provides, in part:

> 46. (1) Subject to the approval of the Governor in Council and subject also to subsection (4), the rules committee may make general rules and orders
>
> (a) for regulating the practice and procedure in the Trial Division and in the Court of Appeal, [...]
>
> * * *
>
> 46. (1) Sous réserve de l'approbation du gouverneur en conseil et, en outre, du paragraphe (4), le comité peut, par règles ou ordonnances générales :
>
> a) réglementer la pratique et la procédure à la Section de première instance et à la Cour d'appel, et notamment :

As a rule of practice and procedure, rule 81(1) reflects the general rule against hearsay. However, it does not displace longstanding common law exceptions to the hearsay rule, nor the reliability and necessity exception of more recent vintage.[1] In any event, under rule 55, the Court may dispense with compliance with any rule. Rule 55 provides:

> 55. In special circumstances, on motion, the Court may dispense with compliance with any of these Rules. 55. Dans des circonstances particulières, la Cour peut, sur requête, dispenser de l'observation d'une disposition des présentes règles.

In appropriate circumstances, a party desiring to introduce hearsay evidence on the basis of an exception to rule 81 may consider bringing a motion under rule 55 to have the matter resolved in advance of trial.

14 In the circumstances here, if Partsource intended to rely on exceptions to the hearsay rule, it was for Partsource, in response to the motion to strike, to put forward evidence and/or arguments before the Prothonotary or Motions Judge as to admissibility. It was for the Prothonotary or Motions Judge to conduct their own analysis as to the reliability and necessity of such evidence. As Partsource took the position that the evidence was not hearsay, no evidence or argument was

submitted justifying admissibility on the grounds of necessity and reliability. Indeed, it is difficult to conceive of why it should be necessary to rely on hearsay evidence in these circumstances and why such evidence should be considered reliable. In any event, without such evidence or argument, questions of the admissibility of evidence on the basis of necessity and reliability did not arise and should not have been considered by the Motions Judge as a reason to defer the matter to the Trial Judge.

15 In leaving the matter to the Trial Judge, the approach of the Motions Judge would deny to CTC the right to know the evidence it has to refute until such time as the Trial Judge has made his or her ruling on admissibility. However, CTC cannot be certain that the Trial Judge will exclude paragraph 9. It is, therefore, in the position of having to cross-examine on it.

16 CTC cannot effectively cross-examine in respect of hearsay statements made by unidentified sources. Notwithstanding that the onus is on Partsource to demonstrate its entitlement to the relief it seeks, in order to respond to the allegation in paragraph 9 of the Bish affidavit, CTC would be required to explore, through cross-examination on the affidavit, the identity of the customers to whom reference is made and, if they are identified, to interview them or otherwise conduct an investigation for the purpose of ascertaining the veracity of the statements attributed to them. This would effectively reverse the onus in the expungement application. This is clearly prejudicial to CTC.

17 The third reason given by the Motions Judge for dismissing the motion to strike was that the Court will usually not make an a priori ruling on admissibility unless the case is obvious. As I have indicated, this case is obvious. The words of paragraph 9, on their face, show that the evidence is hearsay. It is clearly proffered for its truth. There is no suggestion that the necessity and reliability exception applies. This is a case in which, prior to the hearing, it is appropriate to strike the offending paragraph.

18 Nonetheless, I would emphasize that motions to strike all or parts of affidavits are not to become routine at any level of this Court. This is especially the case where the question is one of relevancy. Only in exceptional cases where prejudice is demonstrated and the evidence is obviously irrelevant will such motions be justified. In the case of motions to strike based on hearsay, the motion should only be brought where the hearsay goes to a controversial issue, where the hearsay can be clearly shown and where prejudice by leaving the matter for disposition at trial can be demonstrated.

19 The appeal will be allowed with costs and paragraph 9 of the Bish affidavit will be struck out.

MALONE J.A.
RICHARD C.J.:-- I agree.
ROTHSTEIN J.A.:-- I agree.

1 There is some debate as to whether the reliability and necessity exception to the hearsay rule is now the only test for admissibility or whether it is an additional exception to the long list of exceptions that have hitherto been part of the common law. (See Sopinka, Lederman, and Bryant, The Law of Evidence in Canada (2d ed., 1999), para. 6.64).

Tab 4

Case Name:

Dagg v. Canada (Minister of Finance)

Michael A. Dagg, appellant;
v.
The Minister of Finance, respondent, and
The Privacy Commissioner of Canada and the Public Service Alliance of Canada, interveners.

[1997] S.C.J. No. 63

[1997] A.C.S. no 63

[1997] 2 S.C.R. 403

[1997] 2 R.C.S. 403

148 D.L.R. (4th) 385

1997 CarswellNat 869

213 N.R. 161

J.E. 97-1384

46 Admin. L.R. (2d) 155

72 A.C.W.S. (3d) 5

File No.: 24786.

Supreme Court of Canada

1997: January 22 / 1997: June 26.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Access to information -- Privacy -- Personal information -- Request made for sign-in logs of government department -- Personal identifying features deleted from information -- Whether information should be disclosed -- Whether part of information can be withheld because "personal information" -- Access to Information Act, R.S.C., 1985, c. A-1, ss. 2, 4, 19(1), (2), 21(1)(b), 25, 31, 41, 48, 49, 54 -- Privacy Act, R.S.C., 1985, c. P-21, ss. 2, 3(i), (j), 8(2)(m).

The appellant filed a request with the Department of Finance for copies of logs with the names, identification numbers and signatures of employees entering and leaving the workplace on weekends. These logs were kept by security personnel for safety and security reasons but not for the purpose of verifying overtime claims. The appellant intended to present this information to the union anticipating that the union would find it helpful in the collective bargaining process and that the union would as a consequence be disposed to retain his services. The respondent disclosed the relevant logs but deleted the employees' names, identification numbers and signatures on the ground that this information constituted personal information and was thus exempted from disclosure. The appellant unsuccessfully sought a review by the Minister of this decision and filed a complaint with the Information Commissioner, arguing that deleted information should be disclosed by virtue of exceptions related to personal information in the Privacy Act. The Federal Court, Trial Division, on a review of the Minister's decision, found the information not to be personal but this decision was reversed on appeal. At issue here is whether the information in the logs constitutes "personal information" within the meaning of s. 3 of the Privacy Act and whether the Minister failed to exercise his discretion properly in refusing to disclose the requested information pursuant to s. 19(2)(c) of the Access to Information Act and s. 8(2)(m)(i) of the Privacy Act.

Held (La Forest, L'Heureux-Dubé, Gonthier and Major JJ. dissenting): The appeal should be allowed.

Per Lamer C.J. and Sopinka, Cory, McLachlin and Iacobucci JJ.: Agreement was expressed with La Forest J.'s approach to interpreting the Access to Information Act and the Privacy Act, particularly that they must be interpreted together. La Forest J.'s general approach to the interpretation of s. 3 "personal information" (j) of the Privacy Act (hereinafter s. 3(j)) was also agreed with.

The number of hours spent at the workplace is information that is "related to" the position or function of the individual in that it permits a general assessment to be made of the amount of work required for a particular employee's position or function. For the same reason, the requested information is related to the "responsibilities of the position held by the individual" and falls under the specific exception set out at s. 3(j)(iii) of the Privacy Act. The information provides a general indication of the extent of the responsibilities inherent in the position. There is neither a subjective aspect nor an element of evaluation contained in a record of an individual's presence at the workplace beyond normal working hours. Rather, that record discloses information generic to the position itself.

Per La Forest, L'Heureux-Dubé, Gonthier and Major JJ. (dissenting): The Access to Information Act and Privacy Act have equal status and must be given equal effect. The courts must have regard to the purposes of both in considering whether a government record constitutes "personal information". Both recognize that, in so far as it is encompassed by the definition of "personal information" in s. 3 of the Privacy Act, privacy is paramount over access.

The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry. While the Access to Information Act recognizes a broad right of access to any record under the control of the government, the overarching purposes of the Act must be considered in determining whether an exemption to that general right should be granted. The purpose of the Privacy Act is to protect the privacy of individuals with respect to personal information about themselves held by a government institution and to provide individuals with a right of access to that information.

The definition of "personal information" in s. 3 of the Privacy Act -- "information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing" -- indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition. The language is deliberately broad and entirely consistent with the great pains that have been taken to safeguard individual liberty. Its intent is to capture any information about a specific person, subject only to specific exceptions.

In the present case, the information requested by the appellant revealed the times during which employees of the Department of Finance attended their workplace on weekends over a period of one month. It is patently apparent that this constitutes "information about an identifiable individual" within the meaning of s. 3. It thus prima facie constitutes "personal information" under s. 3 of the Privacy Act.

Although it is not strictly necessary to so find, it is relevant that employees of the respondent would have a reasonable expectation that the information in the sign-in logs would not be revealed to the general public. A reasonable person would not expect strangers to have access to detailed, systematic knowledge of an individual's location during non-working hours, even if that location is his or her workplace.

Once it is determined that a record falls within the opening words of the definition of "personal information" in s. 3 of the Privacy Act, it is not necessary to consider whether it is also encompassed by one of the specific, non-exhaustive examples set out in paras. (a) to (i). It should be noted, nevertheless, that the records requested by the appellant in this case clearly fall within para. (i), which states that "personal information" includes "the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual". In this case, the appellant did not request only the names of the employees. He also wanted access to the times of their arrivals and departures. The time entries thus constitute "other personal information" within the meaning of the first part of para. (i).

It is also clear that disclosure of the names themselves, i.e., without the time entries or signatures, would disclose information about the individual within the meaning of the second part of para. (i). In his access request, the appellant asked for copies of the logs signed by employees on specific days. Even if the Minister disclosed only the names of the employees listed on those logs, the disclosure would reveal that certain identifiable persons attended their workplace on those days.

Section 48 of the Access to Information Act places the onus on the government to show that it is authorized to refuse to disclose a record. The Act makes no distinction between the determination as to whether a record is prima facie personal information and whether it is encompassed by one of the exceptions. Even where it has been shown that the record is prima facie personal information, the

government retains the burden of establishing that a record does not fall within one of the exceptions set out in s. 3.

The section 3 personal information provision exempts information attaching to positions but not information relating to specific individuals. Information relating to the position is thus not "personal information", even though it may incidentally reveal something about named persons. Conversely, information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is "personal information". Generally speaking, information relating to the position, function or responsibilities of an individual will consist of the kind of information disclosed in a job description.

The information requested in the present case is not information about the nature of a particular position. While it may give the appellant a rough, overall picture of weekend work patterns, it provides no specific, accurate information about any specific employee's duties, functions or hours of work. Rather, it reveals information about the activities of a specific individual which may or may not be work-related. Even if the logs can be said to record an employee's overtime hours accurately, such information is "personal information". The specific hours worked by individual employees reveal nothing about either the nature or quantity of their work.

The names on the sign-in logs do not constitute a "document prepared by . . . individual[s] in the course of employment". First, these logs are not prepared by the employees who sign them; they are the responsibility of security officers. Second, they are not made "in the course of employment" and have nothing to do with the responsibilities of their positions.

A de novo review of the decision of the head of the institution, under s. 8(2)(m)(i) of the Privacy Act, that the public interest in disclosure clearly outweighed any invasion of privacy is not mandated by s. 2 of the Access to Information Act which provides that decisions on disclosure should be reviewed independently of government. The reviewing court, under s. 49 of that Act, is to determine whether the refusal to disclose by the head of a government institution was authorized. If the information does not fall within one of the exceptions to a general right of access, the head of the institution is not "authorized" to refuse disclosure, and the court may order that the record be released pursuant to s. 49. In making this determination, the reviewing court may substitute its opinion for that of the head of the government institution. The situation changes, however, once it is determined that the head of the institution is authorized to refuse disclosure. Section 49 of the Access to Information Act, then, only permits the court to overturn the decision of the head of the institution where that person is "not authorized" to withhold a record. Where the requested record constitutes personal information, the head of the institution is authorized to refuse and the de novo review power set out in s. 49 is exhausted.

The head of a government institution, under s. 19(2) of the Access to Information Act, has a discretion to disclose personal information in certain circumstances. A decision is not immune from judicial oversight merely because it is discretionary. Abuse of discretion may be alleged but where the discretion has been exercised in good faith, and, where required, in accordance with principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

The Minister properly examined the evidence and carefully weighed the competing policy interests. He was entitled to make the conclusion that the public interest did not outweigh the privacy interest. For this Court to overturn this decision would not only amount to a substitution of its view of the

matter for his but also do considerable violence to the purpose of the legislation. The Minister's failure to give extensive, detailed reasons for his decision did not work any unfairness upon the appellant.

The head of a government institution, pursuant to s. 48 of the Access to Information Act, has the burden of establishing that he or she is "authorized to refuse" to disclose a requested record. The Minister satisfied this burden when he showed that the information in the sign-in logs constituted "personal information". Once that fact is established, the Minister's decision to refuse to disclose pursuant to s. 8(2)(m)(i) of the Privacy Act may only be reviewed on the basis that it constituted an abuse of discretion. The Minister did not have a "burden" to show that his decision was correct because that decision is not reviewable by a court on the correctness standard. The Minister weighed the conflicting interests at stake. The fact that he stated that the appellant failed to demonstrate that the public interest should override the privacy rights of the employees named in the sign-in logs was therefore irrelevant.

Cases Cited

By Cory J.

Considered: Canada (Information Commissioner) v. Canada (Solicitor General), [1988] 3 F.C. 551; Rubin v. Clerk of Privy Council (Can.) (1993), 62 F.T.R. 287.

By La Forest (dissenting)

R. v. Morgentaler, [1993] 3 S.C.R. 463; St. Peter's Evangelical Lutheran Church, Ottawa v. City of Ottawa, [1982] 2 S.C.R. 616; Canada (Information Commissioner) v. Canada (Solicitor General), [1988] 3 F.C. 551; Canada (Information Commissioner) v. Canada (Secretary of State for External Affairs), [1990] 1 F.C. 395; Information Commissioner v. Minister of Employment and Immigration (1986), 5 F.T.R. 287; Bland v. National Capital Commission, [1991] 3 F.C. 325; Rubin v. Canada (Canada Mortgage and Housing Corp.), [1989] 1 F.C. 265; R. v. Dyment, [1988] 2 S.C.R. 417; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; R. v. Hebert, [1990] 2 S.C.R. 151; R. v. Broyles, [1991] 3 S.C.R. 595; R. v. Duarte, [1990] 1 S.C.R. 30; R. v. Osolin, [1993] 4 S.C.R. 595; Schwartz v. Canada, [1996] 1 S.C.R. 254; Order M-35 (Re Corporation of the Township of Osprey, September 4, 1992), [1992] O.I.P.C. No. 119 (QL); Order P-718 (Re Ontario Science Centre, July 6 1994), [1994] O.I.P.C. No. 211 (QL); Order M-438 (Re Town of Amherstburg Police Services Board, December 30, 1994), [1994] O.I.P.C. No. 434 (QL); Katz. v. United States, 389 U.S. 347 (1967); R. v. Wong, [1990] 3 S.C.R. 36; R. v. Wise, [1992] 1 S.C.R. 527; R. v. Plant, [1993] 3 S.C.R. 281; Canadian Jewish Congress v. Canada (Minister of Employment and Immigration), [1996] 1 F.C. 268; Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3 F.C. 527; Terry v. Canada (Minister of National Defence) (1994), 86 F.T.R. 266; MacKenzie v. Canada (Minister of National Health and Welfare) (1994), 88 F.T.R. 52; Thorne v. Newfoundland and Labrador Hydro Electric Corp. (1993), 109 Nfld. & P.E.I.R. 233; Rubin v. Clerk of the Privy Council (Can.) (1993), 62 F.T.R. 287; Orth v. Macdonald Dettwiler & Associates Ltd. (1986), 16 C.C.E.L. 41; Canada (Information Commissioner) v. Canadian Radio-television and Telecommunications Commission, [1986] 3 F.C. 413; McHugh v. Union Bank of Canada, [1913] A.C. 299; Smith & Rhuland Ltd. v. The Queen, on the relation of Brice Andrews, [1953] 2 S.C.R. 95; Boulis v. Minister of Manpower and Immigration, [1974] S.C.R. 875; Vancouver (City of) v. Simpson, [1977] 1 S.C.R. 71; Isinger v. Buckland (Rural Municipality No. 491) (1986), 48 Sask. R. 207; Re Michelin Tires Manufacturing (Canada) Ltd. (1975), 13 N.S.R. 587; Grand Council of the Crees (of Quebec) v. Canada (Min-

ister of External Affairs and International Trade), [1996] F.C.J. No. 903 (Q.L.); Kelly v. Canada (Solicitor General) (1992), 53 F.T.R. 147; Maple Lodge Farms Ltd. v. Government of Canada, [1982] 2 S.C.R. 2; Supermarchés Jean Labrecque Inc. v. Flamand, [1987] 2 S.C.R. 219; Canadian Arsenals Ltd. v. Canadian Labour Relations Board, [1979] 2 F.C. 393; Macdonald v. The Queen, [1977] 2 S.C.R. 665; Northwestern Utilities Ltd. v. City of Edmonton, [1979] 1 S.C.R. 684.

Statutes and Regulations Cited

Access to Information Act, R.S.C., 1985, c. A-1, ss. 2, 4, 13, 19(1), (2), 21(1)(b), 25, 31, 41, 48, 49, 53(2), 54.
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Interpretation Act, R.S.C., 1985, c. I-21, ss. 11, 12.
Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56.
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APPEAL from a judgment of the Federal Court of Appeal, [1995] 3 F.C. 199, 124 D.L.R. (4th) 553, 181 N.R. 139, allowing an appeal from a judgment of Cullen J. (1993), 70 F.T.R. 54, 22 Admin. L.R. (2d) 171. Appeal allowed, La Forest, L'Heureux-Dubé, Gonthier and Major JJ. dissenting.

Alan Riddell and Sean Gaudet, for the appellant.
Graham Garton, Q.C., and Anne M. Turley, for the respondent.
Denis J. Power, Q.C., and Holly Harris, for the intervener the Privacy Commissioner of Canada.
Andrew Raven and David Yazbeck, for the intervener the Public Service Alliance of Canada.

Solicitors for the appellant: Soloway, Wright, Ottawa.
Solicitor for the respondent: The Attorney General of Canada, Ottawa.
Solicitors for the intervener the Privacy Commissioner of Canada: Nelligan, Power, Ottawa.
Solicitors for the intervener the Public Service Alliance of Canada: Raven, Jewitt & Allen, Ottawa.

The judgment of Lamer C.J. and Sopinka, Cory, McLachlin and Iacobucci JJ. was delivered by

1 **CORY J.**:-- I have read the careful and extensive reasons of Justice La Forest. I agree with his approach to the interpretation of the Access to Information Act, R.S.C. 1985, c. A-1, and the Privacy Act, R.S.C., 1985, c. P-21, particularly that they must be interpreted and read together. I also agree that the names on the sign-in logs are "personal information" for the purposes of s. 3 of the Privacy Act. However, I arrive at a different conclusion with respect to the application of s. 3 "personal information" (j) (hereinafter s. 3(j)) of that Act.

2 Subsection 3(j) of the Privacy Act provides that:

> . . . for the purposes of sections 7, 8 and 26 and section 19 of the Access to Information Act, ["personal information"] does not include
>
> (j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,
>
> . . .
>
> (iii) the classification, salary range and responsibilities of the position held by the individual,
> (iv) the name of the individual on a document prepared by the individual in the course of employment. . . .

3 I agree with La Forest J. that the names on the sign-in logs do not fall under s. 3(j)(iv) of the Privacy Act. It would be difficult to conclude that the sign-in logs were "prepared by" the employees, as that expression is commonly understood.

4 However, I am of the view that both the opening words of s. 3(j) and the specific provisions of s. 3(j)(iii) of the Privacy Act are sufficiently broad to encompass the information sought by the appellant.

5 La Forest J. holds, at para. 94, that the purpose of s. 3(j) and s. 3(j)(iii) of the Privacy Act is:

> . . . to exempt only information attaching to positions and not that which relates to specific individuals. Information relating to the position is thus not "personal information", even though it may incidentally reveal something about named persons. Conversely, information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is "personal information". [Emphasis in original.]

6 I agree. Moreover, I agree with La Forest J. that "[g]enerally speaking, information relating to the position . . . will consist of the kind of information disclosed in a job description", such as "the terms and conditions associated with a particular position, including . . . qualifications, duties, responsibilities, hours of work and salary range" (para. 95).

7 However, in applying these considerations to the facts, La Forest J. concludes that the information requested by the appellant is not information about the nature of a particular position. It is on this point that I must differ.

8 The number of hours spent at the workplace is generally information "that relates to" the position or function of the individual, and thus falls under the opening words of s. 3(j). It is no doubt true that employees may sometimes be present at their workplace for reasons unrelated to their employment. Nevertheless, I am prepared to infer that, as a general rule, employees do not stay late into the evening or come to their place of employment on the weekend unless their work requires it. Ordinarily the workplace cannot be mistaken for either an entertainment centre or the setting for a party. The sign-in logs therefore provide information which would at the very least permit a general assessment to be made of the amount of work which is required for an employee's particular position or function.

9 For the same reason, the information in the sign-in logs is related to "the . . . responsibilities of the position held by the individual" and falls under the specific exception set out at s. 3(j)(iii) of the Privacy Act. Although this information may not disclose anything about the nature of the responsibilities of the position, it does provide a general indication of the extent of those responsibilities. Generally, the more work demanded of the employee, the longer will be the hours of work required to complete it in order to fulfil the "responsibilities of the position held by the individual". Nothing in s. 3(j)(iii) of the Act indicates that the information must refer to "responsibilities" in a qualitative, as opposed to quantitative, sense.

10 The reasons of the Federal Court in Canada (Information Commissioner) v. Canada (Solicitor General), [1988] 3 F.C. 551 (T.D.) (hereinafter "Information Commissioner") and Rubin v. Clerk of Privy Council (Can.) (1993), 62 F.T.R. 287 (hereinafter "Rubin") are in my view distinguishable.

11 In Information Commissioner, Jerome A.C.J. held that certain opinions expressed about the training, personality, experience or competence of individual employees did not fall under any of the exemptions set out at s. 3(j) of the Privacy Act. In construing these specific exceptions, it was observed that, apart from s. 3(j)(v) (the individual's own views or opinions given in the course of employment), each of them are examples of "matters of objective fact" (pp. 557-58). According to Jerome A.C.J., at p. 558:

> There is no indication that qualitative evaluations of an employee's performance were ever intended to be made public. Indeed, it would be most unjust if the de-

> tails of an employee's job performance were considered public information simply because that person is in the employ of the government.

12 In my view, there is neither a subjective aspect nor an element of evaluation contained in a record of an individual's presence at the workplace beyond normal working hours. Rather, that record discloses information generic to the position itself.

13 In Rubin, it was held that, although the salary range attaching to a position fell under s. 3(j)(iii) of the Privacy Act, the actual salary earned by the employee filling the position did not. However, unlike the information contained in the sign-in sheets, the actual salary which a person receives does not reveal anything inherent about the position. On the contrary, it is information that relates to the individual employee.

14 My conclusion that the names on the sign-in logs fall within the opening words of s. 3(j) of the Privacy Act and, alternatively, within s. 3(j)(iii) of the Act, is sufficient to dispose of this appeal. It follows that the information must be disclosed.

15 There remain two additional matters which I would like to mention. First, there might be another acceptable manner of resolving the dispute which would go further in protecting the privacy and security of the individuals. Perhaps this could be achieved by setting out the hours worked and indicating which of the employees appearing on the sign-in sheets were members of the bargaining unit, without revealing their names. That solution might satisfy all concerned. Yet, in the absence of submissions on such a proposed solution, it would be unfair and improper to consider it in this appeal.

16 Second, in light of the conclusion that the information must be disclosed, it is not necessary for me to consider whether the Minister erred in his exercise of the discretion conferred upon him pursuant to s. 19(2) of the Access to Information Act and s. 8 of the Privacy Act. In general, I agree with La Forest J.'s conclusion that a Minister's discretionary decision under s. 8(2)(m)(i) is not to be reviewed on a de novo standard of review. Perhaps it will suffice to observe that the Minister is not obliged to consider whether it is in the public interest to disclose personal information. However in the face of a demand for disclosure, he is required to exercise that discretion by at least considering the matter. If he refuses or neglects to do so, the Minister is declining jurisdiction which is granted to him alone.

17 Furthermore, it could be determined that the Minister committed an error in principle resulting in a loss of jurisdiction when he stated:

> I do not believe that you have demonstrated that if there were any public interest that it clearly overrides the individual's right to privacy. [Emphasis added.]

18 From this, it appears that the Minister of Finance placed upon the appellant the burden of demonstrating that the public interest in disclosure clearly outweighed any privacy interest. Yet, s. 8 of the Privacy Act does not mention any burden of proof. It simply provides that the Minister must be satisfied that the public interest in disclosure clearly outweighs privacy. The quoted words from the Minister's ruling could lead to the conclusion that he abused the discretion conferred upon him. If this had been the conclusion reached, I would have referred the matter back to the Minister for consideration without the imposition of the onus on the appellant.

19 In the result, I would allow the appeal, with costs.

The reasons of La Forest, L'Heureux-Dubé, Gonthier and Major JJ. were delivered by

20 LA FOREST J. (dissenting):-- This appeal involves a conflict between access to information and privacy rights under federal legislation. For the first time, this Court has the opportunity to consider an application pursuant to s. 41 of the Access to Information Act, R.S.C., 1985, c. A-1, to review a decision as to whether certain information under the control of the Government of Canada should be disclosed. Specifically, the appellant challenges the decision of the respondent Minister of Finance to refuse to disclose portions of departmental sign-in logs on the basis that they constitute "personal information" within the meaning of s. 3 of the Privacy Act, R.S.C., 1985, c. P-21.

Factual Background

21 On October 16, 1990, the appellant, Dagg, a professional access to information consultant, filed a request with the Department of Finance for copies of logs signed by employees entering and leaving the workplace on weekends during the month of September, 1990. On November 6, 1990, the respondent Minister disclosed the relevant logs to the appellant. The Minister had, however, deleted the employees' names, identification numbers and signatures. In his letter accompanying the disclosed logs, the Minister explained that this information constituted personal information and was thus exempted from disclosure in accordance with s. 19(1) of the Access to Information Act.

22 On November 29, 1990, the appellant filed a complaint with the Information Commissioner pursuant to s. 31 of the Access to Information Act. On March 18, 1991, he wrote to the Minister seeking a review of his earlier decision. He argued that the names of the employees which had been deleted from the record should be disclosed by virtue of s. 3 "personal information" (j) (hereinafter s. 3(j)) or s. 8(2)(m) of the Privacy Act. The Minister confirmed his decision by way of a letter dated July 3, 1991. In his report of September 4, 1991, the Information Commissioner concluded that the appellant had not been deprived of a right under the Access to Information Act and indicated that he was unable to support his complaint.

23 The appellant applied to the Federal Court, Trial Division, for a review of the Minister's decision pursuant to s. 41 of the Access to Information Act. The evidence of R. Langille, the Department's Director of Security Services, revealed that the sign-in logs recorded the names, identification numbers and signatures of the individuals entering the Department, as well as their location in the building and the times of their arrival and departure. According to Langille, the primary purpose of the sign-in logs was to locate personnel in case of fire. He also stated that they had been used to assist in investigations of theft and vandalism, though they were not kept for that purpose. On occasion, he testified, logs had been shown to managers in order to verify that an employee was present in the building at a particular time. As far as Langille was aware, however, the logs were not used to verify overtime claims.

24 In his own evidence, the appellant stated that he sought the information as part of a marketing initiative. He wanted to determine whether union members were working overtime on weekends without claiming compensation. He intended to present this information to the union anticipating that it would find it helpful in the collective bargaining process and thereby be disposed to retain his services. He also hoped to obtain a legal precedent on the release of names that would force government departments to adopt a consistent response to such requests.

25 On November 8, 1993, Cullen J. held that the names were not personal information and should be released. The respondent appealed to the Federal Court of Appeal. In a unanimous decision dated April 21, 1995, the court allowed the appeal.

Applicable Legislation

26 Before proceeding further, it will be useful to set out the relevant provisions of the Access to Information Act and the Privacy Act. Section 2 of each Act sets out the statute's purpose:

> Access to Information Act
>
> 2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.
>
> Privacy Act
>
> 2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.

27 Section 4 of the Access to Information Act sets out the basic right to government-held information:

> 4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is
>
> (a) a Canadian citizen, or
> (b) a permanent resident within the meaning of the Immigration Act,
>
> has a right to and shall, on request, be given access to any record under the control of a government institution.

28 This right to government information is limited by a number of exemptions set out in the Access to Information Act beginning at s. 13. Of relevance here is s. 19(1), the personal information exemption, which states:

> 19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the Privacy Act.

29 "Personal information" is defined by s. 3 of the Privacy Act. It reads:

> 3. . . . "personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing, . . .

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but, for the purposes of sections 7, 8 and 26 and section 19 of the Access to Information Act, does not include

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,
(ii) the title, business address and telephone number of the individual,
(iii) the classification, salary range and responsibilities of the position held by the individual,
(iv) the name of the individual on a document prepared by the individual in the course of employment, and
(v) the personal opinions or views of the individual given in the course of employment. . . .

30 Even if a record constitutes "personal information" under this definition, however, s. 19(2) of the Access to Information Act provides the head of a government institution with a residual discretion to release the information under the following circumstances:

19. . . .

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

(a) the individual to whom it relates consents to the disclosure;
(b) the information is publicly available; or
(c) the disclosure is in accordance with section 8 of the Privacy Act.

31 Section 8 of the Privacy Act, in relevant part, states:

8. . . .

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

. . .

(m) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure. . . .

32 The Information Commissioner is appointed under s. 54 of the Access to Information Act by the Governor in Council after approval by resolution of the Senate and House of Commons. He has the responsibility of receiving and investigating complaints under the Act including from those who have been denied access to a record or part of a record.

33 Section 41 of the Access to Information Act provides for the review of a decision to refuse access to a record. It states:

> 41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

34 Section 48 of the Act sets out the burden of proof to be employed by a reviewing court:

> 48. In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

35 Finally, s. 49 sets out the powers of the reviewing court to order disclosure of government information:

> 49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

Judicial History

Federal Court, Trial Division (1993), 70 F.T.R. 54

36 Cullen J. held that the question whether a record is "personal information" is to be determined according to whether its predominant characteristic is personal or professional. In his view, the information in the sign-in logs, even if potentially usable to ascertain personal information about the individuals thereon, is nonetheless predominantly of a professional and non-personal nature. Taken as a whole, he concluded, they indicate how many individuals are working overtime for the Department.

37 Cullen J. found that the broad definition of "personal information" proposed by the respondent would mean that virtually all government information would be exempt from disclosure. Such an interpretation, he held, deviates from Parliament's intention that most information emanating from government should be disclosed.

38 Cullen J. also held that the sign-in logs did not fall within s. 3(i) of the Privacy Act. Because the identification numbers and signatures had been excised from the logs, he determined, the names did not "appear" with other personal information. He concluded, moreover, at p. 58, that the names themselves did not disclose any "other personal information" as defined in s. 3(i).

39 Having determined that the names on the sign-in logs were not personal information, Cullen J. found it unnecessary to determine whether they fell within the exemption provided in s. 3(j) of the Privacy Act or whether the public interest override in s. 8(2)(m) militated in favour of disclosure.

Federal Court of Appeal, [1995] 3 F.C. 199

40 On appeal to the Federal Court of Appeal, Isaac C.J., for the court, held that Cullen J. erred by giving the Access to Information Act pre-eminence over the Privacy Act. In his view, the statutes are complementary and must be construed harmoniously with one another. He also found that Cullen J. erred in using the so-called "predominant characteristic test" to determine whether the names in the sign-in logs constituted personal information. The plain language of s. 3 of the Privacy Act, he held, states simply that "personal information" is information about an identifiable individual that is recorded in any form.

41 Isaac C.J. then determined that s. 3 "personal information" (i) (hereinafter s. 3(i)) of the Privacy Act also applied to the sign-in logs. He held so, first, because the names appeared in the logs together with identification numbers and signatures of the individuals concerned, and secondly, because the names, in and of themselves, would disclose the individuals' whereabouts at specified times.

42 Isaac C.J. next considered whether the sign-in logs fell within the exceptions set out in s. 3(j) of the Privacy Act. In his view, the information revealed in the logs was not related to the employees' positions or functions. There was no evidence, he held, that this information indicated the employees' working hours. He also dismissed the appellant's arguments that the logs disclosed information about the employees' overtime responsibilities and that the logs are documents prepared in the course of employment.

43 Finally, Isaac C.J. addressed the argument that the Minister exercised his discretion improperly in declining to disclose the information pursuant to s. 8(2)(m) of the Privacy Act. In rejecting the appellant's contention that there was a public interest in the disclosure of the information, he noted that the sign-in logs did not indicate whether the employees were working or whether they were working overtime and, if so, the number of hours they worked. He concluded, therefore, that the disclosure of the names would not produce the result desired by the appellant.

Issues

44 There are three issues to be decided in this appeal:

1. Do the names on the sign-in logs constitute "personal information" as defined in s. 3 of the Privacy Act?
2. Do the names on the logs fall within the exception set out in s. 3(j) of the Privacy Act?
3. Did the Minister exercise his discretion properly in refusing to disclose the names on the sign-in sheets pursuant to s. 8(2)(m)(i) of the Privacy Act?

Analysis

General Interpretive Principles: Access to Information v. Privacy

45 This appeal involves a clash between two competing legislative policies -- access to information and privacy. For obvious reasons, the appellant and respondent have opposing views as to which of these policies should prevail in this case. It should also come as no surprise that the litigants have markedly different conceptions of the statutes that embody those policies. Recognizing the conflicting nature of governmental disclosure and individual privacy, Parliament attempted to mediate this discord by weaving the Access to Information Act and the Privacy Act into a seamless code. In my opinion, it has done so successfully and elegantly. While the two statutes do not efface the contradiction between the competing interests -- no legislation possibly could -- they do set out a coherent and principled mechanism for determining which value should be paramount in a given case.

46 The appellant contends that the personal information exemption in the Access to Information Act should be construed narrowly so as to favour full disclosure. The Act, he points out, provides that members of the public have a "right of access" to government information (ss. 2, 4) and that exceptions to this right should be "limited and specific" (s. 2). He argues, in effect, that where there is any ambiguity as to whether a record constitutes personal information, the right to disclosure should prevail over the right of privacy.

47 This position is belied, however, by both the wording and history of the legislation. As already noted, the Access to Information Act and the Privacy Act are parallel statutes, designed to work in concert to restrict the federal government's control over certain kinds of information. The Access to Information Act gives individuals a right of access to government information. The Privacy Act permits them to gain access to information about themselves held in government data banks, and limits the government's ability to collect, use and disclose personal information.

48 Both statutes regulate the disclosure of personal information to third parties. Section 4(1) of the Access to Information Act states that the right to government information is "[s]ubject to this Act". Section 19(1) of the Act prohibits the disclosure of a record that contains personal information "as defined in section 3 of the Privacy Act". Section 8 of the Privacy Act contains a parallel prohibition, forbidding the non-consensual release of personal information except in certain specified circumstances. Personal information is thus specifically exempted from the general rule of disclosure. Both statutes recognize that, in so far as it is encompassed by the definition of "personal information" in s. 3 of the Privacy Act, privacy is paramount over access.

49 This interpretation is buttressed by the legislative history of the Acts. As this Court has recently confirmed, evidence of a statute's history, including excerpts from Hansard, is admissible as relevant to the background and purpose of the legislation, provided, of course, that the court remains mindful of its limited reliability and weight; see R. v. Morgentaler, [1993] 3 S.C.R. 463, at pp. 483-85.

50 The Access to Information Act and the Privacy Act were originally considered together by Parliament as Bill C-43, and were enacted simultaneously as Schedules I and II to S.C. 1980-81-82-83, c. 111. In introducing the Bill for third reading, the Minister of Communications made the following comments (House of Commons Debates, vol. XVI, 1st sess., 32nd Parl., at p. 18853 (June 28, 1982)):

> . . . I would like to take a few moments to discuss the relationship between access to information and privacy legislation. Combining access to information and privacy legislation in one bill has permitted the complete integration of these two complimentary [sic] types of legislation.
>
> Parallel rights of access to information held by the government and parallel rights of review of decisions to refuse access have been created. At the same time, however, the principle that the right to privacy takes precedence over the general right of access has been clearly recognized. This is a principle with which I am sure all hon. members agree. Thus the term "personal information" has the same meaning in both the privacy and access to information legislation.
>
> Also the disclosure of information under the access to information portion of the bill is determined by the principles regarding disclosure of personal information to third persons set out in the privacy portion. This approach will ensure complete consistency between the treatment of personal information under both statutes, thus avoiding the situation which has developed in some countries where competing rights to privacy and to access to government-held information have been created. [Emphasis added.]

51 It is clear, therefore, that Parliament did not intend access to be given preeminence over privacy. The appellant correctly points out that under the Access to Information Act, access is the general rule. It is also true that exceptions to that rule must be confined to those specifically set out in the statute and that the government has the burden of showing that information falls into one of these exceptions. It does not follow, however, that the "personal information" exemption should receive a cramped interpretation. To do so would effectively read the Privacy Act as subordinate to the Access to Information Act. As stated in s. 12 of the Interpretation Act, R.S.C., 1985, c. I-21, every enactment is to be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". A court may not disregard, "in an effort to give effect to what is taken to be the purpose of the statute . . . certain provisions of the Act"; see St. Peter's Evangelical Lutheran Church, Ottawa v. City of Ottawa, [1982] 2 S.C.R. 616, at p. 626. The Access to Information Act expressly incorporates the definition of "personal information" from the Privacy Act. Consequently, the underlying purposes of both statutes must be given equal effect. As Isaac C.J. stated in the Court of Appeal below, at p. 217:

> It is obvious that both statutes are to be read together, since section 19 of the Access Act does incorporate by reference certain provisions of the Privacy Act. Nevertheless, there is nothing in the language of either statute which suggests, let alone compels, the conclusion that the one is subordinate to the other. They are each on the same footing. Neither is pre-eminent. There is no doubt that they are complementary and must be construed harmoniously with each other according to well-known principles of statutory interpretation in order to give effect to the stated parliamentary intention and in order to ensure the attainment of the stated parliamentary objectives.

52 This position has been confirmed in a number of decisions of the Federal Court. In Canada (Information Commissioner) v. Canada (Solicitor General), [1988] 3 F.C. 551 (T.D.), Jerome A.C.J. stated the following, at pp. 556-57:

> On the issue of which purpose is to govern interpretation in this case, I do not believe that either statute should be given pre-eminence. Clearly, what Parliament intended by the incorporation of a section of the Privacy Act in subsection 19(1) of the Access to Information Act was to ensure that the principles of both statutes would come into play in the decision whether to release personal information. In Re Robertson and Minister of Employment and Immigration (1987), 42 D.L.R. (4th) 552; 13 F.T.R. 120 (F.C.T.D.), I considered the purposes of both statutes in determining whether the information sought required protection from disclosure, (at pages 557 D.L.R.; 124 F.T.R.):
>
> > The two main purposes of the Access to Information Act and Privacy Act are to provide access to information under the control of a government institution and to protect the privacy of individuals with respect to personal information about themselves. These principles do not appear to me to require protection from disclosure for a submission made by a public body to another public body about a publicly funded programme. The issue is whether the Acts provide protection for an individual who adds to such a public submission his own personal opinion on the subject and his signature.
>
> Similarly, in the present case, the report is the product of a publicly-funded study of a publicly-operated institution, and ought to be available to the public, unless it is protected by one of the specific exemptions in the Access to Information Act. The intent of subsection 19(1), and its incorporation of section 3 of the Privacy Act, is clearly to protect the privacy or identity of individuals who may be mentioned in otherwise releasable material. I note that the definition of personal information is deliberately broad. It is entirely consistent with the great pains that have been taken to safeguard individual identity.

Similarly, Dubé J. noted in Canada (Information Commissioner) v. Canada (Secretary of State for External Affairs), [1990] 1 F.C. 395 (T.D.), that the objects of the two acts should be read together. He concluded, at p. 401, that the joint objective of the acts was "that information shall be provided to the public, except personal information relating to individuals".

53 Admittedly, there are dicta in some decisions implying that access should, in some circumstances, be favoured over privacy. In Information Commissioner v. Minister of Employment and Immigration (1986), 5 F.T.R. 287, Jerome A.C.J., in contradistinction to his later comments in Canada (Information Commissioner) v. Canada (Solicitor General), supra, relied solely on the Access to Information Act's purpose clause in concluding that doubt ought to be resolved in favour of disclosure. In that case, however, it was not contested that the information requested constituted "personal information" under s. 8 of the Privacy Act. Rather, the dispute was whether the head of a

government institution may refuse to disclose personal information pursuant to s. 19(2) of the Access to Information Act if the individual to whom the information relates consents to the disclosure.

54 Similarly, in Bland v. National Capital Commission, [1991] 3 F.C. 325 (T.D.), at p. 335, Muldoon J. referred to Heald J.A.'s comments in Rubin v. Canada (Canada Mortgage and Housing Corp.), [1989] 1 F.C. 265, at p. 274, where he stated that the exemptions to the general right of access must be interpreted "strictly". As in Information Commissioner v. Minister of Employment and Immigration, supra, however, Muldoon J.'s comments were made in the context of deciding whether the head of the National Capital Commission exercised her discretion properly in refusing to release the requested information pursuant to s. 19(2) of the Access to Information Act. The Rubin case, moreover, did not even involve the issue of personal information. In that decision, the dispute was whether the Canada Mortgage and Housing Corporation could refuse to disclose certain records containing accounts of consultations or deliberations involving Crown employees pursuant to s. 21(1)(b) of the Access to Information Act.

55 In summary, it is clear that the Access to Information Act and Privacy Act have equal status, and that courts must have regard to the purposes of both statutes in considering whether a government record constitutes "personal information". Some commentators have suggested that this "parallel" interpretive model permits judges too much discretion and has led to inconsistency and contradiction in the jurisprudence. See, for example, Tom Onyshko, "The Federal Court and the Access to Information Act" (1993), 22 Man. L.J. 73, at p. 106. It is suggested that the two statutes should be considered conceptually distinct and that the right to access should be the paramount consideration under the access legislation.

56 As I have indicated, however, this interpretation flies in the face of the language, structure and history of the legislation. I do not believe, moreover, that the parallel interpretation model is inherently contradictory or necessarily leads to inconsistent results. The Access to Information Act clearly provides that "personal information" is not to be disclosed except in certain specified circumstances. Of course, the determination of what constitutes "personal information" will involve a balancing of competing values. Such a balancing process, where mandated by legislation, cannot be avoided simply because it might be easier to apply a clear, bright-line rule that favours one interest over another. By employing the considerations set out in the Privacy Act, courts are perfectly capable of developing a jurisprudence that achieves consistency in principle.

57 That being said, I cannot agree with the respondent that, the words of the "personal information" exemption being clear and unambiguous, the task of statutory interpretation does not arise in this case. The determination of what constitutes "personal information" is an interpretive exercise; an exercise that will inevitably require a consideration of the competing values of access and privacy. I will next consider the meaning of "personal information" with these values in mind.

Do the Names on the Sign-in Logs Constitute "Personal Information"?

58 Before attempting to determine whether the sign-in logs requested by the appellant in this case constitute "personal information" within the meaning of s. 3 of the Privacy Act, it will be helpful to consider the purposes of the Acts in somewhat greater detail.

59 As earlier set out, s. 2(1) of the Access to Information Act describes its purpose, inter alia, as providing "a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public". The idea that members of the public should have an enforceable right to gain access to gov-

ernment-held information, however, is relatively novel. The practice of government secrecy has deep historical roots in the British parliamentary tradition; see Patrick Birkinshaw, Freedom of Information: The Law, the Practice and the Ideal (1988), at pp. 61-84.

60 As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them; see David J. Mullan, "Access to Information and Rule-Making", in John D. McCamus, ed., Freedom of Information: Canadian Perspectives (1981), at p. 54.

61 The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 Can. J. of Econ. and Pol. Sci. 479, at p. 480:

> Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.

See also: Canadian Bar Association, Freedom of Information in Canada: A Model Bill (1979), at p. 6.

62 Access laws operate on the premise that politically relevant information should be distributed as widely as reasonably possible. Political philosopher John Plamenatz explains in Democracy and Illusion (1973), at pp. 178-79:

> There are not two stores of politically relevant information, a larger one shared by the professionals, the whole-time leaders and persuaders, and a much smaller one shared by ordinary citizens. No leader or persuader possesses more than a small part of the information that must be available in the community if government is to be effective and responsible; and the same is true of the ordinary citizen. What matters, if there is to be responsible government, is that this mass of information should be so distributed among professionals and ordinary citizens that competitors for power, influence and popular support are exposed to relevant and searching criticism. [Emphasis in original.]

63 Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the Access to Information Act recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.

64 The purpose of the Privacy Act, as set out in s. 2 of the Act, is twofold. First, it is to "protect the privacy of individuals with respect to personal information about themselves held by a govern-

ment institution"; and second, to "provide individuals with a right of access to that information". This appeal is, of course, concerned with the first of these purposes.

65 The protection of privacy is a fundamental value in modern, democratic states; see Alan F. Westin, Privacy and Freedom (1970), at pp. 349-50. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy -- the freedom to engage in one's own thoughts, actions and decisions; see R. v. Dyment, [1988] 2 S.C.R. 417, at p. 427, per La Forest J.; see also Joel Feinberg, "Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?" (1982), 58 Notre Dame L. Rev. 445.

66 Privacy is also recognized in Canada as worthy of constitutional protection, at least in so far as it is encompassed by the right to be free from unreasonable searches and seizures under s. 8 of the Canadian Charter of Rights and Freedoms; see Hunter v. Southam Inc., [1984] 2 S.C.R. 145. Certain privacy interests may also inhere in the s. 7 right to life, liberty and security of the person; see R. v. Hebert, [1990] 2 S.C.R. 151, and R. v. Broyles, [1991] 3 S.C.R. 595.

67 Privacy is a broad and somewhat evanescent concept, however. It is thus necessary to describe the particular privacy interests protected by the Privacy Act with greater precision. In Dyment, I referred to Privacy and Computers, the Report of the Task Force established jointly by the Department of Communications/Department of Justice (1972), especially at pp. 428-30. That "report classifies these claims to privacy as those involving territorial and spatial aspects, those related to the person, and those that arise in the information context". It is the latter type of privacy interest that is of concern in the present appeal. As I put it in Dyment, at pp. 429-30:

> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the Privacy Act. . . .

See also R. v. Duarte, [1990] 1 S.C.R. 30, at p. 46 ("privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself"); R. v. Osolin, [1993] 4 S.C.R. 595, at pp. 613-15 (per L'Heureux-Dubé J., dissenting); Westin, supra, at p. 7 ("[p]rivacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others"); Charles Fried, "Privacy" (1968), 77 Yale L.J. 475, at p. 483 ("[p]rivacy . . . is control over knowledge about oneself").

68 With these broad principles in mind, I will now consider whether the information requested by the appellant constitutes personal information under s. 3 of the Privacy Act. In its opening para-

graph, the provision states that "personal information" means "information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing". On a plain reading, this definition is undeniably expansive. Notably, it expressly states that the list of specific examples that follows the general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition; see Schwartz v. Canada, [1996] 1 S.C.R. 254, at pp. 289-91. Consequently, if a government record is captured by those opening words, it does not matter that it does not fall within any of the specific examples.

69 As noted by Jerome A.C.J. in Canada (Information Commissioner) v. Canada (Solicitor General), supra, at p. 557, the language of this section is "deliberately broad" and "entirely consistent with the great pains that have been taken to safeguard individual identity". Its intent seems to be to capture any information about a specific person, subject only to specific exceptions; see J. Alan Leadbeater, "How Much Privacy for Public Officials?", speech to Canadian Bar Association (Ontario), March 25, 1994, at p. 17. Such an interpretation accords with the plain language of the statute, its legislative history and the privileged, foundational position of privacy interests in our social and legal culture.

70 In the present case, the information requested by the appellant revealed the times during which employees of the Department of Finance attended their workplace on weekends over a period of one month. It is patently apparent that this constitutes "information about an identifiable individual" within the meaning of s. 3 of the Privacy Act. As a result, I believe that the information prima facie constitutes "personal information" under s. 3. Notably, information relating to the number of hours worked by an employee during a particular period has been held to be personal information under the Ontario Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, and the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56: Order M-35 (Re Corporation of the Township of Osprey, September 4, 1992), [1992] O.I.P.C. No. 119 (QL); Order P-718 (Re Ontario Science Centre, July 6, 1994), [1994] O.I.P.C. No. 211 (QL). Similarly, it has been held that information that would reveal the number of overtime hours worked by an identifiable individual is personal information: Order M-438 (Re Town of Amherstburg Police Services Board, December 30, 1994), [1994] O.I.P.C. No. 434 (QL). The general definition of "personal information" under s. 2(1) of the Ontario Acts is virtually identical to that contained in s. 3 of the federal Privacy Act.

71 Although it is not strictly necessary for my analysis, I believe that employees of the respondent would have a reasonable expectation that the information in the sign-in logs would not be revealed to the general public. The "reasonable expectation of privacy" principle is a tool used in search and seizure jurisprudence to determine whether or not a search is "reasonable" in constitutional terms; see Hunter v. Southam Inc., supra; Katz v. United States, 389 U.S. 347 (1967). The principle ensures that, at a conceptual level, the dignity and autonomy interests at the heart of privacy rights are only compromised when there is a compelling state interest for doing so.

72 In my view, a reasonable person would not expect strangers to have access to detailed, systematic knowledge of an individual's location during non-working hours, even if that location is his or her workplace. The motions judge, at p. 60, concluded that "revealing the masses of individuals entering and leaving a government premise [sic] for a certain time frame is hardly the stuff of revealing personal information". There are numerous reasons, however, why individuals may not

wish members of the general public to have access to records of their comings and goings from work during non-office hours. Consider the case of an employee, physically abused by her spouse, who is permitted by management to work after normal working hours in order to avoid detection and harassment. Would this individual consider the disclosure of her sign-in logs to be innocuous? See Leadbeater, supra, at p. 18. To take a less foreboding example, is it fair to expect that the sign-in logs of government employees who regularly work after hours could be made available to corporations with an interest in targeting such persons for marketing certain products or services?

73 In the Charter context, this Court has recognized that individuals have a right to be free from various forms of state surveillance. In Duarte, supra, the Court determined that the electronic taping of private communications by state authorities violated the privacy interests protected by s. 8 of the Charter. In R. v. Wong, [1990] 3 S.C.R. 36, it held that the videotaping of events in a private hotel room also ran afoul of the s. 8 right against unreasonable search and seizure. And in R. v. Wise, [1992] 1 S.C.R. 527, the Court concluded that a person's reasonable expectation of privacy extended to protection from unrecorded, electronic surveillance of a person's physical movements. In that case, the Court held that the accused's s. 8 rights were violated by the placement of a crude electronic tracking device in his car, though the majority concluded that the search was only "minimally intrusive" for the purposes of determining whether the evidence obtained should be excluded pursuant to s. 24(2) of the Charter.

74 It must be remembered, however, that in the criminal law context, the countervailing state interest in surveillance may be very strong. In Wise, for example, the targeted individual was a prime suspect in a series of murders. The state interest in disclosing the information in the present case, if any, is certainly far less compelling than the interest at stake in Wise. Of course, the recording of a person's presence at his or her workplace may be less intrusive than the kind of state-controlled electronic surveillance at issue in cases like Wise, Duarte and Wong. Nevertheless, as I noted in my dissent in Wise, at p. 557, "[a]n individual has a reasonable expectation of privacy not only in the communications he makes, but in his movements as well".

75 In determining whether an individual has a reasonable expectation of privacy in a particular piece of information, it is important to have regard to the purpose for which the information was divulged; see Dyment, supra, at pp. 429-30, per La Forest J.; R. v. Plant, [1993] 3 S.C.R. 281, at pp. 292-93. Generally speaking, when individuals disclose information about themselves they do so for specific reasons. Sometimes, information is revealed in order to receive a service or advantage. At other times, persons will release information because the law requires them to do so. In either case, they do not expect that the information will be broadcast publicly or released to third parties without their consent. As I stated in Dyment, supra, at pp. 429-30, "situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected".

76 In the present case, the information on the sign-in logs was collected in order to determine who was in the building in the case of a fire or other emergency. Although the logs were occasionally used for other purposes, there is no evidence that they were ever used to verify overtime claims. More important, it is clear that the persons signing the logs would not have expected that they might be released to the general public. At the very least, employees of the Department should be entitled to expect that the information in the logs would be retained by their employer to be used by it for legitimate business purposes.

77 As earlier stated, once it is determined that a record falls within the opening words of the definition of "personal information" in s. 3 of the Privacy Act, it is not necessary to consider whether it is also encompassed by one of the specific, non-exhaustive examples set out in paras. (a) to (i). I note, nevertheless, that the records requested by the appellant in this case clearly fall within para. (i). That provision states that "personal information" includes:

> (i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual. . . .

78 The Court of Appeal found that the names on the sign-in sheets are encompassed by the first part of para. (i); i.e., they "appea[r] with other personal information relating to the individual", namely, the signatures and identification numbers of the person making the entry. It also concluded that the disclosure of the name itself would reveal information about the individual as set out in the second branch of the provision.

79 The appellant avers that the names do not fall within the first part of para. (i) because he did not request the disclosure of their accompanying identification numbers and signatures. The respondent contends, in contrast, that the s. 4(1) of the Access to Information Act does not grant a right of access to a discrete piece of information, but rather to a record, a term defined in s. 3 of that statute. The inquiry as to whether a name should be disclosed, he asserts, must consider the whole of the document in which the personal information appears, not merely a truncated version of it.

80 The respondent's submission on this point is unconvincing. While it is true that Act speaks of access to a "record", I do not believe this should be interpreted as meaning only an entire physical document. Under any practical, contextualized definition, "record" would refer to a particular piece of information under the control of a government institution, regardless of whether that piece is located within a larger "document". If the physical nature of the document is such that non-personal information appears together with personal information, it generally should be possible to disclose only the non-personal portion of the document. As the Minister's actions demonstrate, it was possible in the instant case simply to excise the identification numbers and signatures from the sign-in logs. Indeed, s. 25 of the Access to Information Act requires the Minister to disclose any portion of a record that does not contain information that he is authorized to withhold, so long as the portion can reasonably be severed from any part that does contain such information.

81 While the Court of Appeal thus erred in concluding that the fact that names on the sign-in logs appeared with the signatures and identification numbers rendered the names "personal information", this does not end the matter. The appellant did not request only the names of the employees. He also wanted access to the times of their arrivals and departures. It was this information that the appellant believed would help him determine whether union members were working overtime in violation of their collective agreement. For the reasons set out in my analysis of the general definition of "personal information", the time entries made in the sign-in logs thus constitute "other personal information" within the meaning of the Privacy Act.

82 As noted above, the Court of Appeal also held that disclosing the names on the sign-in logs would itself reveal information about the individual in contravention of the second branch of the test set out in para. (i). Isaac C.J. explained, at pp. 223-24:

> The names in the sign-in logs would certainly disclose that those individuals were on specific premises, on particular days and between specified times. In other words, they were information about the whereabouts of the individuals concerned at specific times. . . . I have no doubt that this information is personal and relates to identifiable individuals.

From a purely technical standpoint, this analysis is misleading. The Court of Appeal seems to have considered the disclosure of the names together with the times of ingress and egress recorded in the logs. The second branch of para. (i) refers, however, to the "disclosure of the name itself". The passage quoted above, therefore, is more properly characterized as relating to the first branch of para. (i).

83 The proper question to be asked in relation to the second branch is whether the disclosure of the names themselves, i.e., without the time entries or signatures, would disclose information about the individual. On a plain reading, it is obvious that it would. In his access to information request, the appellant asked for copies of the logs signed by employees on specific days. Even if the Minister disclosed only the names of the employees listed on those logs, the disclosure would reveal that certain identifiable persons attended their workplace on those days. The disclosure of the names would thus "reveal information about the individual" within the meaning of the second part of para. (i).

84 The appellant argues, however, that this provision should be so read as to require that the disclosure of the name itself reveal personal information about the individual. In his view, a literal interpretation of para. (i) fails to recognize that the disclosure of a document will always reveal some information about the individual by connecting him or her with other information contained in the document. Such an interpretation, he states, would prohibit any disclosure where the name revealed any information whatsoever about the individual. In the result, names on documents would invariably constitute "personal information".

85 I cannot accept this submission. Paragraph (i) clearly states that a record is personal information if the disclosure of the name itself would reveal information about the individual. It simply does not require this information to be "personal". Notably, the first part of para. (i) does refer to "personal" information that appears with the name of the individual. It is highly unlikely that the drafters of this provision would have inadvertently omitted to include the word "personal" in the second part of para. (i) when they included it in the first.

86 In any event, it is apparent that the disclosure of the names themselves would reveal "personal" information. As I have discussed, even if the time entries were not included in the disclosure, the names would reveal that certain employees attended their workplace on particular days. This constitutes "information about an identifiable individual" within the meaning of s. 3 of the Privacy Act. Indeed, each of the examples set out in paras. (a) to (i) is simply that -- an example of information about identifiable individuals that is typically kept in government records.

87 Underlying the appellant's objection to this straightforward interpretation of para. (i) is the notion that the inclusion of records containing the names of individuals would prevent the disclosure of an unjustifiably broad array of government documents. As will be discussed later, however, s. 3(j)(iv) of the Privacy Act specifically exempts "the name of the individual on a document prepared by the individual in the course of employment" from the definition of "personal information".

There is no danger, therefore, that the names of government officials will be kept secret merely because they are contained on documents prepared by those individuals in the course of employment.

Is the Requested Information Excluded from the Definition of "Personal Information"?

88 The appellant submits that, even if the information he requested is prima facie "personal information", it falls into the exemption provided in s. 3(j) of the Privacy Act. That provision states:

> 3. . . .
>
> "personal information" . . . .
>
> . . . does not include
>
> (j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,
>
> (i) the fact that the individual is or was an officer or employee of the government institution,
> (ii) the title, business address and telephone number of the individual,
> (iii) the classification, salary range and responsibilities of the position held by the individual,
> (iv) the name of the individual on a document prepared by the individual in the course of employment, and
> (v) the personal opinions or views of the individual given in the course of employment. . . .

Specifically, the appellant contends that the sign-in logs are captured by the general opening words of para. (j) as well as the specific examples set out in subparas. (iii) and (iv).

89 Before dealing with the merits of these submissions, it is necessary to consider a procedural question. In the Court of Appeal, Isaac C.J. held that once it is determined that a record is prima facie personal information, the onus of establishing that one of the exceptions applies lies with the person making the access request. Similar conclusions were reached in Canadian Jewish Congress v. Canada (Minister of Employment and Immigration), [1996] 1 F.C. 268 (T.D.), at p. 283; Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3 F.C. 527 (T.D.), at p. 539; Terry v. Canada (Minister of National Defence) (1994), 86 F.T.R. 266, at p. 269; and MacKenzie v. Canada (Minister of National Health and Welfare) (1994), 88 F.T.R. 52, at pp. 55-56.

90 Section 48 of the Access to Information Act, however, places the onus on the government to show that it is authorized to refuse to disclose a record. The Act makes no distinction between the determination as to whether a record is prima facie personal information and whether it is encompassed by one of the exceptions. As a result, it is clear that even where it has been shown that the record is prima facie personal information, the government retains the burden of establishing that a record does not fall within one of the exceptions set out in s. 3(j).

91 That being said, it remains to determine whether the Minister has discharged his onus of showing that the information does not fall into one of the exemptions. Reading the opening clause

of para. (j) in conjunction with subpara. (iii), it is apparent that information about government employees that relates to their position and function, including the responsibilities of their position, does not constitute "personal information". The appellant and his supporting intervener contend that information about hours of work relates to employees' position or function. Such information, they assert, reveals that it is a requirement of their positions that they work overtime or on weekends.

92 In considering this issue, it is helpful to characterize the precise nature of the information requested. The sign-in logs reveal the presence of certain employees during specified hours on the weekends. They do not indicate whether those employees were working during those periods or whether any work performed constituted "overtime". At best, the logs disclose that certain individuals were likely, although not necessarily, required to work for some period during weekends. They may also indicate a probability that these persons were working overtime.

93 In my view, this information does not relate to the positions or functions of government employees, or to the responsibilities associated with their positions. In Canada (Information Commissioner) v. Canada (Secretary of State for External Affairs), supra, the court made a distinction between information relating to a position and that relating to an individual. In that case, the head of the government institution revealed the names of persons named in a list of temporary employees. The Privacy Commissioner found that the names constituted "personal information" and that the disclosure thus violated the Privacy Act. In an attempt to avoid compounding this error, the department refused to release information on the security level attaching to the positions that these individuals occupied. The court held, however, that the security classifications pertained to particular positions and not to the individuals who filled them. Dubé J. stated the following, at pp. 399-400:

> The Commissioner argues that security classification is a condition attached to the position itself and not to the individual and, as such, it is not personal information. It is merely a minimum requirement and its inclusion on the call-up form does not indicate the level of security clearance actually held by the employee, but merely that the employee has met the minimum clearance for that position.
>
> The Department agrees that the security classification in question is a condition attached to the position, but submits that it is personal information as well, since the names of the individuals have already been revealed.
>
> Clearly, security classification pertains to a position and not to the individual who applied for that position or who eventually filled it. Personal information as defined in section 3 of the Privacy Act means information relating to an individual whether it be his race, colour, religion, personal record, opinions, etc. Nowhere does security classification fall within the heads of personal information listed under section 3 of the Privacy Act. Even paragraph 3(c), which deals with identifying numbers, symbols or other particulars, limits such particulars to the individual, not to the position held by the individual. Thus, in my view, security classification is not information to be withheld on the ground that it is "personal information".

94 This approach is fundamentally sound and is fully consistent with the wording and objects of the legislation. The same approach, I pause to note, has been used in interpreting like language in the Newfoundland Freedom of Information Act, R.S.N. 1990, c. F-25, s. 10(2)(a); see Thorne v. Newfoundland and Labrador Hydro Electric Corp. (1993), 109 Nfld. & P.E.I.R. 233, at p. 235. Section 3(j) of the Privacy Act expressly exempts information about an individual that relates to their position or functions. Similarly, para. (iii) refers to "the classification, salary range and responsibilities of the position held by the individual". The purpose of these provisions is clearly to exempt only information attaching to positions and not that which relates to specific individuals. Information relating to the position is thus not "personal information", even though it may incidentally reveal something about named persons. Conversely, information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is "personal information". It has been held, for instance, that while a general report on the food service operations at a regional psychiatric centre should be released, the author's opinions about specified individuals and their training, personality, experience or competence was "personal information" that was not exempted by s. 3(j) of the Privacy Act. Canada (Information Commissioner) v. Canada (Solicitor General), supra. Similarly, in Rubin v. Clerk of the Privy Council (Can.) (1993), 62 F.T.R. 287, the court held that while the salary range attaching to a position could be disclosed pursuant to s. 3(j)(iii) of the Privacy Act, the specific salary or per diem remuneration paid to a particular government official could not.

95 Generally speaking, information relating to the position, function or responsibilities of an individual will consist of the kind of information disclosed in a job description. It will comprise the terms and conditions associated with a particular position, including such information as qualifications, duties, responsibilities, hours of work and salary range. (For an example of a job description, see Orth v. Macdonald Dettwiler & Associates Ltd. (1986), 16 C.C.E.L. 41 (B.C.C.A.), at pp. 44-46). The information requested in the present case is not information about the nature of a particular position. While it may give the appellant a rough, overall picture of weekend work patterns, it provides no specific, accurate information about any specific employee's duties, functions or hours of work. Rather, it reveals information about the activities of a specific individual which may or may not be work-related. As already noted, the sign-in logs do not reveal whether any particular employee is working overtime. In order to determine this, one would need to know whether the employee was actually working while on the premises and the number of hours he or she had worked during the week.

96 In any event, even if the logs can be said to record accurately an employee's overtime hours, I am of the view that information concerning when an individual works overtime is "personal information". Whether a person works overtime, and for how long, relates to how he or she performs his or her duties and not to the responsibilities and functions inherent in the position itself. An individual may work overtime for any number of different reasons, relating, for instance, to his or her productivity during normal working hours. The specific hours worked by individual employees, therefore, reveal nothing about either the nature or quantity of their work. In his letter to the appellant reporting the results of the investigation of his complaint, the Information Commissioner stated the following, which I endorse:

> The information to which you seek to have access in this case does not, in my view, provide any insight into the positions held by nor the functions performed by the persons whose names appear on the sign-in sheets. While it may

> indicate the hours during which they attended at their work premises on a given day, this is not the type of information which, in my view, Parliament intended should be publicly accessible. To conclude otherwise would mean that a public official's conditions of work
>
> -- Does he or she work regular or compressed or flexible hours? What are the person's break and meal periods? Has the person received medical or other special leave? -- could become matters of public record. That would go far beyond the spirit and intent of this derogation which, in my view, is to ensure that the public can conduct business with identifiable, not anonymous, public officials. The information at issue here is not at all about the nature of the work of named public officials but only about their whereabouts at a specific time. There is simply no indication that Parliament intended this derogation to be interpreted in a way which would result in public officials being subjected to a form of physical surveillance through records disclosure.

97 This conclusion is consistent with the purposes of the Access to Information Act and the Privacy Act. As discussed above, the collective purpose of the legislation is to provide Canadians with access to information about the workings of their government without unduly infringing individual privacy. As noted by Jerome A.C.J. in Canada (Information Commissioner) v. Canada (Solicitor General), supra, at p. 557, s. 3(j) of the Privacy Act does not exempt government employees from this general rule of privacy. The fact that persons are employed in government does not mean that their personal activities should be open to public scrutiny. By limiting the release of information about specific individuals to that which relates to their position, the Act strikes an appropriate balance between the demands of access and privacy. In this way, citizens are ensured access to knowledge about the responsibilities, functions and duties of public officials without unduly compromising their privacy.

98 The intervener PSAC argues, however, that there are compelling policy reasons for disclosure in this case. In its view, the disclosure of employment-related information is designed, in part, to ensure that the operation of the Access to Information Act and Privacy Act is consistent with the collective bargaining regime. The disclosure of the information requested by the appellant, it submits, would facilitate bargaining agents in exercising their rights and ensure that the public is able to determine whether public servants are appropriately compensated for their work.

99 I do not find this argument convincing. It is true that there is a general public interest in the smooth functioning of the collective bargaining process and in ensuring that employers, including those in the public sector, live up to their obligations under collective agreements. I do not believe, however, that this interest is embodied in the access to information or privacy statutes. As I have discussed, the Access to Information Act is concerned with securing the values of participation and accountability in the democratic process. Of course, collective bargaining plays an important role in the democratic system. However, it is in many ways an autonomous regime, with its own enabling legislation and comprehensive system of dispute resolution. This system attempts to mediate the conflict between the private interests of employers and the private, collective interests of workers. In this sense, a union's interest in obtaining helpful information from its employer is no greater than the employer's interest in obtaining like information. Conflicts regarding such information should be resolved within the confines of that system, i.e., by recourse to the usual dispute resolution methods of labour relations -- negotiation, arbitration and administrative review. There is no indication that

access to information legislation was intended to enable one side in this conflict to obtain information that it would not otherwise be entitled to under the collective bargaining system. It is acceptable, of course, if the legislation permits this incidentally, i.e. by permitting someone with a particular private interest to benefit because disclosure accords with the public goals of the legislation. The legislation should not be interpreted, however, with the collective bargaining system specifically in mind. In my view, the fact that disclosure of the sign-in logs in this case would be helpful to the union is not relevant to determining whether the information relates to an employee's position or functions within the meaning of s. 3(j) of the Privacy Act.

100 The appellant also argues that the names on the sign-in logs fall within the scope of s. 3(j)(iv) in that they constitute a "document prepared by . . . individual[s] in the course of employment". This argument has little merit. Firstly, it is misleading to say that the sign-in logs are "prepared" by the employees who sign them. As disclosed in the evidence, the sign-in logs are the responsibility of the Corps of Commissionaires security officers. Secondly, the logs are not made "in the course of employment". As noted above, the sign-in logs are designed for security purposes. Employees are required to fill them out in order to gain access to the building. They have nothing to do with the responsibilities of their positions. For the same reasons that the logs do not relate to the employees' positions, functions or responsibilities, they should not be considered to have been prepared "in the course of employment".

Did the Minister Exercise his Discretion Properly?

101 The appellant submits that the Minister failed to exercise his discretion properly in refusing to disclose the requested information pursuant to s. 19(2)(c) of the Access to Information Act and s. 8(2)(m)(i) of the Privacy Act. Section 19(2)(c) of the Access to Information Act states that the head of a government institution may disclose a record that contains personal information if the disclosure is in accordance with s. 8 of the Privacy Act. Section 8, in relevant part, states:

> 8. . . .
>
> (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed . . .
>
> . . .
>
> (m) for any purpose where, in the opinion of the head of the institution,
>
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure. . . . [Emphasis added.]

102 The appellant argues that there is no evidence that the Minister weighed the privacy interests of the employees whose names appeared on the sign-in logs against the public interest in disclosure. He asserts that if the Minister had properly exercised his discretion, he would have concluded that the public interest in disclosure clearly outweighed the minimal invasion of privacy that would have resulted.

103 The first step in evaluating this submission is to determine the appropriate standard of review of the Minister's decision. The appellant notes that pursuant to s. 2 of the Access to Information Act, decisions on the disclosure of government information "should be reviewed inde-

pendently of government". He also relies on the fact that s. 48 of that statute specifies that "the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned". From this, the appellant argues that the Minister's exercise of discretion under s. 8(2)(m) of the Privacy Act should be strictly limited by the courts.

104 The determination of the appropriate standard of review of discretionary decisions under the Access to Information Act has been the source of considerable controversy in the Federal Court. In a number of decisions, the court has implied that discretionary decisions are to be reviewed on a correctness or de novo standard. In Rubin v. Canada (Canada Mortgage and Housing Corp.), supra, the Federal Court of Appeal considered the effect of s. 21(1)(b) of the Access to Information Act. That provision states that the head of a government institution may refuse to disclose a record that contains "an account of consultations or deliberations" involving Crown employees or officers. The court held, at p. 273, that the exercise of this discretion was "not unfettered" and that it must be exercised in accordance with "recognized legal principles" and "in a manner which is in accord with the conferring statute". In considering whether the minutes of the CMHC's Board meeting from 1975 to 1988 should have been disclosed pursuant to s. 21(1)(b), the court concluded that the sheer volume of the material involved indicated that the delegate of the Corporation did not make a proper examination and determination as to whether any of the information requested came within the parameters of the provision. It was also apparent from the position taken by the General Counsel and Corporate Secretary of the CMHC, the court found, that the CMHC concluded that the records could be withheld without actually examining the material. The court rejected the holding in Canada (Information Commissioner) v. Canadian Radio-television and Telecommunications Commission, [1986] 3 F.C. 413 (T.D.), that once it is determined that a record falls within the class referred to in s. 21(1), the right to disclosure becomes subject to the head of the government institution's discretion to disclose it. Such a conclusion, the court held, ignores the directive expressed in s. 2 of the Act that decisions respecting access to public documents are to be reviewed "independently of government". Accordingly, the court overturned the decision to withhold the records and referred the matter back to the delegate of the CMHC for redetermination.

105 The Rubin case was relied on by Muldoon J. in Bland, supra, where he considered the provision at issue in the instant case, s. 8(2)(m)(i) of the Privacy Act. In Bland, a newspaper reporter investigating allegations of favouritism in the allocation of subsidized rents by the National Capital Commission ("NCC") was denied access to a list of the addresses and rental charges of NCC tenants on the grounds that it was "personal information". Curiously, although he held that the information related to a "discretionary benefit of a financial nature" pursuant to s. 3(l) of the Privacy Act and did not therefore constitute "personal information", Muldoon J. also found that even if it was, it should have been disclosed pursuant to s. 8(2)(m)(i). In coming to this conclusion, the court found, at p. 340, that the mere assertion that the public interest in disclosure did not outweigh the invasion of privacy was not sufficient as it "evinces no weighing of the factor of invasion of privacy against that of the public interest in disclosure". He went on to conclude that the tenant's privacy interest was negligible and that any invasion of it was clearly outweighed by the public interest in disclosure. See also Rubin v. Clerk of the Privy Council (Can.), supra, at p. 291, and MacKenzie v. Canada (Minister of National Health and Welfare), supra, at p. 57.

106 To the extent that these decisions can be said to stand for the proposition that the Minister's decision to refuse to disclose a record pursuant to the public interest exception set out in s. 8(2)(m)(i) of the Privacy Act is to be reviewed on a de novo standard, they are clearly incorrect. It is

true, of course, that s. 2(1) of the Access to Information Act states that "decisions on the disclosure of government information should be reviewed independently of government". Reading the Act as a whole, however, it is clear that this exhortation does not mandate the de novo review of the s. 8(2)(m)(i) discretion. Section 49 of the Access to Information Act sets out the power of the Federal Court to order disclosure in the circumstances of the present case:

> 49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate. [Emphasis added.]

107 Section 49 directs the reviewing court to determine whether or not the head of the government institution who has refused disclosure was in fact "authorized" to do so. As I have discussed, the Access to Information Act provides a general right of access to government-held information, subject to certain exceptions. If the information does not fall within one of these exceptions, the head of the institution is not "authorized" to refuse disclosure, and the court may order that the record be released pursuant to s. 49 of the Act. It is clear that in making this determination, the reviewing court may substitute its opinion for that of the head of the government institution. The situation changes, however, once it is determined that the head of the institution is authorized to refuse disclosure. Section 19(1) of the Access to Information Act states that, subject to s. 19(2), the head of the institution shall refuse to disclose personal information. Section 49 of the Access to Information Act, then, only permits the court to overturn the decision of the head of the institution where that person is "not authorized" to withhold a record. Where, as in the present case, the requested record constitutes personal information, the head of the institution is authorized to refuse and the de novo review power set out in s. 49 is exhausted.

108 Of course, s. 19(2) of the Access to Information Act provides that the head of a government institution may disclose personal information in certain circumstances. Generally speaking, the use of the word "may", especially when it is used, as in this case, in contradistinction to the word "shall", indicates that an administrative decision maker has the discretion, and not the duty, to exercise a statutory power; see McHugh v. Union Bank of Canada, [1913] A.C. 299 (P.C.); Smith & Rhuland Ltd. v. The Queen, on the relation of Brice Andrews, [1953] 2 S.C.R. 95; Interpretation Act, R.S.C., 1985, c. I-21, s. 11.

109 In the present case, moveover, any ambiguity regarding the use of the word "may" is removed by the language of s. 8(2)(m)(i) of the Privacy Act. That section, which is incorporated into s. 19(2)(c) of the Access to Information Act, states that personal information may be disclosed where, in the opinion of the head of the institution, the public interest in disclosure clearly outweighs the invasion of privacy that could result. It is difficult to imagine statutory language setting out a broader discretion. Courts have repeatedly held that the use of such language indicates a discretionary power; see Boulis v. Minister of Manpower and Immigration, [1974] S.C.R. 875; Vancouver (City of) v. Simpson, [1977] 1 S.C.R. 71; Isinger v. Buckland (Rural Municipality No. 491) (1986), 48 Sask. R. 207 (C.A.); Re Michelin Tires Manufacturing (Canada) Ltd. (1975), 13 N.S.R.

(2d) 587 (S.C.T.D.). And in a series of decisions, the Federal Court has specifically found that the power to disclose personal information in the public interest pursuant to s. 8(2)(m)(i) of the Privacy Act is discretionary; see Canadian Jewish Congress v. Canada (Minister of Employment and Immigration), supra; Sutherland v. Canada (Minister of Indian and Northern Affairs), supra; Terry v. Canada (Minister of National Defence), supra; Grand Council of the Crees (of Quebec) v. Canada (Minister of External Affairs and International Trade), [1996] F.C.J. No. 903 (QL).

110 In Kelly v. Canada (Solicitor General) (1992), 53 F.T.R. 147, Strayer J. discussed the general approach to be taken with respect to discretionary exemptions under the Privacy Act. He stated, at p. 149:

> It will be seen that these exemptions require two decisions by the head of an institution: first, a factual determination as to whether the material comes within the description of material potentially subject to being withheld from disclosure; and second, a discretionary decision as to whether that material should nevertheless be disclosed.
>
> The first type of factual decision is one which, I believe, the court can review and in respect of which it can substitute its own conclusion. This is subject to the need, I believe, for a measure of deference to the decisions of those whose institutional responsibilities put them in a better position to judge the matter. . . .
>
> The second type of decision is purely discretionary. In my view in reviewing such a decision the court should not itself attempt to exercise the discretion de novo but should look at the document in question and the surrounding circumstances and simply consider whether the discretion appears to have been exercised in good faith and for some reason which is rationally connected to the purpose for which the discretion was granted.

In my view, this is the correct approach to reviewing the exercise of discretion under s. 8(2)(m)(i) of the Privacy Act.

111 The fact that a statutory power is discretionary does not mean, of course, that a decision made pursuant to it is immune from judicial oversight. It may always be alleged that the discretion was abused. The correct standard of review was articulated by McIntyre J. in Maple Lodge Farms Ltd. v. Government of Canada, [1982] 2 S.C.R. 2, at pp. 7-8:

> It is . . . a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

See also Vancouver (City of) v. Simpson, supra.

112 The appellant makes no allegations of bad faith, unfair procedure or consideration of irrelevant matters. Rather, he contends that the Minister failed to weigh the privacy interests of the employees named on the sign-in logs against the public interest in disclosure. It is clear, however, that the Minister did carefully weigh the competing policy interests in the present case. The appellant's request to the Minister to exercise his discretion to disclose the personal information was made in the following terms:

> Disclosure of the names is in the public interest because it enables citizens to determine who is working, who authorized the work and prevents abuse of staff by overzealous managers and upholds the spirit of the collective agreement. Thus the names on the sign-in sheets should be disclosed.

The Minister's reply stated:

> As I am sure you can appreciate, any waiver of the protection provided individuals in the Privacy Act must be undertaken only after very careful consideration and must be balanced against the threat to an individual's privacy. I do not believe that you have demonstrated that if there were any public interest that it clearly overrides the individual's right to privacy. [Emphasis added.]

113 There is no evidence, as was the case in Rubin, supra, that the Minister failed to examine the evidence properly. It is apparent that he considered the appellant's request for a public interest waiver in the light of the objects of the legislation and came to a determination that the public interest did not "clearly outweigh" the violation of privacy that could result from disclosure. This was a conclusion that he was entitled to make. For this Court to overturn this decision would amount to a substitution of its view of the matter for his. Such a result would do considerable violence to the purpose of the legislation and would amount to an unjustified usurpation of the Minister's statutory role.

114 In essence, the appellant's objection to the Minister's decision is that he did not give sufficient reasons for it. Generally speaking, however, in the absence of a specific statutory requirement, administrative decision makers have no duty to give reasons for their decisions; see Supermarchés Jean Labrecque Inc. v. Flamand, [1987] 2 S.C.R. 219, at p. 233; Canadian Arsenals Ltd. v. Canadian Labour Relations Board, [1979] 2 F.C. 393 (C.A.); Macdonald v. The Queen, [1977] 2 S.C.R. 665; Northwestern Utilities Ltd. v. City of Edmonton, [1979] 1 S.C.R. 684. While it has been suggested that the failure to give reasons, even when there is no statutory requirement to do so, may amount to a breach of the duty to be fair in certain circumstances (David P. Jones and Anne S. de Villars, Principles of Administrative Law (2nd ed. 1994), at p. 299), the Minister's failure to give extensive, detailed reasons for his decision did not work any unfairness upon the appellant.

115 Finally, it should be noted that in oral argument before this Court, the respondent is said to have asserted that by stating that he did "not believe that [the appellant] . . . demonstrated that if there were any public interest that it clearly overrides the individual's right to privacy", the Minister incorrectly reversed the onus set out in s. 48 of the Access to Information Act. That provision states that the head of a government institution has the burden of establishing that he or she is "authorized to refuse" to disclose a requested record. As I have discussed in relation to s. 49 of that Act, the Minister satisfied this burden when he showed that the information in the sign-in logs constituted "personal information". Once that fact is established, the Minister's decision to refuse to disclose

pursuant to s. 8(2)(m)(i) of the Privacy Act may only be reviewed on the basis that it constituted an abuse of discretion. The Minister did not have a "burden" to show that his decision was correct because that decision is not reviewable by a court on the correctness standard. Reading his statement in context, it is clear that the Minister weighed the conflicting interests at stake. The fact that he stated that the appellant failed to demonstrate that the public interest should override the privacy rights of the employees named in the sign-in logs is therefore irrelevant.

Disposition

116 From the foregoing, I have concluded that the appeal should be dismissed. It remains to consider the special provision regarding costs set out in s. 53(2) of the Access to Information Act. It states that "[w]here the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result". Though ultimately unsuccessful, I believe that the appellant has raised a number of important and novel legal issues. Under the circumstances, it would be appropriate to award costs to the appellant from the respondent.

117 Accordingly, I would dismiss the appeal, but would award the appellant's costs from the respondent.

Tab 5

Indexed as:

Irwin Toy Ltd. v. Québec (Attorney General)

The Attorney General of Quebec, appellant;
v.
Irwin Toy Limited, respondent;
and
Gilles Moreau in his capacity as President of the Office de la protection du consommateur, intervener;
and
The Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Saskatchewan, Pathonic Communications Inc., Réseau Pathonic Inc., and the Coalition contre le retour de la publicité destinée aux enfants, interveners.

[1989] 1 S.C.R. 927

[1989] S.C.J. No. 36

File No.: 20074.

Supreme Court of Canada

1987: November 19, 20 / 1989: April 27.

Present: Dickson C.J. and Beetz, Estey *, McIntyre, Lamer, Wilson and Le Dain * JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

* Estey and Le Dain JJ. took no part in the judgement.

Constitutional law -- Distribution of legislative powers -- Commercial advertising -- Provincial legislation prohibiting commercial advertising directed at persons under thirteen years of age -- Whether provincial legislation intra vires the provincial legislature -- Colourable legislation -- Impairment of federal undertakings -- Conflict with federal legislation -- Criminal law -- Constitution Act, 1867, ss. 91, 92 -- Consumer Protection Act, R.S.Q., c. P-40.1, ss. 248, 249 -- Broadcasting Act, R.S.C. 1970, c. B-11, s. 3(c).

Constitutional law -- Charter of Rights -- Application -- Exception where express declaration -- Provincial legislation prohibiting commercial advertising directed at persons under thirteen years of age -- Whether provincial legislation protected from the application of s. 2(b) of the Canadian Charter of Rights and Freedoms by a valid and subsisting override provision -- Canadian Charter of Rights and Freedoms, [page928] s. 33 -- Consumer Protection Act, R.S.Q., c. C-40.1, ss. 248, 249, 364 -- Act respecting the Constitution Act, 1982, S.Q. 1982, c. 21, ss. 1, 7.

Constitutional law -- Charter of Rights -- Freedom of expression -- Commercial advertising -- Provincial legislation prohibiting commercial advertising directed at persons under thirteen years of age -- Scope of freedom of expression -- Whether provincial legislation infringes the guarantee of freedom of expression -- Whether limit imposed by the provincial legislation on freedom of expression justifiable under s. 1 of the Canadian Charter -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b) -- Consumer Protection Act, R.S.Q., c. P-40.1, ss. 248, 249 -- Regulation respecting the application of the Consumer Protection Act, R.R.Q., c. P-40.1, r. 1, ss. 87 to 91.

Constitutional law -- Charter of Rights -- Reasonable limits --Provincial legislation prohibiting commercial advertising directed at persons under thirteen years of age -- Whether provincial legislation too vague to constitute a limit prescribed by law -- Whether only evidence of legislative objective contemporary with the adoption of the provincial legislation relevant to justifying provincial legislation as a reasonable limit upon freedom of expression -- Canadian Charter of Rights and Freedoms, s. 1 -- Consumer Protection Act, R.S.Q., c. P-40.1, ss. 248, 249.

Constitutional law -- Charter of Rights -- Fundamental justice -- Life, liberty and security of person -- Whether corporations may invoke the protection of s. 7 of the Canadian Charter of Rights and Freedoms -- Meaning of the word "Everyone" in s. 7.

Civil rights -- Provincial human rights legislation -- Freedom of expression -- Commercial advertising -- Provincial legislation prohibiting commercial advertising directed at persons under thirteen years of age -- Scope of freedom of expression -- Whether provincial legislation infringes the guarantee of freedom of expression -- Whether limit imposed by the provincial legislation on freedom of expression justifiable under s. 9.1 of the Quebec Charter -- Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 3, 9.1 -- Consumer Protection Act, R.S.Q., c. P-40.1, ss. 248, 249 -- Regulation respecting the application of the Consumer Protection Act, R.R.Q., c. P-40.1, r. 1, ss. 87 to 91.

In November 1980, the respondent sought a declaration from the Superior Court that ss. 248 and 249 of the Consumer Protection Act, R.S.Q., c. P-40.1, which prohibited commercial advertising directed at persons under [page929] thirteen years of age, were ultra vires the Quebec legislature and, subsidiarily, that they infringed the Quebec Charter of Human Rights and Freedoms. The Superior Court dismissed the action. On appeal, the respondent also invoked the Canadian Charter of Rights and Freedoms which entered into force after the judgment of the Superior Court. The Court of Appeal allowed the appeal holding that the challenged provisions infringed s. 2(b) of the Canadian Charter and that the limit imposed on freedom of expression by ss. 248 and 249 was not justified under s. 1. This appeal is to determine (1) whether ss. 248 and 249 are ultra vires the Quebec legislature or rendered inoperative by conflict with s. 3 of Broadcasting Act, R.S.C. 1970, c. B-11; (2) whether they are protected from the application of the Canadian Charter by a valid and subsist-

ing override provision; (3) whether they infringe s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter; and if so, (4) whether the limit imposed by ss. 248 and 249 is justifiable under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter; and (5) whether they infringed s. 7 of the Canadian Charter.

Held (Beetz and McIntyre JJ. dissenting): The appeal should be allowed.

(1) Sections 248 and 249 of the Consumer Protection Act are not ultra vires the provincial legislature nor deprived of effect under s. 3 of the Broadcasting Act.
(2) The override provision in s. 364 of the Consumer Protection Act expired on June 23, 1987.
(3) Sections 248 and 249 infringe s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter.
(4) Per Dickson C.J. and Lamer and Wilson JJ. (Beetz and McIntyre JJ. dissenting): Section 248 and 249 are justified under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter.
(5) Section 7 of the Canadian Charter cannot be invoked by the respondent.
(1) Constitution Act, 1867

Sections 248 and 249 of the Consumer Protection Act, as modified by or completed by the regulations, are, like in the Kellogg's case, legislation of general application enacted in relation to consumer protection and are not a colourable attempt, under the guise of a law of general application, to legislate in relation to television advertising. The dominant aspect of the law for purposes [page930] of characterization is the regulation of all forms of advertising directed at persons under thirteen years of age rather than the prohibition of television advertising which cannot be said to be the exclusive or even primary aim of the legislation. The relative importance of television advertising and the other forms of children's advertising subject to exemption and prohibition is not a sufficient basis for a finding of colourability.

Sections 248 and 249 do not purport to apply to television broadcast undertakings. Read together with s. 252 of the Consumer Protection Act, it is clear that ss. 248 and 249 apply to the acts of an advertiser, not to the acts of a broadcaster. The challenged provisions, therefore, do not trench on exclusive federal jurisdiction by purporting to apply to a federal undertaking and, in so doing, affecting a vital part of its operation. Further, the importance of advertising revenues in the operation of a television broadcast undertaking and the fact that the prohibition of commercial advertising directed to persons under thirteen years of age affected the capacity to provide children's programs do not form a sufficient basis on which to conclude that the effect of the provisions was to impair the operation of the undertaking, in the sense that the undertaking was "sterilized in all its functions and activities". The most that can be said is that the provisions "may, incidentally, affect the revenue of one or more television stations".

Sections 248 and 249 are not in conflict with s. 3(c) of the Broadcasting Act. This section does not purport to prevent provincial laws of general application from having an incidental effect on broadcasting undertakings. There is also no conflict or functional incompatibility between the federal regulatory regime applicable to broadcasters adopted by the CRTC and the provincial consumer protection legislation applicable to advertisers. Both schemes have been designed to exist side by side. Neither television broadcasters nor advertisers are put into a position of defying one set of standards by complying with the other. If each group complies with the standards applicable to it,

no conflict between the standards ever arises. It is only if advertisers seek to comply only with the lower threshold applicable to television broadcasters that a conflict arises. Absent an attempt by the federal government to make that lower standard the sole governing standard, there is, therefore, no occasion to invoke the doctrine of paramountcy.

Finally, having found that ss. 248 and 249 were enacted pursuant to a valid provincial objective and that [page931] they do not conflict with federal regulation, it cannot be said that because there are sanctions against a breach of these sections, they are best characterized as being, in pith and substance, legislation relating to criminal law. The province has, under s. 92(15) of the Constitution Act, 1867, jurisdiction to enact penal sanctions in relation to otherwise valid provincial objectives.

(2) Application of Canadian Charter

For the reasons given in Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, s. 364 of the Consumer Protection Act -- the standard override provision enacted by s. 1 of the Act respecting the Constitution Act, 1982, S.Q. 1982, c. 21 -- came into force on June 23, 1982 and ceased to have effect on June 23, 1987. Since s. 364 was not re-enacted pursuant to s. 33(4) of the Canadian Charter, it follows that ss. 248 and 249 of the Consumer Protection Act are no longer protected from the application of the Canadian Charter by a valid and subsisting override provision.

(3) Freedom of Expression

Per Dickson C.J. and Lamer and Wilson JJ.: When faced with an alleged violation of the guarantee of freedom of expression, the first step is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression, or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. If the activity falls within the protected sphere of conduct, the second step is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government's action was to restrict her expression. To make [page932] this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing. Here, respondent's activity is not excluded from the sphere of conduct protected by freedom of expression. The government's purpose in enacting ss. 248 and 249 of the Consumer Protection Act and in promulgating ss. 87 to 91 of the Regulation respecting the application of the Consumer Protection Act was to prohibit particular content of expression in the name of protecting children. These provisions therefore constitute limitations to s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter.

Per Beetz and McIntyre JJ.: Sections 248 and 249 of the Consumer Protection Act, which prohibit advertising aimed at children, infringe s. 2(b) of the Canadian Charter and s. 3 of the Quebec Char-

ter. Sections 248 and 249 restrict a form of expression -- commercial expression -- protected by s. 2(b) and s. 3.

(4) Reasonable Limits

Per Dickson C.J. and Lamer and Wilson JJ.: Sections 248 and 249, read together, are not too vague to constitute a limit prescribed by law. Section 249 can be given a sensible construction, producing no contradiction or confusion with respect to s. 248. Further, ss. 248 and 249 do not leave the courts with an inordinately wide discretion. According to s. 248, the advertisement must have commercial content and it must be aimed at those under thirteen years of age, and s. 249 directs the judge to weigh three factors relating to the context in which the advertisement was presented. Sections 248 and 249, therefore, do provide the courts with an intelligible standard to be applied in determining whether an advertisement is subject to restriction.

In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert post facto a purpose which did not animate the legislation in the first place. However, in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available. The same is true as regards proof that the measure is proportional to its objective. It is equally possible that a purpose which was not demonstrably pressing and substantial at the time of the legislative enactment becomes demonstrably pressing and substantial with the passing of time and the [page933] changing of circumstances. In this case, the question is whether the evidence submitted by the government establishes that children under 13 are unable to make choices and distinctions respecting products advertised and whether this in turn justifies the restriction on advertising put into place. Studies subsequent to the enactment of the legislation can be used for this purpose.

Based on the s. 1 and s. 9.1 materials, ss. 248 and 249 constitute a reasonable limit upon freedom of expression and are justifiable under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter. The objective of regulating commercial advertising directed at children accords with a general goal of consumer protection legislation -- to protect a group that is most vulnerable to commercial manipulation. Children are not as equipped as adults to evaluate the persuasive force of advertising. The legislature reasonably concluded that advertisers should not be able to capitalize upon children's credulity. The s. 1 and s. 9.1 materials demonstrate, on the balance of probabilities, that children up to the age of thirteen are manipulated by commercial advertising and that the objective of protecting all children in this age group is predicated on a pressing and substantial concern.

The means chosen by the government were also proportional to the objective. First, there is no doubt that a ban on advertising directed to children is rationally connected to the objective of protecting children from advertising. The government measure aims precisely at the problem identified in the s. 1 and s. 9.1 materials. It is important to note that there is no general ban on the advertising of children's products, but simply a prohibition against directing advertisements to those unaware of their persuasive intent. Commercial advertisements may clearly be directed at the true purchasers -- parents or other adults. Indeed, non-commercial educational advertising aimed at children is permitted. Second, the evidence adduced sustains the reasonableness of the legislature's conclusion that a ban on commercial advertising directed to children was the minimal impairment of free expression consistent with the pressing and substantial goal of protecting children against manipulation through such advertising. Where the government is best characterized as the singular antagonist of the individual whose right has been infringed, the courts can assess with a high degree of certainty

whether the least intrusive means have been chosen to achieve the government's objective. On the other hand, where the government is best characterized as mediating between the [page934] claims of competing individuals and groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources which cannot be evaluated by the courts with the same degree of certainty. Thus, while evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must nevertheless be a sound evidentiary basis for the government's conclusions. Third, there was no suggestion here that the effects of the ban are so severe as to outweigh the government's pressing and substantial objective. Advertisers are always free to direct their message at parents and other adults. They are also free to participate in educational advertising. The real concern animating the challenge to the legislation is that revenues are in some degree affected. This only implies that advertisers will have to develop new marketing strategies for children's products.

Per Beetz and McIntyre JJ. (dissenting): Sections 248 and 249 of the Consumer Protection Act are not justified under s. 1 of the Canadian Charter or s. 9(1) of the Quebec Charter. The promotion of the welfare of children is certainly an objective of pressing and substantial concern for any government, but it has not been shown in this case that their welfare was at risk because of advertising directed at them. Further, the means chosen were not proportional to the objective. A total prohibition of advertising on television aimed at children below an arbitrarily fixed age makes no attempt to achieve of proportionality.

Freedom of expression is too important a principle to be lightly cast aside or limited. Whether political, religious, artistic or commercial, freedom of expression should not be suppressed except where urgent and compelling reasons exist and then only to the extent and for [page935] the time necessary for the protection of the community. This is not such a case.

(5) Fundamental Justice

Respondent's contention that ss. 248 and 249 of the Consumer Protection Act infringe s. 7 of the Canadian Charter cannot be entertained. The proceedings in this case are brought only against the company and not against any individuals. A corporation, unlike its officers, cannot avail itself of the protection offered by s. 7. The word "Everyone" in s. 7, read in light of the rest of the section, excludes corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and includes only human beings.

Cases Cited

By the majority

Applied: Attorney General of Quebec v. Kellogg's Co. of Canada, [1978] 2 S.C.R. 211; R. v. Oakes, [1986] 1 S.C.R. 103; Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712; Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; considered: Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 749; Attorney-General for Manitoba v. Attorney-General for Canada, [1929] A.C. 260; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; referred to: Commission du salaire mini-

mum v. Bell Telephone Co. of Canada, [1966] S.C.R. 767; Carnation Co. v. Quebec Agricultural Marketing Board, [1968] S.C.R. 238; Re C.F.R.B. and Attorney-General for Canada, [1973] 3 O.R. 819; Capital Cities Communications Inc. v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141; Nova Scotia Board of Censors v. McNeil, [1978] 2 S.C.R. 662; Mann v. The Queen, [1966] S.C.R. 238; Smith v. The Queen, [1960] S.C.R. 776; Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; PSAC v. Canada, [1987] 1 S.C.R. 424; RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460; Palko v. Connecticut, 302 U.S. 319 (1937); Switzman v. Elbling, [1957] S.C.R. 285; Eur. Court H. R., Handyside case, decision of 29 April 1976, Series A No. 24; RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; R. v. Thomsen, [1988] 1 S.C.R. 640; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; Sunday Times v. United Kingdom (1979), 2 E.H.R.R. 245; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; Alliance des professeurs de Montréal v. Procureur général du Québec, [1985] C.A. 376; F.H. Hayhurst Co. v. Langlois, [1984] C.A. 74; Saumur v. City of Quebec, [1953] 2 S.C.R. 299.

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By the minority

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712; Palko v. Connecticut, 302 U.S. 319 (1937); Switzman v. Elbling, [1957] S.C.R. 285; RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

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Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 7, 33.
Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 3, 9.1.
Civil Code of Lower Canada, arts. 987, 1001 to 1011.
Constitution Act, 1867, ss. 91(27), (29), 92(10), (13), (15), (16).
Consumer Protection Act, R.S.Q., c. P-40.1 [previously S.Q. 1978, c. 6], ss. 215, 248, 249, 252, 278, 282, 316, 364 [en. 1982, c. 21, s. 1].
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APPEAL from a judgment of the Quebec Court of Appeal, [1986] R.J.Q. 2441, 32 D.L.R. (4th) 641, 3 Q.A.C. 285, 26 C.R.R. 193, setting aside a judgment of the Superior Court, [1982] C.S. 96. Appeal allowed, Beetz and McIntyre JJ. dissenting.

Yves de Montigny and Richard Tardif, for the appellant.
Yvan Bolduc, Michel Robert, Q.C., Luc Martineau and Marie-Josée Hogue, for the respondent.
Pierre Valois and Gilberte Bechara, for the intervener Gilles Moreau.
Lorraine E. Weinrib, for the intervener the Attorney General for Ontario.
[page938]
Grant S. Garneau, for the intervener the Attorney General for New Brunswick.
Joseph J. Arvay and Jennifer Button, for the intervener the Attorney General of British Columbia.
Robert G. Richards, for the intervener the Attorney General for Saskatchewan.
Louis-Yves Fortier, Q.C., and Michel Sylvestre, for the interveners Pathonic Communications Inc. and Réseau Pathonic Inc.

Marc Legros and Diane Lajoie, for the intervener the Coalition contre le retour de la publicité destinée aux enfants.

Solicitors for the appellant: Jean-K. Samson and Yves de Montigny, Ste-Foy.
Solicitors for the respondent: Heenan, Blaikie, Montréal; Robert, Dansereau, Barré, Marchessault & Lauzon, Montréal.
Solicitors for the intervener Gilles Moreau: Valois & Associés, Montréal.
Solicitor for the intervener the Attorney General for Ontario: Richard F. Chaloner, Toronto.
Solicitor for the intervener the Attorney General for New Brunswick: Gordon F. Gregory, Fredericton.
Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.
Solicitor for the intervener the Attorney General for Saskatchewan: Brian Barrington-Foote, Regina.
Solicitors for the interveners Pathonic Communications Inc. and Réseau Pathonic Inc.: Ogilvy, Renault, Montréal.
Solicitors for the intervener the Coalition contre le retour de la publicité destinée aux enfants: Legros & Lajoie, Anjou.

The judgment of Dickson C.J. and Lamer and Wilson JJ. was delivered by

1 **THE CHIEF JUSTICE AND LAMER AND WILSON JJ.**:-- This appeal raises questions concerning the constitutionality, under ss. 91 and 92 of the Constitution Act, 1867, and ss. 2(b) and 7 of the Canadian Charter of Rights and Freedoms, of ss. 248 and 249 of the Quebec Consumer Protection Act, R.S.Q., c. P-40.1, respecting the prohibition of television advertising directed at persons under thirteen years of age.

2 The appeal is by leave of this Court from the judgment of the Quebec Court of Appeal (Kaufman and Jacques JJ.A.; Vallerand J.A. dissenting) on September 18, 1986, [1986] R.J.Q. 2441, 32 D.L.R. (4th) 641, 3 Q.A.C. 285, 26 C.R.R. 193, allowing an appeal from the judgment of Hugessen A.C.J. of the Superior Court for the District of Montreal on January 8, 1982, [1982] C.S. 96, which dismissed the respondent's action for a declaration that ss. 248 and 249 of the Consumer Protection Act were ultra vires the legislature of the province of Quebec and subsidiarily that they were inoperative as infringing the Quebec Charter of Human Rights and Freedoms, R.S.Q. c. C-12.

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I - The Relevant Legislative and Constitutional Provisions

3 The relevant provisions of the Consumer Protection Act are ss. 248, 249 and 252, which provide:

> 248. Subject to what is provided in the regulations, no person may make use of commercial advertising directed at persons under thirteen years of age.

249. To determine whether or not an advertisement is directed at persons under thirteen years of age, account must be taken of the context of its presentation, and in particular of

(a) the nature and intended purpose of the goods advertised;
(b) the manner of presenting such advertisement;
(c) the time and place it is shown.

The fact that such advertisement may be contained in printed matter intended for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over, or that it may be broadcast during air time intended for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over does not create a presumption that it is not directed at persons under thirteen years of age.

252. For the purposes of sections 231, 246, 247, 248 and 250, "to advertise" or "to make use of advertising" means to prepare, utilize, distribute, publish or broadcast an advertisement, or to cause it to be distributed, published or broadcast.

4 The relevant provisions of the Regulation respecting the application of the Consumer Protection Act, R.R.Q., c. P-40.1, r. 1, are ss. 87 to 91 in Division II of Chapter VII, entitled "Advertising directed at children", which provide:

87. For the purposes of this Division, the word "child" means a person under 13 years of age.

88. An advertisement directed at children is exempt from the application of section 248 of the Act, under the following conditions:

(a) it must appear in a magazine or insert directed at children;

(b) the magazine or insert must be for sale or inserted in a publication which is for sale;

(c) the magazine or insert must be published at intervals of not more than 3 months; and [page940] (d) the advertisement must meet the requirements of section 91.

89. An advertisement directed at children is exempted from the application of section 248 of the Act if its purpose is to announce a programme or show directed at them, provided that the advertisement is in conformity with the requirements of section 91.

90. An advertisement directed at children is exempt from the application of section 248 of the Act, if it is constituted by a store window, a display, a container, a

wrapping or a label or if it appears therein, provided that the requirements of paragraphs a to g, j, k, o and p of section 91 are met.

91. For the purposes of applying sections 88, 89 and 90, an advertisement directed at children may not:

(a) exaggerate the nature, characteristics, performance or duration of goods or services;

(b) minimize the degree of skill, strength or dexterity or the age necessary to use goods or services;

(c) use a superlative to describe the characteristics of goods or services or a diminutive to indicate its cost;

(d) use a comparative or establish a comparison with the goods or services advertised;

(e) directly incite a child to buy or to urge another person to buy goods or services or to seek information about it;

(f) portray reprehensible social or family lifestyles;

(g) advertise goods or services that, because of their nature, quality or ordinary use, should not be used by children;

(h) advertise a drug or patent medicine;
(i) advertise vitamin in liquid, powdered or tablet form
(j) portray a person acting in an imprudent manner;

(k) portray goods or services in a way that suggests an improper or dangerous use thereof;

(l) portray a person or character known to children to promote goods or services, except:

i. in the case of an artist, actor or professional announcer who does not appear in a publication or programme directed at children; [page941] ii. in the case provided for in section 89 where he is illustrated as a participant in a show directed at children.

For the purposes of this paragraph, a character created expressly to advertise goods or services is not considered a character known to children if it is used for advertising alone;

(m) use an animated cartoon process except to advertise a cartoon show directed at children;

(n) use a comic strip except to advertise a comic book directed at children;

(o) suggest that owning or using a product will develop in a child a physical, social or psychological advantage over other children of his age, or that being without the product will have the opposite effect;

(p) advertise goods in a manner misleading a child into thinking that, for the regular price of those goods, he can obtain goods other than those advertised.

Sections 3 and 9.1 of the Quebec Charter of Human Rights and Freedoms provide:

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

9.1. In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

Sections 1, 2(b) and 7 of the Canadian Charter of Rights and Freedoms provide:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

. . .

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; [page942]
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.

II - The Respondent's Declaratory Action and the Judgments of the Superior Court and the Court of Appeal

5 In the fall of 1980 the respondent broadcast advertising messages which the Office de la protection du consommateur claimed were in contravention of ss. 248 and 249 of the Consumer Protection Act. On November 21, 1980, following several warnings from the Office, the respondent instituted an action seeking a declaration that ss. 248 and 249 of the Act were ultra vires or alternatively inoperative. In December of that year some 188 charges of contravention of the Act were laid against the respondent. According to the respondent the charges were ultimately disposed of on the basis that the court which was seized of them lacked jurisdiction: F.H. Hayhurst Co. v. Langlois, [1984] C.A. 74. An interlocutory injunction was granted against the respondent on June 26, 1981 by Landry J. of the Superior Court. That order was appealed. A motion to suspend the injunction pending the appeal was dismissed. A motion for contempt against the respondent and its vice-president was dismissed on the ground that the injunction order was too vague. The penal, injunction and contempt proceedings are not really relevant to the issues in the appeal but they serve to indicate the extent to which the respondent has become embroiled in the application of the challenged provisions and its interest in bringing its action for a declaration.

6 As appears from the judgment of Hugessen A.C.J. (as he then was), the principal contention of the respondent was that ss. 248 and 249 of the Consumer Protection Act were colourable legislation in that, while purporting to apply generally to commercial advertising directed to persons under thirteen [page943] years of age, their true purpose or object, as indicated by the regulations and the evidence of the nature of children's advertising at the time the provisions were adopted, was to prohibit television advertising directed to persons under thirteen years of age. Hugessen A.C.J. expressed the respondent's contention as follows at p. 97: "The principal thrust of the plaintiff's [i.e. Irwin Toy's] attack is that this is colourable legislation. While the prohibition appears to be aimed at all forms of advertising directed to children, the exemptions granted by the regulations and the realities of commercial practice together result in the legislation having for principal, and indeed almost for exclusive purpose the prohibition of televised advertisements directed to children." In the Superior Court the respondent Irwin Toy adduced evidence to show that at the time the challenged provisions were adopted television was by a very large margin the advertising medium most used for children's advertising; that most of the other media used for children's advertising, such as magazines and inserts, were the subject of exemptions under ss. 87-91 of the regulations; and that the other media used for children's advertising that are not exempted from the prohibition in s. 248 of the Act are of such marginal and relatively little significance in practice as to make the prohibition in s. 248 essentially one, for all practical purposes, of television advertising alone. Hugessen A.C.J. conceded that if this were indeed the fact the legislation would be a colourable attempt to prohibit television advertising, but he took the view, acting on judicial notice of other forms of children's advertising, that the challenged provisions of the Act, as modified by the regulations, were not aimed exclusively at television advertising. Because of the submissions that were made in this Court with respect to his reasoning and findings on this issue we quote the pertinent passages of his reasons at p. 97 in full:

> There can be equally no doubt that the attacked legislation affects and is intended to affect television advertising. The words of section 249, quoted above,

make this quite plain. Under the regulations, a number of other forms of advertising, notably that appearing in magazines specifically directed on children, are exempted from the prohibition. Plaintiff points out that television and children's magazines are the two principal vehicles which it uses for advertising aimed at children and that the exemption of the latter means that the [page944] legislation is directed solely at the former. Plaintiff also points out that insofar as its business is concerned, there are no other practical advertising vehicles and that it does not use radio, billboards, direct mail or any of the various other possible supports for its publicity.

The argument is ingenious but seems to me to be based on a fallacious generalisation drawn from plaintiff's particular situation and practice. While it is no doubt true that plaintiff and other toy manufacturers have made heavy use of television for their advertising, it is certainly not the case that all advertising directed at children employs this medium. There is evidence before me of other vehicles being employed by other manufacturers who have a particular interest in the children's market and, even in the absence of such evidence, I believe I could take judicial notice of the fact that sporting goods, candy bars, breakfast cereals, fast foods, soft drinks and a whole range of other goods and services are promoted by means of advertisements directed wholly or largely at children. The vehicles employed can range all the way from billboards in hockey rinks or sports stadiums to giveaways in the form of hats or cards with pictures of athletes, to competitions or colouring books. With very few exceptions, all are covered by the prohibition in the legislation and are not exempted by the regulations. Hence the impugned sections are not aimed exclusively at television advertising.

7 Hugessen A.C.J. held that the purpose of the sections of the Act dealing with advertising, including the challenged provisions, was a valid one of consumer protection falling within provincial legislative jurisdiction under heads 13 and 16 of s. 92 of the Constitution Act, 1867. He indicated the relationship of the challenged provisions to the general purpose of the provisions respecting advertising in Title II as follows at p. 97:

As its name implies, the Consumer Protection Act has for its purpose the protection of the consumer against questionable business practices. Amongst such practices are misleading, deceptive or unfair advertising. The whole of Title II of the Act, comprising almost forty sections including the two presently under attack, deals with this subject. The evident aim and purpose is to make it more difficult for consumers to be led into making unwise bargains or to be subjected to undue pressures. It is not unreasonable for the Legislature to view children as being a particularly vulnerable target in [page945] this respect either as purchasers and consumers in their own right or as the means through which advertisers can bring pressure to bear upon their parents. Legislation aimed at regulating and controlling such advertising has a perfectly proper provincial purpose and is within the powers assigned to the Legislature under section 92 paragr. 13 and paragr. 16 of the B.N.A. Act.

8 With respect to the contention that the challenged provisions were inoperative because they had the effect of preventing the plaintiff from advertising by means of television, a matter within exclusive federal jurisdiction, Hugessen A.C.J., referring to the distinction between the message and the medium, applied the judgment of this Court in Attorney General of Quebec v. Kellogg's Co. of Canada, [1978] 2 S.C.R. 211, in which the Court distinguished between a regulation of television advertising applied to an advertiser and one applied to a television station or broadcast undertaking. Hugessen A.C.J. found it unnecessary to deal with the contention raised in the pleadings but not pressed in argument before him that the challenged provisions infringed the Quebec Charter of Human Rights and Freedoms. He also summarily rejected a contention that the challenged provisions infringed the respondent's right to "commercial speech".

9 The respondent inscribed in appeal on January 14, 1982 from the judgment of the Superior Court dismissing its action for a declaration. On November 6, 1984, it applied to the Court of Appeal for leave to amend its declaration and inscription in appeal to invoke the Canadian Charter of Rights and Freedoms, which entered into force after the judgment of the Superior Court, and to seek, in addition to the declaration already prayed for, a declaration that ss. 248 and 249 of the Consumer Protection Act were inoperative as infringing the freedom of expression guaranteed by s. 2(b) of the Charter and a declaration that the standard override provision in s. 364 of the Consumer Protection Act, purporting to exclude the application of ss. 2 and 7 to 15 of the Charter, was ultra vires, as not being in conformity with the authority conferred [page946] by s. 33 of the Charter. Leave to amend was granted by the Court of Appeal, and on December 13, 1984 the respondent's declaration was amended accordingly. The Court of Appeal also invited the parties to submit material that would be relevant to the question of justification under s. 1 of the Charter, should the challenged provisions be found to infringe s. 2(b) thereof, and this was done.

10 Like the Superior Court, the Court of Appeal disposed of the issue of validity under the division of powers on the basis of the judgment of this Court in Kellogg's, holding, without elaboration, that the case at bar was indistinguishable from Kellogg's. On the issue of validity of the override provision in s. 364 of the Consumer Protection Act, the Court applied its judgment in Alliance des professeurs de Montréal v. Procureur général du Québec, [1985] C.A. 376, in which it had held that the standard override provision enacted by An Act respecting the Constitution Act, 1982, and subsequent statutes and purporting to exclude the application of s. 2 and ss. 7 to 15 of the Canadian Charter of Rights and Freedoms was ultra vires as not being in conformity with the authority conferred by s. 33 of the Charter. On the question of the alleged limitation of the freedom of expression guaranteed by s. 2(b) of the Charter the Court held that freedom of expression extended to commercial expression, that ss. 248 and 249 of the Consumer Protection Act infringed freedom of expression and that the limit imposed on freedom of expression by these provisions was not justified under s. 1 of the Charter. It was on this last point that the members of the Court of Appeal differed. The majority (Kaufman and Jacques JJ.A.) were of the view that the s. 1 materials did not show, in respect of television advertising directed at children between the ages of six and thirteen, a sufficiently important legislative purpose to justify an interference with a guaranteed freedom. While they accepted that the materials established that advertising had a harmful effect on children of six years of age and under, they were of the opinion that it was not shown to have any harmful effect on other children within the contemplated age group so long as the product advertised was not [page947] injurious and the advertising was fair. Vallerand J.A., dissenting on this issue, agreed with his colleagues that the s. 1 materials did not clearly establish the allegedly harmful effect of television advertising directed at persons under 13 years of age but he was of the view that there were grounds

for a serious concern about the possibility of such harm and that this concern made the legislative purpose behind the challenged provisions of sufficient importance to meet the first branch of the test under s. 1 laid down in R. v. Oakes, [1986] 1 S.C.R. 103. Vallerand J.A. was further of the view that the means chosen -- the total prohibition of television advertising directed at persons under thirteen years of age -- was the only effective means of dealing with the problem and that it was proportionate to the purpose served. Vallerand J.A. further rejected the contention that the challenged provisions were void for vagueness. In the result, the appeal from the judgment of the Superior Court was allowed and ss. 248 and 249 of the Consumer Protection Act declared to be inoperative.

III - The Constitutional Questions and the Issues in the Appeal

11 On the appeal to this Court the following constitutional questions were stated by Beetz J. in his order of January 30, 1987:

1. Is s. 364 of the Consumer Protection Act, R.S.Q., c. P-40.1, added by s. 1 of An Act respecting the Constitution Act, 1982, S.Q. 1982, c. 21, inconsistent with the provisions of s. 33 of the Constitution Act, 1982 and so ultra vires and of no force or effect to the extent of the inconsistency pursuant to s. 52(1) of the latter Act?
2. If question 1 is answered in the affirmative, do ss. 248 and 249 of the Consumer Protection Act infringe the rights, freedoms and guarantees contained in ss. 2(b) and 7 of the Canadian Charter of Rights and Freedoms, and if so, can those sections be justified under s. 1 of the Canadian Charter of Rights and Freedoms?
[page948]
3. Are ss. 248 and 249 of the Consumer Protection Act ultra vires the legislature of the province of Quebec, or are they to some degree of no force or effect under s. 3 of the Broadcasting Act, R.S.C. 1970, c. B-11?

12 The issues in the appeal in the order in which we propose to address them, to the extent necessary for the disposition of the appeal, may be summarized as follows:

1. Are ss. 248 and 249 of the Consumer Protection Act ultra vires the legislature of the province of Quebec or rendered inoperative by conflict with s. 3 of the Broadcasting Act, R.S.C. 1970, c. B-11?
2. Are ss. 248 and 249 protected from the application of the Canadian Charter of Rights and Freedoms by a valid and subsisting override provision enacted pursuant to s. 33 of the Charter?
3. Do ss. 248 and 249 infringe the freedom of expression guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms and s. 3 of the Quebec Charter of Human Rights and Freedoms?
4. If so, is the limit imposed by ss. 248 and 249 on freedom of expression justified under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter?

5. Do ss. 248 and 249 infringe s. 7 of the Canadian Charter by creating a liability to deprivation of liberty in terms which are impermissibly vague, contrary to a principle of fundamental justice and to s. 1 of the Charter?

13 This appeal was heard at the same time as the appeals in Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, and Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790. The issues respecting the validity of the standard override provision and whether freedom of expression extends to commercial expression are common to the three appeals. It is convenient, however, in this [page949] appeal to begin with consideration of the question of the validity or operative effect of ss. 248 and 249 of the Consumer Protection Act under the division of powers because that issue logically precedes a consideration of whether the challenged provisions infringe the Canadian Charter of Rights and Freedoms. It was the issue before the Superior Court and the issue that was disposed of first in the Court of Appeal. It was the issue on which the television broadcast interveners Pathonic Communications Inc. and Réseau Pathonic Inc. (hereinafter referred to as "Pathonic") were granted leave to intervene. While the disposition of this issue by the Court of Appeal was not, of course, a ground of appeal by the Attorney General of Quebec, he addressed submissions to this issue, as did the respondent and the interveners.

IV - Whether ss. 248 and 249 are ultra vires the Legislature of the Province of Quebec

14 Four separate issues emerge from the argument in this Court with respect to the validity or operative effect of ss. 248 and 249 of the Consumer Protection Act: (a) whether these provisions are distinguishable, in so far as their constitutional characterization is concerned, from the challenged provision of the advertising regulations under the Consumer Protection Act that was characterized by this Court in Kellogg's, supra, as having a valid provincial purpose; (b) whether, as contended by Pathonic, their effect on a television broadcast undertaking is such as to render them, despite the judgment of the Court in Kellogg's, inoperative in so far as television advertising is concerned; (c) whether they are practically and functionally incompatible with the regulatory scheme put into place by the Canadian Radio-Television and Telecommunications Commission (CRTC) pursuant to the Broadcasting Act, R.S.C. 1970, c. B-11; and (d) whether they amount to an invasion of the federal criminal law power. We discuss each of these issues in turn.

A. The Constitutional Characterization of ss. 248 and 249

15 In Kellogg's, the challenged provision was s. 11.53 of Division XI-A, entitled "Advertising [page950] intended for children", of the General Regulations adopted pursuant to the authority conferred on the Lieutenant-Governor in Council by s. 102(o) of the Consumer Protection Act to make regulations "to determine standards for advertising goods, whether or not they are the object of a contract, or credit, especially all advertising intended for children". Section 11.53 of the regulations provided:

> 11.53 No one shall prepare, use, publish or cause to be published in Quebec advertising intended for children which:
>
> . . .

(n) employs cartoons;

16 The Kellogg companies were charged with breaches of this provision in connection with certain television advertisements and an injunction was sought against them to restrain further infractions. An injunction was granted by the Superior Court, [1974] C.S. 498, but an appeal from this judgment was allowed by a majority of the Court of Appeal (Tremblay C.J. and Montgomery J.A.), [1975] C.A. 518, who held that since the content of television broadcasting fell within exclusive federal jurisdiction provincial legislation with respect to such content was inoperative, citing the judgment of this Court in Commission du salaire minimum v. Bell Telephone Co. of Canada, [1966] S.C.R. 767, in support of this conclusion. Turgeon J.A., dissenting, applied the distinction between legislation in relation to a matter and legislation incidentally affecting a matter. He held the challenged regulation and the law under which it was adopted to be within provincial jurisdiction although it might incidentally affect a matter within federal jurisdiction.

17 Martland J., with whom Ritchie, Pigeon, Dickson, Beetz and de Grandpré JJ. concurred, held that the challenged provision validly applied to television advertising because it was part of a general regulation of advertising for children that had a valid provincial purpose and its effect on a television broadcast undertaking was a merely incidental one. Laskin C.J., dissenting, with whom Judson and Spence JJ. concurred, was of the view that the challenged provision could not validly [page951] apply to prevent an advertiser from advertising its products on television because in such application it encroached on a matter within exclusive federal jurisdiction, the content of television broadcasting.

18 Like Turgeon J.A. in the Court of Appeal, Martland J. applied the distinction between legislation in relation to a matter and legislation which incidentally affects a matter, citing the judgment of the Court in Carnation Co. v. Quebec Agricultural Marketing Board, [1968] S.C.R. 238, as an analogous application of this distinction. He held that the challenged provision was aimed at certain kinds of advertising by advertisers and not at the operation of a television broadcast undertaking. He said at p. 225:

> In my opinion this regulation does not seek to regulate or to interfere with the operation of a broadcast undertaking. In relation to the facts of this case it seeks to prevent Kellogg from using a certain kind of advertising by any means. It aims at controlling the commercial activity of Kellogg. The fact that Kellogg is precluded from using televised advertising may, incidentally, affect the revenue of one or more television stations but it does not change the true nature of the regulation. In this connection the case of Carnation Company Ltd. v. The Quebec Agricultural Marketing Board is analogous.

Martland J. stressed the fact that the regulation was being applied and the injunction sought against Kellogg and not against a television station. He reserved his opinion as to whether the regulation could be validly applied against a television station. He said at p. 225: "Whether the regulation could be applied to the television station itself or whether an injunction against Kellogg would bind such station does not arise in this case and I prefer to express no opinion with respect to it."

19 The disputed regulation in Kellogg's, as Martland J. observed, sought to prevent the advertiser "from using a certain kind of advertising by any means." It was concerned with a certain kind

of advertising content but it applied to all advertising media employing such content. Moreover, it had a limited application to advertising content, merely [page952] prohibiting the use of cartoons, but otherwise permitting children's advertising. It was thus a provision of general application in pursuit of the legislative object which Martland J. characterized as "to protect children in Quebec from the harmful effect of the kinds of advertising therein prohibited" (p. 223). It was aimed at all children's advertising employing cartoons, not at television advertising as such nor at the television broadcaster. The implication of the distinction emphasized by Martland J. between application to the advertiser and application to a broadcast undertaking is that provincial legislation of general application with respect to advertising content would only be considered to encroach on exclusive federal jurisdiction with respect to broadcast content to the extent it was applied to a broadcast undertaking, that is, to the control over content exercised by such an undertaking rather than by an advertiser.

20 In the case at bar the respondent contended that the challenged provision of the Consumer Protection Act, when read together with the regulations to which they are made expressly subject and considered in the light of the evidence of their practical effect, exhibit a different purpose or object from that of the regulation that was in issue in Kellogg's. The respondent contends that when the challenged provisions are seen in the context of the regulations and the evidence it is clear that they are aimed essentially and primarily at television as a medium of children's advertising, a matter within exclusive federal jurisdiction. In support of this contention the respondent emphasizes the relative importance of the prohibition of television advertising directed to persons under thirteen years of age, as indicated by the evidence and the extent of the exemptions provided by the regulations for other forms of children's advertising. The respondent contends that the trial judge was in error in taking judicial notice of the existence and relative importance of other forms of children's advertising. There is no doubt that the evidence adduced by the respondent at trial and the s. 1 and s. 9.1 materials submitted by the [page953] Attorney General of Quebec show that television advertising is by any measure the most important form of children's advertising. It is indisputably, however, not the only form as the exemptions indicate. Moreover, the genuine concern with the other forms of children's advertising is indicated by the extent to which the exempted forms are made subject to the content requirements of s. 91 of the regulations. The Attorney General of Quebec submitted that television advertising, because of its massive penetration and ease of access for children, did not lend itself to as precise regulation as other forms of communication and must therefore be the subject of a particular regime. The respondent argued that this was an admission that the prohibition in s. 248 of the Act was primarily directed at television advertising. We take it to have been in justification of a prohibition in the case of television advertising rather than a concession that the challenged provisions as modified by the regulations are aimed primarily at such advertising. The Attorney General of Quebec noted that there are other forms of children's advertising subject to the prohibition. On the whole, despite the fact that the relative impact on television advertising is much greater than it was in Kellogg's, we are of the opinion that ss. 248 and 249 of the Act, as modified by or completed by the regulations, can also be said to be legislation of general application enacted in relation to consumer protection, as in Kellogg's, rather than a colourable attempt, under the guise of a law of general application, to legislate in relation to television advertising. In other words, the dominant aspect of the law for purposes of characterization is the regulation of all forms of advertising directed at persons under thirteen years of age rather than the prohibition of television advertising which cannot be said to be the exclusive or even primary aim of the legislation. In effect, we agree with Hugessen A.C.J. on the general significance, for the purposes of characterization of the legislation, of the fact that other forms of advertising directed to persons under thirteen years,

whatever be their relative importance, are not exempted from the prohibition. The existence of such other forms of children's advertising was not seriously challenged but rather their [page954] significance from the constitutional point of view in attempting to ascertain the dominant aspect of the legislation. The existence of such other forms of children's advertising did not rest entirely on the judicial notice taken by the trial judge, who said that even if there was not evidence of such other forms he would be prepared to take judicial notice of them. The relative importance of television advertising and the other forms of children's advertising subject to exemption and prohibition is not in our opinion a sufficient basis for a finding of colourability. There is no suggestion that the legislative or regulatory concern with these other forms of children's advertising is a mere pretence or façade for a primary, if not exclusive, purpose of regulating television advertising. It is not the relative importance of these other forms of advertising but the bona fide nature of the legislative concern with them that is in issue on the question of colourability.

B. The Effect of ss. 248 and 249 on Broadcasting Undertakings

21 The interveners Pathonic, as we understood their argument, did not contend, as did the respondent, that the challenged provisions of the Consumer Protection Act were distinguishable on their face in respect of the characterization of their purpose or object from the provision of the regulations that was considered in Kellogg's. They contended that the challenged provisions were rendered ultra vires or inoperative because of their effect on a television broadcast undertaking. They submitted that the prohibition of television advertising affected a vital part of the operation of such an undertaking and impaired the undertaking. The interveners suggested that what distinguished Kellogg's from the case at bar was the presence of a television undertaking in the proceedings. The presence of the interveners in the proceedings does not, of course, make the challenged provisions ones that are being applied to a television undertaking. [page955] What the interveners really suggest is that had a television broadcast undertaking been represented in Kellogg's to establish the effect of a regulation of television advertising on such an undertaking the Court might have come to a different conclusion.

22 Recently, in Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 749 (Bell Canada 1988), Beetz J., writing for the Court, reviewed the principles of constitutional interpretation applicable to the regulation of federal undertakings. He distinguished between situations in which (1) a provincial law would, if applied to a federal undertaking, affect a vital part of its operations and (2) the effect of the provincial law on a federal undertaking, whether applied to it directly or not, would impair its operations (at pp. 859-60):

> The impairment test is not necessary in cases in which, without going so far as to impair the federal undertaking, the application of the provincial law affects a vital part of the undertaking ....
>
> In order for the inapplicability of provincial legislation rule to be given effect, it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralysing it.

The federal government has exclusive jurisdiction as regards "essential and vital elements" of a federal undertaking, including the management of such an undertaking, because those matters form the

"basic, minimum and unassailable content" of the head of power created by operation of s. 91(29) and the exceptions in s. 92(10) of the Constitution Act, 1867. No provincial law touching on those matters can apply to a federal undertaking. However, where provincial legislation does not purport to apply to a federal undertaking, its incidental effect, even upon a vital part of the operation of the undertaking, will not normally render the provincial legislation ultra vires.

23 The case of Attorney-General for Manitoba v. Attorney-General for Canada, [1929] A.C. 260 [page956] (P.C.), upon which Pathonic relied a great deal in its submissions, provides a counter-example to this last statement and illustrates the doctrine of impairment. The legislation there in issue, the Manitoba Municipal and Public Utility Board Act, S.M. 1926, c. 33, s. 162, provided that: "No person, firm, or corporation shall sell, or offer or agree to sell, or directly or indirectly attempt to sell, in Manitoba, any shares, stocks, bonds or other securities of or issued by any company unless the company has first been approved by the Board as one the securities of which are permitted to be sold in Manitoba and a certificate to that effect ... [is] issued by the Board." The Act exempted block sales of securities by companies to brokers but did regulate the sale of those securities by brokers to the public. In this sense, as Pathonic submitted, s. 162 did not apply to the companies themselves but applied, rather, to brokers. The issue before the Privy Council was whether s. 162 was ultra vires the province in so far as it purported to apply to the sale of the shares of a federally incorporated company.

24 In concluding that the province did not have jurisdiction to enact s. 162, Viscount Sumner, who delivered the judgment of their Lordships, considered the effect of the provision on federal incorporated companies (at pp. 266-67):

> An artificial person, incorporated under the powers of the Dominion with certain objects, invested by these powers with capacities to trade in pursuit of those objects and with the status and capacities of a Dominion incorporation, is ... liable in the most ordinary course of business to be stillborn from the moment of incorporation, sterilized in all its functions and activities, thwarted and interfered with in its first and essential endeavours to enter on the beneficial and active employment of its powers, by the necessity of applying to a Provincial executive for permission to begin to act and to raise its necessary capital, a permission which may be subjected to conditions or refused altogether according to the view, which in their discretion that executive may take of the plans, promises and prospects of a creation of the Dominion.

Despite the fact that s. 162 did not apply to federally incorporated companies, it succeeded, indirectly, [page957] in impairing their operation. That consequence was sufficient to render the provision ultra vires the province of Manitoba.

25 Although the impairment doctrine was developed in cases concerning the federal power to incorporate companies, Beetz J., in Bell Canada 1988, identified the relevance of this doctrine to the regulation of federal undertakings (at p. 862):

> [T]he transposition of the concept of impairment from the field of federally incorporated companies to that of federal undertakings may be valid in cases in which the application of provincial legislation to federal undertakings in fact impairs the latter, paralyses them or destroys them.

As the Attorney-General for Manitoba case makes clear, the concept of impairment extends not only to the direct application of provincial legislation but also to the indirect effect of that legislation. Thus, where provincial legislation applied to a federal undertaking affects a vital part of that undertaking or, though not applied directly to a federal undertaking, has the effect of impairing its operation, the legislation in question is ultra vires.

26 There is no doubt that television advertising is a vital part of the operation of a television broadcast undertaking. The advertising services of these undertakings therefore fall within exclusive federal legislative jurisdiction. It is well established that such jurisdiction extends to the content of broadcasting: Re C.F.R.B. and Attorney-General for Canada, [1973] 3 O.R. 819 (C.A.); Capital Cities Communications Inc. v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141, and advertising forms a part of such content. However, ss. 248 and 249 of the Consumer Protection Act do not purport to apply to television broadcast undertakings. Read together with s. 252, it is clear that ss. 248 and 249 apply to the acts of an advertiser, not to the acts of a broadcaster. Nor did Pathonic contend that ss. 248 and 249 applied to television broadcasters. Indeed, it went so far as to submit that the province of Quebec was unable to regulate the advertising practices of television broadcasters because signals coming from outside the province and received directly by the public or re-distributed [page958] by a cable company could not be subject to the standards of the Consumer Protection Act. While this submission demonstrates that the Quebec government can only achieve partial success in controlling commercial advertising aimed at children, it also demonstrates that a province can aim to regulate provincial advertisers without applying its regulations to television broadcasters situate in the province. Therefore, the provisions in question do not trench on exclusive federal jurisdiction by purporting to apply to a federal undertaking and, in so doing, affecting a vital part of its operation.

27 Do the provisions nevertheless have the effect of impairing the operation of a federal undertaking? The interveners adduced evidence showing the importance of advertising revenues in the operation of a television broadcast undertaking and that the prohibition of commercial advertising directed to persons under thirteen years of age affected the capacity to provide children's programs. This is not a sufficient basis on which to conclude that the effect of the provisions was to impair the operation of the undertaking, in the sense that the undertaking was "sterilized in all its functions and activities". The most that can be said, as in Kellogg's (at p. 225), is that the provisions "may, incidentally, affect the revenue of one or more television stations". Nor can it be said that the provisions have the potential to impair the operation of a broadcast undertaking. Interpreted strictly, as under the Application Guide for Sections 248 and 249 (Advertising Intended for Children Under 13 Years of Age) produced by the Office de la protection du consommateur (October 8, 1980), products and services aimed exclusively at children "may not, for all practical purposes, be advertised during children's programs (unless the message is presented so that it cannot, in any way, arouse a child's interest)." Even if it were true, as Pathonic submitted, that applied this way, the provisions prevent the production of programs aimed at children since they remove potential funding for those programs -- a contention which was denied by the Attorney General of Quebec, who insisted that advertisers were always free to aim their message [page959] at adults rather than children, and which must also be considered in light of the explicit acceptance in the Application Guide for Sections 248 and 249 (at p. 9) of educational advertising aimed at children produced by private companies -- this would only demonstrate that the legislation constrains business decisions both for those who produce advertisements and for those who carry them. It should also be noted that Pathonic is subject to a parallel, though somewhat less stringent, requirement under the terms of the Broadcast Code for

Advertising to Children, which Code is incorporated by reference as a condition of Pathonic's licence to carry on a broadcasting transmitting undertaking granted by the CRTC (at p. 3):

> Pre-schoolers
>
> Children of pre-school age often are unable to distinguish between program content and actual promotions. Therefore, any commercials scheduled for viewing during the school-day morning hours must be directed to the family, parent, or an adult, rather than to children.

Pathonic did not claim that such a limit on the conduct of its business had or could have the effect of disrupting its operations. Nor do we find that ss. 248 and 249 have or could have that effect.

C. The Compatibility of ss. 248 and 249 with Federal Regulation

28 Irwin Toy submitted that even if the effect of ss. 248 and 249 was not to impair the operation of a federal undertaking, these provisions conflicted with the declaration found in s. 3(c) of the Broadcasting Act, R.S.C. 1970, c. B-11 (now R.S.C., 1985, c. B-9), which reads:

> Broadcasting Policy for Canada
>
> 3. It is hereby declared that
>
> . . .
>
> (c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only [page960] to generally applicable statutes and regulations, is unquestioned;

The respondent argued that the only federal regulation restricting public access to television programming were the Television Broadcasting Regulations, C.R.C. 1978, c. 381. Because these regulations do not restrict advertising aimed at children, and because s. 3 of the Broadcasting Act enshrines the right to freedom of expression subject only to generally applicable statutes or regulations, Irwin Toy submitted that the scheme of the Broadcasting Act provided legislative protection for their advertising activities. Under the doctrine of paramountcy, ss. 248 and 249, to the extent they purported to apply to television advertising, were therefore of no force or effect.

29 This argument cannot succeed. It is based, in part, on a misunderstanding of the Interpretation Act, R.S.C. 1970, c. I-23 (now R.S.C., 1985, c. I-21). The respondent concluded from ss. 2 and 3 of the Interpretation Act that the word "loi" in the French text of s. 3 of the Broadcasting Act refers only to federal laws of general application. Therefore, no provincial law of general application could restrict advertising. In fact, s. 2 of the Interpretation Act sets out the definition of various terms, including "loi" and the corresponding English term, "Act", as those terms are to be interpreted "in this Act", not as those terms are to be interpreted in every federal Act. Section 2 simply makes clear that the kind of Act or "loi" to which the Interpretation Act applies is a federal Act, not a provincial Act. That does not imply that whenever the word "loi" appears in a federal statute, it can only refer to a federal Act. Furthermore, the English text of s. 3 of the Broadcasting Act refers to "statutes", not "Acts". Thus, the definition of "Act" or "loi" in s. 2 of the Interpretation Act is

simply not relevant. Even assuming that it could have that effect, the general declaration found in s. 3(c) of the Broadcasting Act does not purport to prevent provincial laws of general application from having an incidental effect on broadcasting undertakings.

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30 More significantly, perhaps, the interveners, Pathonic, drew attention to a condition of its licence imposed by the CRTC pursuant to s. 17(1)(a) of the Broadcasting Act and typical of one of the conditions imposed on private television broadcasters:

> It is a condition of this licence that the licensee shall adhere to the provisions of the Broadcast Code for Advertising to Children published by the Canadian Association of Broadcasters and to any amendment or amendments which may from time-to-time be made thereto.

As we understood their argument, Pathonic contended that such a condition of licence constituted regulatory action by the CRTC occupying the field as concerns television advertising aimed at children.

31 To address this argument, one must first outline the nature of the Broadcast Code for Advertising to Children and the manner in which it functions as an instrument of CRTC policy. According to Section A of the Code (revised, 1984):

> The Broadcast Code for Advertising to Children has been designed to complement the general principles for ethical advertising outlined in the Canadian Code of Advertising Standards which applies to all advertising. Both Codes are supplementary to all federal and provincial laws and regulations governing advertising, including those regulations and procedures established by the Canadian Radio-Television and Telecommunications Commission, the Department of Consumer and Corporate Affairs and Health and Welfare Canada.

The Code goes on to establish detailed guidelines which are in substance quite similar to the content standards established in the Regulation respecting the application of the Consumer Protection Act (albeit with respect to advertising not carried on television) and are in many cases more specific and demanding. The Code does, however, contemplate that advertisements which meet the requirements set out therein can aim at children. Indeed, it establishes a procedure for pre-clearance of advertisements by the "Children's Section of the Advertising Standards Council". Nevertheless, the Code is explicitly designed to supplement provincial and [page962] federal laws and does not purport to constitute the sole regulatory mechanism applicable to children's advertising.

32 While the Code is published by the Canadian Association of Broadcasters and is thus an instrument of self-regulation, it has been subject to formal consideration by the CRTC. On August 21, 1974, the CRTC issued a public announcement entitled "Broadcast Advertising to Children and Children's Programming" commenting on the Broadcast Code of Advertising and its relationship to CRTC policy (Broadcast Advertising Handbook (1978), at p. 11):

> Concern expressed to the Commission has indicated that even though the self-regulatory procedures of the Code have proven effective, further assurances were required to ensure adherence to the Code by legally enforceable procedures.
>
> The House of Commons Standing Committee on Broadcasting, Films and Assistance to the Arts, in its report on children's advertising, indicated that regardless of how excellent the procedures of self-regulation through the Broadcast Code might be, a stronger enforcement system would be desirable.
>
> The Commission, in conformity with its previous undertaking to ensure the effectiveness of the Code and to meet the expressed concerns, hereby gives notice
>
> 1. to all holders of licences to carry on broadcasting transmitting undertakings in Canada and all applicants for such licences, that adherence to the provisions of the Broadcast Code for Advertising to Children will be made a specific condition of each licence; and
> 2. that a representative of the CRTC will formally represent the Commission at all deliberations of the Children's Advertising Sections of the Advertising Standards Council/Conseil des normes de la publicité which have the responsibility for pre-clearing all children's commercials.

Thus, by requiring, as a condition of licence, that television broadcasters adhere to the Code, and by participating in the pre-clearance deliberations respecting advertisements aimed at children, the CRTC has transformed the Code into more than an instrument of industry self-regulation; it has become the federal regulatory regime applicable to private television broadcasters.

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33 The regulatory regime put into place through the vehicle of the Code is designed to apply both to television broadcasters and to advertisers. However, as concerns advertisers, the CRTC does not claim to exercise any mandatory control. Conditions of licence apply only to broadcasters. The Code itself refers to the fact (at p. 6) that the Association of Canadian Advertisers, Inc. and the Canadian Toy Manufacturers Association have agreed to abide by the Code. But the Code does not purport to have the force of law with regard to them.

34 Consequently, can it be said that there is a conflict between a federal and provincial regulatory regime such that the doctrine of paramountcy must be invoked? It bears repeating that the federal conditions of licence on the one hand and provincial consumer protection legislation on the other apply to different actors: television broadcasters and advertisers. From a functional standpoint, however, any standard applied to television broadcasters will necessarily restrict the content of what advertisers produce for television, just as any standard applied to advertisers will necessarily restrict the content of what broadcasters show on television. Thus, if there is a "practical and functional incompatibility" (Bell Canada 1988, supra, at p. 867) between the standards applied to television advertisers and those applied to television broadcasters, the doctrine of paramountcy will come into play. If the two sets of standards are compatible, however, there is no need to invoke paramountcy.

In Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, Dickson J. (as he then was), writing for the majority, made the following observation in this regard (at p. 191):

> In principle, there would seem to be no good reasons 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.

35 Had the CRTC adopted the Broadcast Code for Advertising to Children not as "supplementary to all federal and provincial laws and regulations [page964] governing advertising", but rather as the sole and minimum standard to be applied, the question of conflict and functional incompatibility might have been a real one. But the federal and provincial schemes have been designed to exist side by side. Pre-clearance by the Children's Section of the Advertising Standards Council supplements a parallel evaluation system overseen by the Comité sur l'application des articles 248 et 249 de la Loi sur la protection du consommateur (see the Application Guide for Sections 248 and 249, op. cit., at p. 1). Neither television broadcasters nor advertisers are put into a position of defying one set of standards by complying with the other. If each group complies with the standards applicable to it, no conflict between the standards ever arises. It is only if advertisers seek to comply only with the lower threshold applicable to television broadcasters that a conflict arises. Absent an attempt by the federal government to make that lower standard the sole governing standard, there is no occasion to invoke the doctrine of paramountcy.

D. Sections 248 and 249 and the Criminal Law Power

36 Irwin Toy's final submission concerning the division of powers was that the provisions in issue encroached on the criminal law power conferred on Parliament by s. 91(27) of the Constitution Act, 1867. Section 278 of the Consumer Protection Act provides penalties, including fines and possible imprisonment, for those who are "guilty of an offence constituting a prohibited practice". Section 215 defines "prohibited practice" as "[a]ny practice contemplated in sections 219 to 251", and while the definition applies to Title II on business practices, there is no other definition of the term to explain its use in s. 278. However, s. 278 does not constitute the only sanction that can be applied against a breach of s. 248. Indeed, as we have already mentioned, the Office de la protection du consommateur at one stage sought an injunction ordering Irwin Toy to cease using commercial advertising aimed at children. Section 316 of the Act empowers the President of the Office to seek [page965] injunctions against persons engaged in prohibited practices.

37 Having found that ss. 248 and 249 were enacted pursuant to a valid provincial objective and that they do not conflict with federal regulation, it cannot be said that because there are sanctions against a breach of these sections, they are best characterized as being, in pith and substance, legislation relating to criminal law. Subsection 92(15) of the Constitution Act, 1867 provides that each provincial legislature may make laws respecting:

> 15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

This Court has on numerous occasions upheld provincial penal laws enacted in relation to otherwise valid provincial objectives: Nova Scotia Board of Censors v. McNeil, [1978] 2 S.C.R. 662; Mann v.

The Queen, [1966] S.C.R. 238, and Smith v. The Queen, [1960] S.C.R. 776. The legislation here in issue is no different.

V - Whether ss. 248 and 249 Are Protected from the Application of the Canadian Charter by a Valid and Subsisting Override Provision

38 Section 364 of the Consumer Protection Act, R.S.Q., c. P-40.1, added to that Act by s. 1 of the Act respecting the Constitution Act, 1982, S.Q. 1982, c. 21, reads as follows:

> This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B of the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom).

Section 364 ceased to have effect by operation of s. 33(3) of the Canadian Charter of Rights and Freedoms five years after it came into force, and it was not re-enacted pursuant to s. 33(4) of the Charter. The legislation enacting s. 364 came into [page966] force on June 23, 1982. As this Court decided in Ford, to the extent that s. 7 of the enacting legislation attempted to give retrospective effect to the override provisions it was of no force or effect. The result of this is that the standard override provisions enacted by s. 1 of that Act came into force on June 23, 1982 in accordance with the first paragraph of s. 7 and not on April 17, 1982 as the portion of s. 7 purporting to give retrospective effect to s. 1 envisaged. This means that s. 364 ceased to have effect on June 23, 1987 and that ss. 248 and 249 of the Consumer Protection Act are no longer protected from the application of the Canadian Charter by a valid and subsisting override provision. As was stated in Ford (at p. 734), "on an application for a declaratory judgment in a case of this kind the Court should declare the law as it exists at the time of its judgment." We will thus proceed on the basis that ss. 248 and 249 are subject to the provisions of both the Quebec Charter of Human Rights and Freedoms and the Canadian Charter of Rights and Freedoms.

VI - Whether ss. 248 and 249 Limits Freedom of Expression as Guaranteed by the Canadian and Quebec Charters

A. The Ford and Devine Appeals

39 Although the issue relating to freedom of expression in this appeal was argued together with the Ford and Devine appeals, it is important to emphasize that, unlike in the present case, the two latter cases involved government measures restricting one's choice of language. As the Court stated in Ford (at p. 748):

> Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression.

Having determined that freedom of expression prevents prohibitions against using the language of one's choice, the question became whether, in the Court's words (at p. 766) "a commercial purpose removes the expression ... from the scope of protected [page967] freedom." Thus, while choice of language was the principal matter in those appeals, the commercial element to the expression in issue raised an ancillary question. As the Court made clear at the end of its discussion concerning freedom of expression (at p. 767):

> Although the expression in this case has a commercial element, it should be noted that the focus here is on choice of language and on a law which prohibits the use of a language. We are not asked in this case to deal with the distinct issue of the permissible scope of regulation of advertising (for example to protect consumers) where different governmental interests come into play, particularly when assessing the reasonableness of limits on such commercial expression pursuant to s. 1 of the Canadian Charter or to s. 9.1 of the Quebec Charter.

The instant case concerns the regulation of advertising aimed at children and thus raises squarely the issues which were not treated in Ford. Whereas it was sufficient in Ford to reject the submission that the guarantee of freedom of expression does not extend to signs having a commercial message, this case requires a determination whether regulations aimed solely at commercial advertising limit that guarantee. This, in turn, requires an elaboration of the conclusion already reached in Ford that there is no sound basis on which to exclude commercial expression, as a category of expression, from the sphere of activity protected by s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter.

B. The First Step: Was the Plaintiff's Activity Within the Sphere of Conduct Protected by Freedom of Expression?

40 Does advertising aimed at children fall within the scope of freedom of expression? This question must be put even before deciding whether there has been a limitation of the guarantee. Clearly, not all activity is protected by freedom of expression, and governmental action restricting this form of advertising only limits the guarantee if the activity in issue was protected in the first place. Thus, for example, in Reference Re Public Service [page968] Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; PSAC v. Canada, [1987] 1 S.C.R. 424; and RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460, the majority of the Court found that freedom of association did not include the right to strike. The activity itself was not within the sphere protected by s. 2(d); therefore the government action in restricting it was not contrary to the Charter. The same procedure must be followed with respect to an analysis of freedom of expression; the first step to be taken in an inquiry of this kind is to discover whether the activity which the plaintiff wishes to pursue may properly be characterized as falling within "freedom of expression". If the activity is not within s. 2(b), the government action obviously cannot be challenged under that section.

41 The necessity of this first step has been described, with reference to the narrower concept of "freedom of speech", by Frederick Schauer in his work entitled Free Speech: A Philosophical Enquiry (Cambridge, 1982) at p. 91:

> We are attempting to identify those things that one is free (or at least more free) to do when a Free Speech Principle is accepted. What activities justify an

> appeal to the concept of freedom of speech? These activities are clearly something less than the totality of human conduct and ... something more than merely moving one's tongue, mouth and vocal chords to make linguistic noises.

"Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court "the matrix, the indispensable condition of nearly every other form of freedom" (Palko v. [page969] Connecticut, 302 U.S. 319 (1937), at p. 327); for Rand J. of the Supreme Court of Canada, it was "little less vital to man's mind and spirit than breathing is to his physical existence" (Switzman v. Elbling, [1957] S.C.R. 285, at p. 306). And as the European Court stated in the Handyside case, Eur. Court H. R., decision of 29 April 1976, Series A No. 24, at p. 23, freedom of expression:

> ... is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no "democratic society".

We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s. 2(b) challenge would proceed.

42 The content of expression can be conveyed through an infinite variety of forms of expression: [page970] for example, the written or spoken word, the arts, and even physical gestures or acts. While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection. It is not necessary here to delineate precisely when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee. But it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen. As McIntyre J., writing for the majority in RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, observed in the course of discussing whether picketing fell within the scope of s. 2(b), at p. 588:

> Action on the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression. That freedom, of course, would not extend to protect threats of violence or acts of violence.

Indeed, freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure.

43 The broad, inclusive approach to the protected sphere of free expression here outlined is consonant with that suggested by some leading theorists. Thomas Emerson, in his article entitled "Toward a General Theory of the First Amendment" (1963), 72 Yale L.J. 877, notes (at p. 886) that:

> ... the theory of freedom of expression involves more than a technique for arriving at better social judgments through democratic procedures. It comprehends a vision of society, a faith and a whole way of life. The theory grew out of an age that was awakened and invigorated by the idea of a new society in which man's mind was free, his fate determined by his own powers of reason, and his prospects of creating a rational and enlightened civilization virtually unlimited. It is put forward as a prescription for attaining a creative, progressive, exciting and intellectually robust community. It contemplates a mode of life that, through encouraging toleration, skepticism, reason and initiative, will allow man to realize his full potentialities. It spurns the alternative of [page971] a society that is tyrannical, conformist, irrational and stagnant.

44 D.F.B. Tucker in his book Law, Liberalism and Free Speech (1985) describes what he calls a "deontological approach" to freedom of expression as one in which "the protected sphere of liberty is delineated by interpreting an understanding of the democratic commitment" (p. 35). It is upon precisely this enterprise that we have embarked.

45 Thus, the first question remains: Does the advertising aimed at children fall within the scope of freedom of expression? Surely it aims to convey a meaning, and cannot be excluded as having no expressive content. Nor is there any basis for excluding the form of expression chosen from the sphere of protected activity. As we stated in Ford, supra, at pp. 766-67:

> Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian Charter should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the Charter.

Consequently, we must proceed to the second step of the inquiry and ask whether the purpose or effect of the government action in question was to restrict freedom of expression.

46 It bears repeating that in Ford, the discussion of commercial expression ended at this first stage. The Court had already found that the aim of ss. 58 and 69 of the Charter of the French Language was to prohibit the use of one's language of choice. The centrality of choice of language to freedom of expression transcends any significance that the context in which the expression is intended to be used might have. It was therefore unnecessary in that case to inquire further whether the restriction of commercial expression limited freedom of expression.

C. The Second Step: Was the Purpose or Effect of the Government Action to Restrict Freedom of Expression?

47 Having found that the plaintiff's activity does fall within the scope of guaranteed free expression, [page972] it must next be determined whether the purpose or effect of the impugned governmental action was to control attempts to convey meaning through that activity. The importance of focussing at this stage on the purpose and effect of the legislation is nowhere more clearly stated than in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at pp. 331-32 where Dickson J. (as he then was), speaking for the majority, observed:

> In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity.
>
> Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the Charter. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of Charter rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact.

Dickson J. went on to specify how this inquiry into purpose and effects should be carried out (at p. 334):

> In short, I agree with the respondent that the legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability [page973] and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.

If the government's purpose, then, was to restrict attempts to convey a meaning, there has been a limitation by law of s. 2(b) and a s. 1 analysis is required to determine whether the law is incon-

sistent with the provisions of the Constitution. If, however, this was not the government's purpose, the court must move on to an analysis of the effects of the government action.

a. Purpose

48 When applying the purpose test to the guarantee of free expression, one must beware of drifting to either of two extremes. On the one hand, the greatest part of human activity has an expressive element and so one might find, on an objective test, that an aspect of the government's purpose is virtually always to restrict expression. On the other hand, the government can almost always claim that its subjective purpose was to address some real or purported social need, not to restrict expression. To avoid both extremes, the government's purpose must be assessed from the standpoint of the guarantee in question. Just as the division of powers jurisprudence of this Court measures the purpose of government action against the ambit of the heads of power established under the Constitution Act, 1867, so too, in cases involving the rights and freedoms guaranteed by the Canadian Charter, the purpose of government action must be measured against the ambit of the relevant guarantee. It is important, of course, to heed Dickson J.'s warning against a "theory of shifting purpose" (Big M Drug Mart, supra, at p. 335): "Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable." This is not to say that the degree to which a purpose remains or becomes pressing and substantial cannot change over time. In Big M Drug Mart, Dickson J.'s principal concern was to avoid characterizing purposes in a way that shifted over time. But it is equally true that the government cannot have had [page974] one purpose as concerns the division of powers, a different purpose as concerns the guaranteed right or freedom, and a different purpose again as concerns reasonable and justified limits to that guarantee. Nevertheless, the same purpose can be assessed from different standpoints when interpreting the division of powers, limitation of a guarantee, or reasonable limits to that guarantee.

49 If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression. Archibald Cox has described the distinction as follows (Freedom of Expression (1981), at pp. 59-60):

> The bold line ... between restrictions upon publication and regulation of the time, place or manner of expression tied to content, on the one hand, and regulation of time, place, or manner of expression regardless of content, on the other hand, reflects the difference between the state's usually impermissible effort to suppress "harmful" information, ideas, or emotions and the state's often justifiable desire to secure other interests against interference from the noise and the physical intrusions that accompany speech, regardless of the information, ideas, or emotions expressed.

Thus, for example, a rule against handing out pamphlets is a restriction on a manner of expression and is "tied to content", even if that restriction purports to control litter. The rule aims to control access by others to a meaning being conveyed as well as to control the ability of the pamphleteer to

convey a meaning. To restrict this form of expression, handing out pamphlets, entails [page975] restricting its content. By contrast, a rule against littering is not a restriction "tied to content". It aims to control the physical consequences of certain conduct regardless of whether that conduct attempts to convey meaning. To restrict littering as a "manner of expression" need not lead inexorably to restricting a content. Of course, rules can be framed to appear neutral as to content even if their true purpose is to control attempts to convey a meaning. For example, in Saumur v. City of Quebec, [1953] 2 S.C.R. 299, a municipal by-law forbidding distribution of pamphlets without prior authorization from the Chief of Police was a colourable attempt to restrict expression.

50 If the government is to assert successfully that its purpose was to control a harmful consequence of the particular conduct in question, it must not have aimed to avoid, in Thomas Scanlon's words ("A Theory of Freedom of Expression", in Dworkin, ed., The Philosophy of Law (1977), at p. 161):

> a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.

In each of Scanlon's two categories, the government's purpose is to regulate thoughts, opinions, beliefs or particular meanings. That is the mischief in view. On the other hand, where the harm caused by the expression in issue is direct, without the intervening element of thought, opinion, belief, or a particular meaning, the regulation does aim at a harmful physical consequence, not the content or form of expression.

51 In sum, the characterization of government purpose must proceed from the standpoint of the [page976] guarantee in issue. With regard to freedom of expression, if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity.

b. Effects

52 Even if the government's purpose was not to control or restrict attempts to convey a meaning, the Court must still decide whether the effect of the government action was to restrict the plaintiff's free expression. Here, the burden is on the plaintiff to demonstrate that such an effect occurred. In order so to demonstrate, a plaintiff must state her claim with reference to the principles and values underlying the freedom.

53 We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They were also discussed by the Court in Ford (at pp. 765-67), and can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered

and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles. It is not enough that shouting, for example, has an expressive element. If the plaintiff challenges the effect of government action [page977] to control noise, presuming that action to have a purpose neutral as to expression, she must show that her aim was to convey a meaning reflective of the principles underlying freedom of expression. The precise and complete articulation of what kinds of activity promote these principles is, of course, a matter for judicial appreciation to be developed on a case by case basis. But the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

c. Sections 248 and 249

54 There is no question but that the purpose of ss. 248 and 249 of the Consumer Protection Act was to restrict both a particular range of content and certain forms of expression in the name of protecting children. Section 248 prohibits, subject to regulation, attempts to communicate a commercial message to persons under thirteen years of age. Section 249 identifies factors to be considered in deciding whether the commercial message in fact has that prohibited content. At first blush, the regulations exempting certain advertisements transform the prohibition into a "time, place or manner" restriction aiming only at the form of expression. According to ss. 88 to 90 of the Regulation respecting the application of the Consumer Protection Act, an advertisement can be aimed at children if: (1) it appears in certain magazines or inserts directed at children; (2) it announces a programme or show directed at children; or (3) it appears in or on a store window, display, container, wrapping, or label. Yet, even if all advertising aimed at children were permitted to appear in the manner specified, the restriction would be tied to content because it aims to restrict access to the particular message being conveyed. However, the regulations in question do more than just restrict the manner in which a particular content must be expressed. They also restrict content directly. Section 91 provides that even where advertisements directed at children are permitted, such advertisements must not, for example "use a superlative to describe the characteristics of goods or services" or [page978] "directly incite a child to buy or to urge another person to buy goods or services or to seek information about it". Furthermore, it is clear from the substantial body of material submitted by the Attorney General of Quebec as well as by the intervener, Gilles Moreau, president of the Office de la protection du consommateur, that the purported mischief at which the Act and regulations were directed was the harm caused by the message itself. In combination, therefore, the Act and the regulations prohibit particular content of expression. Such a prohibition can only be justified if it meets the test under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter.

D. Summary and Conclusion

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

sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. If the government's purpose was not to restrict free expression, the plaintiff can still [page979] claim that the effect of the government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

56 In the instant case, the plaintiff's activity is not excluded from the sphere of conduct protected by freedom of expression. The government's purpose in enacting ss. 248 and 249 of the Consumer Protection Act and in promulgating ss. 87 to 91 of the Regulation respecting the application of the Consumer Protection Act was to prohibit particular content of expression in the name of protecting children. These provisions therefore constitute limitations to s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter. They fall to be justified under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter.

VII - Whether the Limit on Freedom of Expression Imposed by ss. 248 and 249 Is Justified Under s. 9.1 of the Quebec Charter or s. 1 of the Canadian Charter

57 The issues raised in this part are as follows: (a) whether the meaning, role and effect of s. 9.1 of the Quebec Charter are essentially different from that of s. 1 of the Canadian Charter; (b) whether the scheme put into place by ss. 248 and 249 is so vague as not to constitute a "limit prescribed by law"; (c) whether the materials (hereinafter referred to as the s. 1 and s. 9.1 materials) relied on by the Attorney General of Quebec are relevant to justifying ss. 248 and 249 as a reasonable limit upon freedom of expression; and (d) whether the s. 1 and s. 9.1 materials justify banning commercial advertising directed at persons under thirteen years of age.

[page980]

A. The Meaning of s. 9.1 of the Quebec Charter of Human Rights and Freedoms

58 The respondent, Irwin Toy, argued that s. 3 of the Quebec Charter provides an absolute guarantee of free expression. On the respondent's submission, absent legislation declaring that these provisions apply notwithstanding the Quebec Charter, it was not open to the Attorney General to argue that ss. 248 and 249 constitute a reasonable limit to the s. 3 guarantee. However, in Ford, supra, this Court drew the following conclusion about s. 9.1 of the Quebec Charter (at pp. 769-70):

> In the case at bar the Superior Court and the Court of Appeal held that s. 9.1 was a justificatory provision corresponding to s. 1 of the Canadian Charter and that it was subject, in its application, to a similar test of rational connection and proportionality. This Court agrees with that conclusion.

Since the test of rational connection and proportionality under s. 9.1 of the Quebec Charter is essentially the same as the test under s. 1 of the Canadian Charter, the two tests will be considered together.

B. Whether ss. 248 and 249 Are too Vague to Constitute a Limit Prescribed by Law

59 The respondent contended that ss. 248 and 249 were insufficiently precise to constitute a limit prescribed by law. For convenience, the two provisions are reproduced here:

> 248. Subject to what is provided in the regulations, no person may make use of commercial advertising directed at persons under thirteen years of age.
>
> 249. To determine whether or not an advertisement is directed at persons under thirteen years of age, account must be taken of the context of its presentation, and in particular of
>
> (a) the nature and intended purpose of the goods advertised;
> (b) the manner of presenting such advertisement;
> (c) the time and place it is shown.
>
> The fact that such advertisement may be contained in printed matter intended for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over, or that it may be broadcast during air time intended [page981] for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over does not create a presumption that it is not directed at persons under thirteen years of age.

The respondent's attack on the vagueness of these provisions was threefold: (1) ss. 248 and 249, read together, are confusing if not contradictory; (2) the courts are given insufficient guidance respecting how to interpret the ban on commercial advertising directed at children; and (3) there is too much scope for discretion to promulgate regulations. The third argument need not be addressed because this Court has already concluded that a limit is "prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements" (R. v. Thomsen, [1988] 1 S.C.R. 640, at pp. 650-51 per Le Dain J. for the Court). (Emphasis added.) A regulation promulgated pursuant to the statutory discretion such as the one here impugned can itself constitute a limit prescribed by law. Thus, only the first two arguments will be addressed.

a. Confusion and Contradiction

60 The respondent alleged that the last paragraph of s. 249 makes it all but impossible for the manufacturer of a children's product to know whether an advertisement of that product will run

afoul of s. 248. One author has commented on the paragraph to the same effect (Martin, "Business Practices -- Title II of the Quebec Consumer Protection Act" in Meredith Memorial Lectures 1979, The New Consumer Protection Act of Quebec (1980), at p. 222):

> When this provision is read carefully, it seems that printed materials or broadcast time aimed only at adults are both covered, and this would appear to take away from the original provisions of this section in which it is said that account must be taken of the context of the presentation of the advertisement. When this section is read as a whole, it would seem that the fact that the advertisement appeared in the Atlantic Monthly, or the like, cannot be invoked as creating any presumption that an advertisement was not directed to children. On the [page982] other hand, this fact could be taken into account as part of the context of the presentation of the advertisement. There is, in short, a contradiction in terms in the article and some redrafting appears required.

61 We conclude that s. 249 can be given a sensible construction. The narrow purpose of the last paragraph is to ensure that the three factors to be weighed by the judge, viz. the nature and intended purpose of the goods advertised, the manner of presenting the advertisement, and the time and place it is shown, are always weighed together. The last paragraph addresses only the third factor -- time and place. It makes clear that children's product advertising, if presented in a manner aimed to attract children, is not permitted even if adults form the largest part of the public likely to see the advertisement. Of course if, in assessing "manner of presentation", the judge concludes that no children were likely to see the advertisement, it is also unlikely that the means chosen were designed to attract children. But the factors must all be weighed according to the balance of probabilities. No presumption is to be drawn by considering the third factor alone. Read this way, there is nothing inherently confusing or contradictory about ss. 248 and 249.

b. Judicial Discretion

62 The respondent contended that the test set out in ss. 248 and 249 leaves an inordinately wide discretion in the judge to determine whether a commercial advertisement was aimed at children. It cites the Introduction to the Application Guide for Sections 248 and 249, which comments on the prohibition against commercial advertising directed at children:

> [T]he terms of the law can lend to different interpretations, thus allowing for some discretion in its application. This discretion is evident, for instance, in the determination of precisely what is meant by "intended for children". Therefore, the Office considers it important to make public the standards it has set to determine whether or not a given advertisement is permitted under the Act.

[page983]

The respondent suggested that this reference to "discretion" made by the very agency charged with administering the statute demonstrates that ss. 248 and 249 are imprecise.

63 Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

64 Sections 248 and 249 do provide an intelligible standard to be applied in determining whether an advertisement is subject to restriction. According to s. 248, the advertisement must have commercial content and it must be aimed at those under thirteen years of age. As explained above, s. 249 directs the judge to weigh three factors relating to the context in which the advertisement was presented. The courts are not simply given a discretion to ban whichever advertisements they please. In order to help advertisers comply with the ss. 248 and 249 standards, the Office de la protection du consommateur developed a more detailed series of guidelines which are not binding on the courts. One cannot infer from the existence of the guidelines that the courts have no intelligible standard to apply. One can only infer that the Office found it reasonable, as part of its mandate, to provide a voluntary pre-clearance mechanism allowing advertisers in most cases to substitute administrative decision-making for judicial decision-making.

C. The Relevance of the s. 1 and s. 9.1 Materials

65 The respondent contended that only evidence of legislative objective contemporary with the adoption [page984] of ss. 248 and 249 was relevant to deciding whether these sections constitute a reasonable limit to freedom of expression. It therefore attacked the relevance of studies post-dating the enactment of the Consumer Protection Act and upon which the government did not rely in adopting the legislation.

66 Where the basis for its legislation is not obvious, the government must bring forward cogent and persuasive evidence demonstrating that the provisions in issue are justified having regard to the constituent elements of the s. 1 or 9.1 inquiry (see R. v. Oakes, supra, at p. 138). In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert post facto a purpose which did not animate the legislation in the first place (see R. v. Big M Drug Mart Ltd., supra, at p. 335). However, in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available. The same is true as regards proof that the measure is proportional to its objective (see R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, at p. 769). It is equally possible that a purpose which was not demonstrably pressing and substantial at the time of the legislative enactment becomes demonstrably pressing and substantial with the passing of time and the changing of circumstances.

67 The respondent claimed that the legislative debates provide no evidence of the intention of the government in enacting ss. 248 and 249 and therefore argued that all other evidence is superfluous. Yet, the following statement of the Minister responsible for the legislation, commenting on why the government chose the thirteen-year-old age limit, gives an adequate sense of the general purpose underlying the legislation (Journal des débats, Commissions parlementaires, 3e sess., 31e Lég., Commission permanente des consommateurs, coopératives et institutions financières, Étude du projet de loi no 72 -- Loi sur la protection du consommateur (10), December 12, 1978 -- No. 226, at p. B-9501):

[page985]

> [TRANSLATION] Ms. Payette: What we wished to avoid at all costs -- I think in response to an observation by the Office concerning the messages currently broadcast -- was not actually reaching children. The proposal that pre-school age children be covered by the Bill did not seem adequate in the circumstances. It seemed to us that thirteen years of age was a good limit. It is possible that certain children are able to draw distinctions and make choices by the age of twelve. Certainly from the age of fourteen they are generally able to do so. So it seemed to us that thirteen, though arbitrary, was fair.
>
> And since we have relied upon a regulatory framework which has been in place for a number of years and which uses the age of thirteen as a cut-off, we adopted that age, on the basis of our experience to date.

The question becomes whether the evidence submitted by the government establishes that children under 13 are unable to make choices and distinctions respecting products advertised and whether this in turn justifies the restriction on advertising put into place. Studies subsequent to the enactment of the legislation can be used for this purpose.

68 One might wonder why the Attorney General did not tender in evidence certain reports and studies that were used by the government both in enacting the legislation and subsequently in reviewing its operation. Nor did the Attorney General rely upon the deliberations of the two legislative committees, one convened in 1976 and the other in 1978, which held hearings concerning revisions to the Consumer Protection Act. In her testimony before the 1978 committee, the Minister made repeated reference to studies conducted for the government and, in particular, to a document tabled with the committee and prepared by the Office de la protection du consommateur respecting the proposed legislation on children's advertising. None of these materials were filed. In September 1985, the Federal-Provincial Committee on Advertising Intended for Children prepared a report entitled The Effects of Quebec's Legislation Prohibiting Advertising Intended for Children. The Attorney General did not see fit to put this report before the Court. We are left to assess the [page986] constitutionality of the legislation on the basis of the material that was filed.

D. Whether the s. 1 and s. 9.1 Materials Justify Banning Commercial Advertising Directed at Persons Under Thirteen Years of Age

69 It is now well established that the onus of justifying the limitation of a right or freedom rests with the party seeking to uphold the limitation, in this case the Attorney General of Quebec, and that the analysis to be conducted is that set forth by Dickson C.J. in R. v. Oakes, supra.

a. Pressing and Substantial Objective

70 The first part of the test involves asking whether the objective sought to be achieved by the impugned legislation relates to concerns which are "pressing and substantial in a free and democratic society". Dickson C.J. explained this requirement in Oakes at pp. 138-39:

> First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd., supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Because we have already found that the plaintiff's activity falls within the sphere of conduct protected by freedom of expression and that the purpose of the legislation is to prohibit particular content of expression in the name of protecting children, it is far from onerous to require that the concern underlying the restrictive legislation be a pressing and substantial one. Without such a high standard of justification, enshrined rights and freedoms would be stripped of most of their value.

[page987]

71 In our view, the Attorney General of Quebec has demonstrated that the concern which prompted the enactment of the impugned legislation is pressing and substantial and that the purpose of the legislation is one of great importance. The concern is for the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising. In the words of the Attorney General of Quebec, [TRANSLATION] "Children experience most manifestly the kind of inequality and imbalance between producers and consumers which the legislature wanted to correct." The material given in evidence before this Court is indicative of a generalized concern in Western societies with the impact of media, and particularly but not solely televised advertising, on the development and perceptions of young children. (For example: Canadian Radio-Television and Telecommunications Commission, Decision CRTC 79-320, April 30, 1979, Renewal of the Canadian Broadcasting Corporation's Television and Radio Network Licences, (1979) 113 Can. Gaz., Part I, 3082; Canadian Association of Broadcasters, Broadcast Code for Advertising to Children, op. cit.; Canadian Broadcasting Corporation, Commercial Acceptance Policy Guideline, see in particular "The CBC and Children's Advertising"; National Association of Broadcasters, Television Code (21st ed. 1980), see in particular "Responsibility Towards Children"; Organization for Economic Cooperation and Development (OECD), Advertising Directed at Children: Endorsements in Advertising (1982); and J.J. Boddewyn, Advertising to Children: Regulation and Self-regulation in 40 Countries (1984)). Broadly speaking, the concerns which have motivated both legislative and voluntary regulation in this area are the particular susceptibility of young children to media manipulation, their inability to differentiate between reality and fiction and to grasp the persuasive intention behind the message, and the secondary effects of exterior influences on the family and parental authority. Responses to the perceived problems are as varied as the agencies and governments which have promulgated them. However the consensus of concern is high.

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72 In establishing the factual basis for this generally identified concern, the Attorney General relied heavily upon the U.S. Federal Trade Commission (FTC) Final Staff Report and Recommendation, In the Matter of Children's Advertising, which contains a thorough review of the scientific evidence on the subject as at 1981. The Report emerged from a rulemaking proceeding initiated by the FTC. The Report's assessment both of children's cognitive ability to evaluate television advertising directed at them and of the possible remedies to mitigate the adverse effects of such advertising are relevant here. One of its principal conclusions is that young children (2-6) cannot distinguish fact from fiction or programming from advertising and are completely credulous when presented with advertising messages (at pp. 34-35):

> In summary, the rulemaking record establishes that the specific cognitive abilities of young children lead to their inability to fully understand child-oriented television advertising, even if they grasp some aspects of it. They place indiscriminate trust in the selling message. They do not correctly perceive persuasive bias in advertising, and their life experience is insufficient to help them counter-argue. Finally, the content, placement and various techniques used in child-oriented television commercials attract children and enhance the advertising and the product. As a result, children are not able to evaluate adequately child-oriented advertising.

The Report thus provides a sound basis on which to conclude that television advertising directed at young children is per se manipulative. Such advertising aims to promote products by convincing those who will always believe.

73 It is reasonable to extend this conclusion in two ways. First, it can be extended to advertising in other media. For example, the OECD Report, op. cit., discusses children's advertising in all media including television, although the greatest body of evidence focusses on the persuasive force of television advertising. Second, it can be extended to advertising aimed at older children (7-13). The Attorney General filed a number of studies reaching [page989] somewhat different conclusions about the age at which children generally develop the cognitive ability to recognize the persuasive nature of advertising and to evaluate its comparative worth. The studies suggest that at some point between age seven and adolescence, children become as capable as adults of understanding and responding to advertisements. The majority in the Court of Appeal interpreted this evidence narrowly and found that it only justified the objective of regulating advertising aimed at children six or younger, not the regulation of advertising aimed at children between the ages of seven and thirteen. They concluded, and we agree, that the evidence was strongest with respect to the younger age category. Opinion is more divided when children in the older age category are involved. But the legislature was not obliged to confine itself solely to protecting the most clearly vulnerable group. It was only required to exercise a reasonable judgment in specifying the vulnerable group.

74 As Dickson C.J. noted in R. v. Edwards Books and Art Ltd., supra, at pp. 781-82, commenting on the legislative decision to exempt businesses having seven or fewer employees from a Sunday closing rule:

> I might add that I do not believe there is any magic in the number seven as distinct from, say, five, ten, or fifteen employees as a cut-off point for eligibility for the exemption. In balancing the interests of retail employees to a holiday in common with their family and friends against the s. 2(a) interests of those affected the Legislature engaged in the process envisaged by s. 1 of the Charter. A "reasonable limit" is one which, having regard to the principles enunciated in Oakes, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

The same can be said of evaluating competing credible scientific evidence and choosing thirteen, as opposed to ten or seven, as the upper age limit [page990] for the protected group here in issue. Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another. In dealing with inherently heterogeneous groups defined in terms of age or a characteristic analogous to age, evidence showing that a clear majority of the group requires the protection which the government has identified can help to establish that the group was defined reasonably. Here, the legislature has mediated between the claims of advertisers and those seeking commercial information on the one hand, and the claims of children and parents on the other. There is sufficient evidence to warrant drawing a line at age thirteen, and we would not presume to re-draw the line. We note that in Ford, supra, at pp. 777-79, the Court also recognized that the government was afforded a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence.

75 In sum, the objective of regulating commercial advertising directed at children accords with a general goal of consumer protection legislation, viz. to protect a group that is most vulnerable to commercial manipulation. Indeed, that goal is reflected in general contract doctrine (see, for example, Civil Code of Lower Canada, arts. 987 and 1001 to 1011 respecting contracts with minors). Children are not as equipped as adults to evaluate the persuasive force of advertising and advertisements directed at children would take advantage of this. The legislature reasonably concluded that advertisers should be precluded from taking advantage of children both by inciting them to [page991] make purchases and by inciting them to have their parents make purchases. Either way, the advertiser would not be able to capitalize upon children's credulity. The s. 1 and s. 9.1 materials demonstrate, on the balance of probabilities, that children up to the age of thirteen are manipulated by commercial advertising and that the objective of protecting all children in this age group is predicated on a pressing and substantial concern. We thus conclude that the Attorney General has discharged the onus under the first part of the Oakes test.

b. Means Proportional to the Ends

76 The second part of the s. 1 and s. 9.1 test involves balancing a number of factors to determine whether the means chosen by the government are proportional to its objective. As Dickson C.J. stated in Edwards Books and Art Ltd., supra, at p. 768:

> Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights.

i. Rational Connection

77 There can be no doubt that a ban on advertising directed to children is rationally connected to the objective of protecting children from advertising. The government measure aims precisely at the problem identified in the s. 1 and s. 9.1 materials. It is important to note that there is no general ban on the advertising of children's products, but simply a prohibition against directing advertisements to those unaware of their persuasive intent. Commercial advertisements may clearly be directed at the true purchasers -- parents or other adults. Indeed, non-commercial educational advertising aimed at children is permitted. Simply put, advertisers [page992] are prevented from capitalizing on the inability of children either to differentiate between fact and fiction or to acknowledge and thereby resist or treat with some skepticism the persuasive intent behind the advertisement. In the present case, we are of the opinion that the evidence does establish the necessary rational connection between means and objective. In Ford, by contrast, no rational connection was established between excluding all languages other than French from signs in Quebec and having the reality of Quebec society communicated through the "visage linguistique".

ii. Minimal Impairment

78 We turn now to the requirement that "the means, even if rationally connected to the objective ... should impair 'as little as possible' the right or freedom in question": Oakes, supra, at p. 139. We would note that in this context, the standard of proof is the civil standard, that is, proof on the balance of probabilities. Furthermore, as Dickson C.J. observed in Oakes, supra, at p. 137:

> Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, The Law of Evidence in Civil Cases (Toronto: 1974), at p. 385. As Lord Denning explained in Bater v. Bater, [1950] 2 All E.R. 458 (C.A.), at p. 459:
>
> > The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge

> of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

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This observation is particularly relevant to the "minimal impairment" branch of the Oakes proportionality test. The party seeking to uphold the limit must demonstrate on a balance of probabilities that the means chosen impair the freedom or right in question as little as possible. What will be "as little as possible" will of course vary depending on the government objective and on the means available to achieve it. As the Chief Justice wrote in Oakes, supra, at p. 139:

> Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.

79 Thus, in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude. In Edwards Books and Art Ltd., supra, Dickson C.J. expressed an important concern about the situation of vulnerable groups (at p. 779):

> In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it [page994] is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy" (Edwards Books and Art Ltd., supra, at p. 772).

80 In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the Charter, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for

achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions: see Sunday Times v. United Kingdom (1979), 2 E.H.R.R. 245, at p. 276. The same degree of certainty may not be achievable in cases involving the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources.

81 In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective.

82 The strongest evidence for the proposition that this ban impairs freedom of expression as little as possible comes from the FTC Report. Because the [page995] Report found that children are not equipped to identify the persuasive intent of advertising, content regulation could not address the problem. The Report concluded that the only effective means for dealing with advertising directed at children would be a ban on all such advertising because "[a]n informational remedy would not eliminate nor overcome the cognitive limitations that prevent young children from understanding advertising" (p. 36). However, the Report also concluded that such a ban could not be implemented either on the basis of audience composition data or on the basis of a definition of "advertising directed at children". It thus counselled against a ban (at p. 2):

> [T]he record establishes that the only effective remedy would be a ban on all advertisements oriented toward young children, and such a ban, as a practical matter, cannot be implemented.

83 The Report gave two reasons why a ban could not be implemented on the basis of audience composition data. First, according to the Report, viewing audiences were not so sufficiently segmented that one could implement a total ban on advertising during time periods when, on the basis of television ratings, programming is directed at young children. Only one network program was identified as attracting a viewing audience composed, over 30 per cent, by young children. Second, if the percentage were relaxed to, say, 20 per cent, a total ban on advertising would catch too many non-children and would still fail to catch all programs frequently watched by young children (at pp. 39-41):

> The data indicate that if either a 50% or a 30% audience cutoff figure is used (i.e. when young children constitute 50% or 30% of the actual viewing audience), advertising on only one network program (Captain Kangaroo) would be affected. Advertising on more programs would be included in a ban only if the cutoff figure were lowered to 20%. However, the staff believes that utilizing a 20% cutoff figure would not be advisable because the use of such a low cutoff figure would affect the viewing of the 80% of the audience who are not young [page996] children and who do not have their cognitive limitations ....
>
> Staff believes that implementing a ban utilizing a 20% figure would not be advisable because the ban's scope would still be underinclusive from the standpoint of advertising affected and the proportion of the child's total television viewing affected ... Further analysis of viewing data for young children (two to

> five) indicates more specifically that if a 20% cutoff figure were used, advertising on only 24 network programs would be affected, 22 of which are shown on Saturday or Sunday mornings. The use of a 20% figure would not include advertising on child-oriented programs shown during other time periods. Only 13% of a young child's weekly viewing of television occurs on weekend mornings.

84 Because the FTC Report focussed on the effect of advertising aimed at young children (2-6) and proceeded on the basis that advertising directed at older children (7-13) did not pose a problem, it concluded, reasonably enough, that no definition could distinguish adequately between advertising directed at young children and advertising directed at older children (at pp. 44-45):

> [The preliminary] Staff Report suggested a definition of "advertising directed to children" based on program design. A remedy based on this definition would ban advertising "in or adjacent to programs that have been designated as children's programs using some a priori judgments." The major and inherent drawback to this definition is that it does not distinguish between programs designed for younger children and those designed for older children ....
>
> The lack of specificity in categorizing children's programs as being primarily for two- to six-year-olds appears to coincide with the industry's practice of not directing advertisements solely to young children. For instance, CBS stated: "while certain advertisers who use television may wish to address young viewers, they rarely, if ever, limit their appeal to the young children alone."

85 Sections 248 and 249 preserve the rationale for a ban contained in the FTC Report at the same time as overcoming the practical limitations suggested [page997] therein. The sections contemplate a larger age group than that envisaged by the FTC Report, and always allow advertising aimed at adults, thereby avoiding the difficulties identified in the Report both with a ban based on audience composition and with a ban based on the definition of "advertising directed to children". The Application Guide for Sections 248 and 249 helps to illustrate this. It specifies a number of time periods during the day when, based on Bureau of Broadcast Measurement (BBM) statistics, over 15 per cent of the audience is made up of children aged 2 to 11. It was possible to arrive at these time periods despite the FTC's arguments precisely because a larger target group was specified. Furthermore, using this larger target group, it was possible for the Office de la protection du consommateur to identify products and advertising methods aimed at children. In this way, the 15 per cent cut-off does not serve to justify a ban on all advertising (as the 20 per cent cut-off discussed by the FTC was designed to do). By specifying categories of (1) products, (2) advertisements and (3) audience, the Guide allows for a sophisticated appraisal of when an advertisement is aimed at children. These three categories are drawn directly from s. 249 and their elaboration by the Office is an attempt to perform the same balancing test required of the courts. Three categories of products are specified: (1) those aimed exclusively at children (toys, and certain candies and foods); (2) those having a large attraction for children (certain cereals, desserts and games); and (3) those aimed at adults. Four categories of advertisements are specified: (1) those not likely to interest children; (2) those not designed to interest children; (3) those directed only partly to children; and (4) those aimed mainly at children. Three categories of audience are specified: (1) children compose over 15 per cent; (2) children compose between 5 per cent and 15 per cent; and (3) children compose less than 5 per cent. On this basis, the Guide sets forth a table according to which different kinds of ad-

vertisements for the various product categories will be permitted depending upon audience composition. There is a system of pre-clearance run by a committee of the Office which helps advertisers to [page998] determine whether any given commercial is subject to the ban.

86 While ss. 248 and 249 do not incorporate all the details included in the Guide, they do put into place the framework for a practicable ban on advertising directed at children. The courts, rather than the Office de la protection du consommateur, are left with the final word as to whether, for example, the strictest limit on advertising should apply where children compose over 15 per cent of the audience rather than, for example, 20 per cent. But if a ban is the only effective means to achieve the legislative objective, and if such a ban can only be implemented using a flexible balancing test, the legislature cannot be faulted for leaving that balancing to the courts. Indeed, this should help to ensure that minimal impairment of free expression is a constant factor in the application of the law.

87 Of course, despite the FTC Report's conclusions to the contrary, the respondent argued that a ban was not the only effective means for dealing with the problem posed by children's advertising. In particular, it pointed to the self-regulation mechanism provided by the Broadcast Code for Advertising to Children as an obvious alternative and emphasized that Quebec was unique among industrialized countries in banning advertising aimed at children (see Boddewyn, op. cit.) The latter assertion must be qualified in two respects. First, as of 1984, Belgium, Denmark, Norway and Sweden did not allow any commercials on television and radio. Second, throughout Canada, as in Italy, the public network does not accept children's commercials (except, in the case of the CBC, during "family programs"). Consequently, Quebec's ban on advertising aimed at children is not out of proportion [page999] to measures taken in other jurisdictions. Nor is legislative action to protect vulnerable groups necessarily restricted to the least common denominator of actions taken elsewhere. Based on narrower objectives than those pursued by Quebec, some governments might reasonably conclude that self-regulation is an adequate mechanism for addressing the problem of children's advertising. But having identified advertising aimed at persons under thirteen as per se manipulative, the legislature of Quebec could conclude, just as reasonably, that the only effective statutory response was to ban such advertising.

88 In sum, the evidence sustains the reasonableness of the legislature's conclusion that a ban on commercial advertising directed to children was the minimal impairment of free expression consistent with the pressing and substantial goal of protecting children against manipulation through such advertising. While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must nevertheless be a sound evidentiary basis for the government's conclusions. In Ford, there was no evidence of any kind introduced to show that the exclusion of all languages other than French was necessary to achieve the objective of protecting the French language and reflecting the reality of Quebec society. What evidence was introduced established, at most, that a marked preponderance for the French language in the "visage linguistique" was proportional to that objective. The Court was prepared to allow a margin of appreciation to the government despite the fact that less intrusive measures, such as requiring equal prominence for the French language, were available. But there still had to be an [page1000] evidentiary basis for concluding that the means chosen were proportional to the ends and impaired freedom of expression as little as possible. In Ford, that evidentiary basis did not exist.

iii. Deleterious Effects

89 There is no suggestion here that the effects of the ban are so severe as to outweigh the government's pressing and substantial objective. Advertisers are always free to direct their message at parents and other adults. They are also free to participate in educational advertising. The real concern animating the challenge to the legislation is that revenues are in some degree affected. This only implies that advertisers will have to develop new marketing strategies for children's products. Thus, there is no prospect that "because of the severity of the deleterious effects of [the] measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve" (Oakes, at p. 140). The final component of the proportionality test is easily satisfied. In Ford, by contrast, the Attorney General of Quebec underscored the importance of the "visage linguistique" for francophone identity and culture and yet the effect of the measure taken was to prohibit the public manifestation of the identity and culture of non-francophones.

c. Conclusion

90 Based on the s. 1 and s. 9.1 materials, we conclude that ss. 248 and 249 constitute a reasonable limit upon freedom of expression and would accordingly uphold the legislation under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter.

[page1001]

VIII - Whether ss. 248 and 249 Violate s. 7 of the Canadian Charter

91 One issue remains to be considered. The respondent alleges that ss. 248 and 249 of the Consumer Protection Act infringe s. 7 of the Charter. The legislation contemplates a possible restriction to liberty which could occur, so the argument goes, in a manner not in accordance with the principles of fundamental justice. The respondent submits that s. 278 of the Consumer Protection Act, read together with ss. 248 and 249, provides for penal sanctions based on a prohibition which is impermissibly vague. The appellant takes no position on the question of whether the principles of fundamental justice give rise to "vagueness doctrine". Its submission is simply that the law is not vague -- a submission which was accepted by Vallerand J.A., the only justice in the court below to deal with the question.

92 We have determined in the context of the s. 1 discussion that ss. 248 and 249 are not vague in terms of either confusion and contradiction or judicial discretion. Thus, there could only be a further challenge under s. 7 if a stricter vagueness test were applied to the penal sanction.

93 There is, however, an issue logically prior to that of vagueness, namely whether corporations can invoke s. 7 of the Charter in their aid. In order to properly understand the submissions of the respondent in this regard, we reproduce here the statutory scheme of penalties against contraventions of ss. 248 and 249.

278. Every person other than a corporation who is guilty of an offence constituting a prohibited practice or who infringes paragraph b, c, d, e or f of section 277 is liable

(a) for the first offence, to a fine of two hundred dollars to five thousand dollars;

(b) for a subsequent offence to the same provision of this act or a regulation committed within a period of two years, to a fine of four hundred dollars to ten thousand dollars, to imprisonment for not more than six months, or to both a fine and imprisonment. [page1002] A corporation guilty of an offence contemplated in the preceding paragraph is liable to a minimum fine five times greater and to a maximum fine ten times greater than those provided for in the preceding paragraph.

Section 215 establishes that ss. 248 and 249 constitute "prohibited practices" within the meaning of the above section:

215. Any practice contemplated in sections 219 to 251 constitutes a prohibited practice for the purposes of this title.

282. Where a corporation is guilty of an offence against this act or any regulation, every director or representative of such corporation who had knowledge of the said offence is deemed to be a party to the offence and is liable to the penalty provided for in section 278 or 279 for a person other than a corporation, unless he establishes to the satisfaction of the court that he did not acquiesce in the commission of such offence.

Imprisonment is clearly one of the penalties envisioned for contravention of, inter alia, ss. 248 and 249 of the Act. A corporation is not, for obvious reasons, subject to imprisonment. By virtue of s. 282 of the Act, directors of corporations are deemed to be parties to offences committed by the corporation and are therefore liable to the penalties listed above. It is, therefore, the directors and representatives of corporations who risk, pursuant to the Act, a restriction of liberty of the kind envisioned in Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486. In the present case, proceedings are brought only against the company and not against any individuals. In the context of physical restriction to liberty, it would be left to officers of a company whose conduct was impugned pursuant to s. 282 of the Act to raise a s. 7 argument in terms of vagueness or imputation of corporate liability to individuals. This circumstance does not arise in the present case.

94 In order to put forward a s. 7 argument in a case of this kind where the officers of the corporation are not named as parties to the proceedings, the corporation would have to urge that its own life, liberty or security of the person was being deprived in a manner not in accordance with the principles of fundamental justice. In our opinion, a corporation cannot avail itself of the protection offered by [page1003] s. 7 of the Charter. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". We have already noted that it is nonsensical to speak of a corporation being put in jail. To say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition. The

only remaining argument is that corporations are protected against deprivations of some sort of "economic liberty".

95 There are several reasons why we are of the view that this argument can not succeed. It is useful to reproduce s. 7, which reads as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

What is immediately striking about this section is the inclusion of "security of the person" as opposed to "property". This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived "of life, liberty or property, without due process of law". The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property -- contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the [page1004] same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.

96 That is, read as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings. In this regard, the case of R. v. Big M Drug Mart Ltd., supra, is of no application. There are no penal proceedings pending in the case at hand, so the principle articulated in Big M Drug Mart is not involved.

IX - Disposition and Answers to Constitutional Questions

97 For these reasons the appeal is allowed with costs and the constitutional questions are answered as follows:

> 1. Is s. 364 of the Consumer Protection Act, R.S.Q., c. P-40.1, added by s. 1 of An Act respecting the Constitution Act, 1982, S.Q. 1982, c. 21, inconsistent with the provisions of s. 33 of the Constitution Act, 1982 and so ultra vires and of no force or effect to the extent of the inconsistency pursuant to s. 52(1) of the latter Act?

Answer: No, except in so far as section 364 is given retrospective effect by section 7 of An Act respecting the Constitution Act, 1982, S.Q. 1982, c. 21. However, because s. 364 expired on June 23, 1987, there is [page1005] no valid and subsisting override provision.

2. If question 1 is answered in the affirmative, do ss. 248 and 249 of the Consumer Protection Act infringe the rights, freedoms and guarantees contained in ss. 2(b) and 7 of the Canadian Charter of Rights and Freedoms, and if so, can those sections be justified under s. 1 of the Canadian Charter of Rights and Freedoms?

Answer: Sections 248 and 249 infringe s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter but are justified under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter. Section 7 of the Canadian Charter cannot be invoked by the respondent.

3. Are ss. 248 and 249 of the Consumer Protection Act ultra vires the legislature of the province of Quebec, or are they to some degree of no force or effect under s. 3 of the Broadcasting Act, R.S.C. 1970, c. B-11?

Answer: No.

The reasons of Beetz and McIntyre JJ. were delivered by

98 McINTYRE J. (dissenting):-- I have had the advantage of reading the reasons for judgment prepared in this appeal by the majority. They have set out the facts and the statutory provisions and regulations which are under consideration here and I need not repeat them. They have also set out the constitutional questions that were settled by Beetz J. which frame the issues arising in this case.

99 I would agree with my colleagues in their answer to the first question, to the effect that because of the expiration of s. 364 of the Consumer Protection Act, R.S.Q. c. P-40.1 there is no valid and subsisting override provision affecting the disposition of this case. I would agree as well with the answer to Question 3, to the effect that ss. 248 and 249 of the Consumer Protection Act are not ultra vires the legislature of Quebec nor deprived of effect under s. 3 of the Broadcasting Act, R.S.C. 1970, c. B-11. My point of disagreement with my colleagues arises from their answer to the second question. While I agree with them [page1006] that ss. 248 and 249 of the Consumer Protection Act infringe s. 2(b) of the Canadian Charter of Rights and Freedoms and s. 3 of the Quebec Charter, I do not agree that they may be justified under s. 1 of the Canadian Charter or s. 9(1) of the Quebec Charter.

100 I would not wish in these reasons to attempt to set out the limits of the application of s. 2(b) of the Charter and to define in general terms the extent of the protected activity under s. 2(b). I would content myself by observing that this Court in Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, has held that commercial expression has the protection of s. 2(b). At pages 766-67, it was said:

> Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian Charter should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the Charter. It is worth noting that the courts below applied a similar generous and broad interpretation to include commercial expression within the protection of freedom of expression contained in s. 3 of the Quebec Charter. Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy. The Court accordingly rejects the view that commercial expression serves no individual or societal value in a free and democratic society and for this reason is undeserving of any constitutional protection.

It is evident then that ss. 248 and 249 of the Consumer Protection Act restrict forms of expression which fall within the protection of s. 2(b). Since I agree that the two sections in their prohibition of advertising aimed at children infringe the s. 2(b) right, the only question in issue is whether the sections can be justified as reasonable limits under s. 1 of the Charter.

[page1007]

The Importance of Freedom of Expression

101 Freedom of expression under s. 2(b) is guaranteed as a fundamental freedom. Its importance and its value are surely beyond question. My colleagues have recognized this and referred to various authorities which recognize the importance of the principle. They have referred to the words of Cardozo J. in Palko v. Connecticut, 302 U.S. 319 (1937), at p. 327, which describe the concept as "the matrix, the indispensable condition of nearly every other form of freedom" and, as well, to those of Rand J. in Switzman v. Elbling, [1957] S.C.R. 285, at p. 306, that it was "little less vital to man's mind and spirit than breathing is to his physical existence". They referred to other authorities on the subject. I would observe, as well, that freedom of expression has long been recognized in Canada as a principle of fundamental importance and even before the adoption of the Charter, the courts of this country had elevated the principle to virtual constitutional status (see RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, at pp. 584-86).

Section 1

102 It is settled that to override a constitutional guarantee a government supporting a limitation imposed by law must show a purpose or objective of pressing and substantial importance. Certainly,

the promotion of the welfare of children is an objective of pressing and substantial concern for any government.

103 Can it be said that the welfare of children is at risk because of advertising directed at them? I am not satisfied that any case has been shown that it is. There was evidence that small children are incapable of distinguishing fact from fiction in advertising. This is hardly surprising: many adults have the same problem. Children, however, do not remain children. They grow up and, while advertising directed at children may well be a source of irritation to parents, no case has been shown here that children suffer harm. Children live in a world of fiction, imagination and make believe. Children's literature is based upon these concepts. As they mature, they make adjustments and can be [page1008] expected to pass beyond the range of any ill which might be caused by advertising. In my view, no case has been made that children are at risk. Furthermore, even if I could reach another conclusion, I would be of the view that the restriction fails on the issue of proportionality. A total prohibition of advertising aimed at children below an arbitrarily fixed age makes no attempt at the achievement of proportionality.

104 In conclusion, I would say that freedom of expression is too important to be lightly cast aside or limited. It is ironic that most attempts to limit freedom of expression and hence freedom of knowledge and information are justified on the basis that the limitation is for the benefit of those whose rights will be limited. It was this proposition that motivated the early church in restricting access to information, even to prohibiting the promulgation and reading of the scriptures in a language understood by the people. The argument that freedom of expression was dangerous was used to oppose and restrict public education in earlier times. The education of women was greatly retarded on the basis that wider knowledge would only make them dissatisfied with their role in society. I do not suggest that the limitations imposed by ss. 248 and 249 are so earth shaking or that if sustained they will cause irremediable damage. I do say, however, that these limitations represent a small abandonment of a principle of vital importance in a free and democratic society and, therefore, even if it could be shown that some child or children have been adversely affected by advertising of the kind prohibited, I would still be of the opinion that the restriction should not be sustained. Our concern should be to recognize that in this century we have seen whole societies utterly corrupted by the suppression of free expression. We should not lightly take a step in that direction, even a small one.

[page1009]

105 It must be recognized that freedom of expression despite its singular importance is, like all rights, subject to limitations. It is not absolute. We have all heard the familiar statement that nobody has a right to shout "fire" in a crowded theatre. It illustrates the extreme and obvious case, but there will, of course, be other cases where limitations on the right may well be necessary and therefore justifiable. This, however, in my view, is not such a case. Freedom of expression, whether political, religious, artistic or commercial, should not be suppressed except in cases where urgent and compelling reasons exist and then only to the extent and for the time necessary for the protection of the community.

106 In my view, no justification can be found under s. 1 of the Charter for these sections, and I would dismiss the appeal and answer constitutional Question No. 2 as follows:

2. If question 1 is answered in the affirmative, do ss. 248 and 249 of the Consumer Protection Act infringe the rights, freedoms and guarantees contained in ss. 2(b) and 7 of the Canadian Charter of Rights and Freedoms, and if so, can those sections be justified under s. 1 of the Canadian Charter of Rights and Freedoms?

Answer: Sections 248 and 249 of the Consumer Protection Act infringe s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter and are not justified under s. 1 of the of the Canadian Charter and s. 9.1 of the Quebec Charter. In agreement with the majority, s. 7 of the Canadian Charter cannot be invoked by the respondent.

Tab 6

Case Name:

MacKay v. Manitoba

IN THE MATTER of The Elections Finances Act, c. 45, Statutes of Manitoba
Murdoch MacKay, Herold L. Driedger, Ben Hanuschak, Charles E. Lamont, Max Hofford, Joel Morassutti and Arthur Z. Green, appellants;
v.
The Government of Manitoba, respondent;
and
The Attorney General of Canada, the Attorney General for Ontario and the Attorney General of Quebec, interveners.

[1989] S.C.J. No. 88

[1989] A.C.S. no 88

[1989] 2 S.C.R. 357

[1989] 2 R.C.S. 357

61 D.L.R. (4th) 385

99 N.R. 116

[1989] 6 W.W.R. 351

J.E. 89-1289

61 Man.R. (2d) 270

43 C.R.R. 1

17 A.C.W.S. (3d) 169

1989 CanLII 26

File No.: 19671.

Supreme Court of Canada

1989: March 14 / 1989: September 14.

Present: Dickson C.J. and Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka and Cory JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Constitutional law -- Charter of Rights -- Charter litigation -- Factual basis -- Declaration sought without factual basis on which to decide issue -- Whether or not Charter issues should be decided in absence of factual basis.

Constitutional law -- Charter of Rights -- Freedom of expression -- Act providing for payment of portion of election expenses if candidates and parties received fixed proportion of votes -- Whether or not Act infringing freedom of expression -- The Elections Finances Act, S.M. 1982-83-84, c. 45 -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b).

The appellants alleged that the Charter right to freedom of expression was infringed by those sections of The Elections Finances Act which provided for the province's paying a portion of the campaign expenses of candidates and parties receiving a fixed proportion of the votes in the provincial election. No evidence was submitted to support the claim. Respondent did not question the status of the appellants to bring the action and preferred to have the case decided on its merits, rather than have it defeated on the technical basis that it had no factual basis. Appellants conceded that the legislation did not discriminate against them and as a result s. 15 of the Charter did not need to be considered. The trial judge held that the legislation in question did not infringe the guarantee of freedom of expression set out in s. 2(b) of the Canadian Charter of Rights and Freedoms. The majority of the Court of Appeal upheld this decision.

Held: The appeal should be dismissed.

The presentation of facts is essential to a proper consideration of Charter issues and not a mere technicality to be dispensed with by the consent of the parties. Here, the absence of a factual base was not just a technicality to be overlooked but a fatal flaw. The effects of the legislation, and not its purpose, were alleged to have infringed the Charter. If the deleterious effects were not established there could be no Charter violation and no case, accordingly, could be made out. In appropriate circumstances, taking judicial notice of broad social facts could overcome the fact that no evidence was put before the Court.

The Act did not prohibit a taxpayer or anyone else from holding or expressing any position or their belief in any position. Rather, it fostered and encouraged the dissemination and expression of a wide range of views and positions.

Cases Cited

Referred to: R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 15. Elections Finances Act, S.M. 1982-83-84, c. 45.

Authors Cited

Morgan, Brian G. "Proof of Facts in Charter Litigation," in R.J. Sharpe, ed., Charter Litigation. Toronto: Butterworths, 1987.

APPEAL from a judgment of the Manitoba Court of Appeal (1985), 39 Man. R. (2d) 274, 24 D.L.R. (4th) 587, [1986] 2 W.W.R. 367, 23 C.R.R. 8, dismissing an appeal from a judgment of Monnin J. (1985), 34 Man. R. (2d) 118, 19 D.L.R. (4th) 185. Appeal dismissed.

Sidney Green, Q.C., for the appellants.
Brian Squair, Q.C., for the respondent. Graham Garton, Q.C., for the intervener the Attorney General of Canada.
Rebecca Regenstreif and Lori Sterling, for the intervener the Attorney General for Ontario.
Jean Bouchard, for the Attorney General of Quebec.

Solicitor for the appellants: Sidney Green, Winnipeg.
Solicitor for the respondent: Tanner Elton, Winnipeg.
Solicitor for the intervener the Attorney General of Canada: John C. Tait, Ottawa.
Solicitor for the intervener the Attorney General for Ontario: Richard F. Chaloner, Toronto.
Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

The judgment of the Court was delivered by

1 **CORY J.**:-- A determination must be made at the outset of this appeal as to whether there has been sufficient evidence presented to enable the Court to consider the Charter issues raised by the appellants.

2 The appellants have challenged the constitutionality of those sections of The Elections Finances Act, S.M. 1982-83-84, c. 45, which provide for the payment from the Consolidated Fund of the Province of Manitoba of a portion of the campaign expenses of those candidates and parties who receive a fixed proportion of the votes in the provincial election. The Act provides that those parties and candidates who receive more than 10 per cent of the votes cast in an electoral division may file a certificate with the Chief Electoral Officer. That officer then calculates the total expenses permitted under the Act, reviews the total expenses incurred and fixes the amount of the eligible reimbursement. The reimbursement is the lesser of either 50 per cent of the total election expenses permitted, or 50 per cent of the actual election expenses incurred, excluding donations in kind. When the Minister of Finance receives a certificate from the Chief Electoral Officer as to the amount owing, payment is made out of the Consolidated Fund.

The Courts Below

3 The trial judge held that the legislation in question did not infringe the guarantee of freedom of expression set out in s. 2(b) of the Canadian Charter of Rights and Freedoms. The majority of the Court of Appeal was of the same view, while the minority found that the impugned sections did indeed contravene s. 2(b) of the Charter and were not saved under s. 1.

The Position of the Appellants

4 At the outset the appellants advised that they were in agreement that the appeal could not succeed if it were found that the payments made to the political parties from the Consolidated Fund could not be traced to the funds the appellants contributed as taxpayers. The appellants further reduced the matters in issue by frankly conceding that the legislation did not discriminate against them and as a result s. 15 of the Charter did not need to be considered.

5 The appellants argued that to provide funding for political parties with taxpayers' dollars constituted an infringement of their freedom of expression guaranteed by s. 2(b) of the Charter. This the appellants submitted would occur when totalitarian or extremist groups obtained 10 per cent of the vote and, pursuant to the impugned provisions of the statute, received financing from the Consolidated Fund to propagate their views which would be diametrically opposed to those of the appellants. In a somewhat contradictory submission, the appellants also argued that the impugned legislation, by instituting a "10 per cent of the popular vote" requirement worked solely for the benefit of the three established parties with the result that splinter groups or new parties could not get access to the funds. Lastly, the appellants submitted that the statutory funding forced taxpayers to support a candidate or candidates with whose views they were in fundamental disagreement. This enforced support of a contrary view was said to constitute an infringement of the taxpayers' constitutional rights to freedom of expression.

The Position of the Respondent

6 The respondent did not question the status of the appellants to bring the action. As a result, this important issue was not considered by the Court and for the purposes of this appeal it is assumed that the appellants had the requisite status to bring the action. Nor did the respondent criticize the complete lack of any evidentiary basis for the appellants' claim. Rather, it was said that the respondent preferred to "have the case decided on the merits" and not defeated on the "technical" basis that there was no factual foundation for the claim. The respondent took the position that the legislation did not in any way infringe the appellants' guarantee of freedom of expression.

The Position of the Interveners, The Attorney General of Canada, The Attorney General for Ontario and The Attorney General of Quebec

7 The position of the interveners was that this appeal could not and should not be resolved in the factual vacuum in which it was presented. This submission should be accepted.

The Essential Need to Establish the Factual Basis in Charter Cases

8 Charter cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to

insist upon the careful preparation and presentation of a factual basis in most Charter cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.

9 Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

10 This Court has stressed the importance of a factual basis in Charter cases. In R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, at p. 762, Dickson C.J. stated:

> Accordingly, there is no evidentiary foundation to substantiate the contention of some of the retailers that their freedom from conforming to religious doctrine has been abridged. The second form of coercion allegedly flowing from the Retail Business Holidays Act has not been established in these appeals.

He also stated at pp. 767-68:

> In the absence of cogent evidence regarding the nature of Hindu observance of Wednesdays or Moslem observance of Fridays, I am unwilling, and indeed unable, to assess the effects of the Act on members of those religious groups. The record includes only the testimony of Bhulesh Lodhia, the Hindu retailer who testified at the trial of Longo Brothers. Mr. Lodhia acknowledged that the Hindu religion did not have a Sabbath Day, but said that Wednesday was observed as "a day of prayer and that's the day we would prefer closing if given the choice". I infer from this evidence that there is no religious prohibition enjoining adherents from working on Wednesdays, but that there exists some moral obligation to pray on that day. It is unclear to me whether the entire day is to be spent in prayer or whether only a portion or portions of the day are to be set aside for that purpose. The degree to which the Act interferes with the religious practices of Hindus has not been established with sufficient precision to warrant a finding that the Act abridges the religious freedoms of Hindus, particularly in the context of the present cases in which none of the retailers is a member of that fait.
>
> The evidence regarding the Islamic faith is even less adequate. It is contained in its entirety in the following exchange during Mr. Lodhia's examination-in-chief:
>
> Q. ... You're a Hindu, what is, to your knowledge, the Sabbath of the Moslem Religion?

A. I believe it is Friday. This is not a satisfactory foundation upon which to mount a constitutional challenge. Whether the Act infringes the freedom of religion of Hindus or Moslems is a question which accordingly ought not to be answered in the present appeals.

11 To the same effect is the very useful article by Brian G. Morgan, "Proof of Facts in Charter Litigation", in R. J. Sharpe, ed., Charter Litigation (1987).

Submissions, Unsupported by Evidence put Forward in this Case

12 In this case there has been not one particle of evidence put before the Court. It will be remembered that the appellants put forward two specific concerns as to the effect of the funding legislation. First it was said that splinter parties such as the Neo-Nazis might obtain 10 per cent of the vote and thus obtain public funding although they espoused principles which were diametrically opposed to that of a democratic society. They contended that their tax funds could be used to support views to which they were fundamentally opposed. Secondly, it was said that the system of funding which required a candidate to get at least 10 per cent of the total vote favoured the three established parties to the detriment of all others.

13 In support of this position the appellants, in oral argument, put forward a number of unsubstantiated propositions. The problems arising from this procedure can best be illustrated by setting out but some of those submissions.

14 For example, counsel referred to the political process of Canada in these words:

> If Your Lordship will look back to the federal legislation, since the enactment of the federal legislation insofar as political parties are concerned, the only political parties that have benefited from the legislation are the political parties that have voted for it, the three major parties in this country.
>
> . . .
>
> But no political party has received over 10 percent of the vote, and I think one of the interveners say [sic] that the applicants make the bald statement that there are many political parties who do not receive 10 percent of the vote, but there is no Affidavit evidence to that effect. Well, Your Lordships, I say with respect that jurisprudence permits me to make the bald statement because what I am saying is so part of our process that it is universally known. There is the COR party that did not get 10 percent, there is the Libertarian party that did not get 10 percent, there is Western Canadian Concept that did not get 10 percent, that there is the Rhinoceros Party that may have got 10 percent in some constituencies but not throughout the country. No political party -- and in Manitoba, again, there would be three or four parties at least that did not get 10 percent of the vote.

These submissions were of particular importance to the argument and yet there is no factual basis put forward to support it.

15 Counsel then referred to the international political situation in these words:

> In Germany, the Nazi party obtained through the democratic process well over 10 percent of the vote, and there are candidates in the province of Manitoba

> and in the country who would express views which this group would defend their right to express, even though Parliament had made them illegal. Parliament had not seen fit to prevent these people from running for office that would get 10 percent of the vote.
>
> . . .
>
> Your Lordships will note that yesterday's The Toronto Star said that the Neo-Nazis are up to 7 percent in Germany. If they were in running in Canada and they got another 3 percent, they are entitled to 50 percent of the state for the financing of their political party. What is the purpose of all this?

16 Once again there had been no factual foundation constructed to support these submissions nor any attempt to relate the statistics pertaining to Germany and Canada.

17 There then followed a reference to the historical evolution of Canada's political parties and processes which was put this way:

> Since the Elections Finances Act, at the federal scene, no political party has ever achieved 10 percent of the vote. But before the Elections Act, a party went from nothing to 19 percent, and the Social Credit Party, which was a radical, anti-establishment view, was not prohibited from expressing its view and, indeed, successfully expressed it. There is absolutely no basis for my learned friends to say that they will be more successful if they had money. I say, with respect, that there is every equal reason saying that they will be less successful.

18 Counsel then continued and made submissions pertaining to the effect of the elections expenses legislation on political campaigns and the results that might be expected.

> Indeed in the most recent election campaign, there were millions of dollars spent by non-political parties pursuing the issues of the political parties and the complaints afterwards that you have to somehow prevent this by tightening up the legislation.
>
> . . .
>
> It has not resulted in the party spending less money, it has resulted in them spending more money. It has resulted -- and I do this now on the face of the legislation. I don't have to give you an affidavit, what is available.
>
> . . .
>
> The statement made by Mr. Justice Monnin, the trial judge, implies that opinions cannot effectively be expressed without finances. I ask Your Lordships to find that that is not the case, to find at least that there is no substantiation for that position, that often the finances result in opinions not being expressed, that they are not used for the expression of opinion, that they are used for selling soul, that the more one has finances, the more one abandons trying to get across a position and

tries to indulge in selling snake oil through signs, through banners, through different things.

The party with no money relies on a policy statement being advertised in the paper or hectographed on a sheet of paper trying to express his opinion. The party with money puts up all kinds of signs saying the name of the candidate in fine colour. There is no basis for any suggestion that people were prohibited from stating their opinions prior to the legislation having been enacted.

. . .

When one says that they can be disseminated better on television, I say with respect to Your Lordship that it is very, very difficult to get across in a 30 minute ad or a five minute ad a policy statement, and they don't do it. It is, "He is your kind of man, et cetera, leader

--" I mean, I could go through the entire litany of these alleged expressions of opinion, and that is not what money does in an election campaign.

. . .

Your Lordships, in 1969, of which I am able to speak, and again I don't have to have affidavits. Your Lordships can take judicial notice .... In 1969, a government was elected in the Province of Manitoba on virtually no money. The same government lost a year ago having spent $3 million out of -- of my money, and of people who pay income tax.

. . .

We don't have such a thing as a presidential election, we don't even have a prime ministerial election, we have elections in the constituencies, which does not mean that they have to spend $20 million to get elected.

19 These submissions pertaining to the financing of political parties and the effect of contributions to campaign expenses were as well of great importance to the argument, yet no evidence was submitted. It may well be that one could take judicial notice of some of the broad social facts referred to by the appellants, but here there is a total absence of a factual foundation to support their case.

20 A factual foundation is of fundamental importance on this appeal. It is not the purpose of the legislation which is said to infringe the Charter but its effects. If the deleterious effects are not established there can be no Charter violation and no case has been made out. Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position.

21 These issues raise questions of importance pertaining to financing candidates in provincial elections that are obviously of great importance to residents of Canada or to any democracy. It would be irresponsible to attempt to resolve them without a reasonable factual background.

22 The appellants also argued an issue that does not require a factual foundation. It was said that the statutory funding of candidates could, whenever a losing candidate or candidates received 10 per cent of the vote, force a taxpayer to support a candidate whose views are fundamentally opposed to that of the taxpayer. This enforced support of a contrary view was said to infringe the taxpayer's right to freedom of expression. I cannot accept that contention. The Act does not prohibit a taxpayer or anyone else from holding or expressing any position or their belief in any position. Rather, the Act seems to foster and encourage the dissemination and expression of a wide range of views and positions. In this way it enhances public knowledge of diverse views and facilitates public discussion of those views.

Disposition

23 In the result the appeal must be dismissed but in the circumstances, particularly in light of the position taken throughout by the respondent, without costs.

Tab 7

Case Name:

Native Council of Nova Scotia v. Canada (Attorney General)

Between
Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council, Native Council of Prince Edward Island Maritime Aboriginal Peoples Council, Chief Jamie Gallant, Chief Kim Nash-Mckinley, and Chief Grace Conrad, Applicants,
and
The Attorney General of Canada, Respondent

[2011] F.C.J. No. 19

[2011] A.C.F. no 19

2011 FC 72

[2012] 4 F.C.R. 112

[2012] 4 R.C.F. 112

383 F.T.R. 64

[2011] 2 C.N.L.R. 138

Dockets T-1375-10, T-1494-10

Federal Court
Halifax, Nova Scotia

Zinn J.

Heard: December 13, 2010.
Judgment: January 25, 2011.

(81 paras.)

Aboriginal law -- Aboriginal status and rights -- Duties of the Crown -- Honour of the Crown -- Government benefits, services and programs -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Racial discrimination -- Application by provincial Native Councils for declaration

that decisions of Governor in Council regarding 2011 Census and National Household Survey (NHS) were unconstitutional, for declaration enjoining Government from administering 2011 Census and NHS, and directing Government to administer mandatory long-form census dismissed -- Honour of Crown not engaged as applicants failed to establish existence of aboriginal right that may have been adversely affected by Government's actions regarding 2011 Census -- Any decrease in response rates among aboriginals would not be result of any distinction or differential treatment, and accordingly would not engage s. 15 of Charter.

Constitutional law -- Canadian Charter of Rights and Freedoms -- Equality rights -- Discrimination, what constitutes -- Grounds of discrimination -- Enumerated -- Application by provincial Native Councils for declaration that decisions of Governor in Council regarding 2011 Census and National Household Survey (NHS) were unconstitutional, for declaration enjoining Government from administering 2011 Census and NHS, and directing Government to administer mandatory long-form census dismissed -- Honour of Crown not engaged as applicants failed to establish existence of aboriginal right that may have been adversely affected by Government's actions regarding 2011 Census -- Any decrease in response rates among aboriginals would not be result of any distinction or differential treatment, and accordingly would not engage s. 15 of Charter.

Government law -- Access to information and privacy -- Protection of privacy -- Governmental or public information -- Census records -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Application by provincial Native Councils for declaration that decisions of Governor in Council regarding 2011 Census and National Household Survey (NHS) were unconstitutional, for declaration enjoining Government from administering 2011 Census and NHS, and directing Government to administer mandatory long-form census dismissed -- Honour of Crown not engaged as applicants failed to establish existence of aboriginal right that may have been adversely affected by Government's actions regarding 2011 Census -- Any decrease in response rates among aboriginals would not be result of any distinction or differential treatment, and accordingly would not engage s. 15 of Charter.

Application by three provincial Native Councils for a declaration that decisions of the Governor in Council regarding the 2011 Census and National Household Survey (NHS) were unconstitutional, for a declaration enjoining the Government from administering the 2011 Census and NHS in the format proposed, and directing the Government to administer the mandatory long-form census as it did in 2006. In 2006, 80 per cent of households received the short-form census, and 20 per cent of households received the long-form census. Completion of these forms was mandatory. In 2010, the Government eliminated the long-form census and determined that every household would have to complete the short-form census. In addition, it was determined that Statistics Canada would conduct a voluntary survey, called the National Household Survey (NHS) which would be distributed to one-third of Canadian households. The questions posed in the NHS were to include those that were asked in the 2006 long-form census. The 2006 long-form census contained four questions concerning aboriginal identification and ancestry: What were the ethnic or cultural origins of this person's ancestors? Is this person an aboriginal person, that is, North American Indian, MÚtis or Inuit (Eskimo)? Is this person a member of an Indian Band/First Nation? and Is this person a Treaty Indian or a Registered Indian as defined by the Indian Act of Canada? The 2011 NHS was to contain four questions concerning aboriginal identification and ancestry: What were the ethnic or cultural origins of this person's ancestors? Is this person an aboriginal person, that is, First Nations (North American

Indian), MÚtis or Inuk (Inuit)? Is this person a Status Indian (Registered or Treaty Indian as defined by the Indian Act of Canada)? and Is this person a member of a First Nation/Indian band? The applicants objected to the elimination of the long-form census and to the wording of the questions directed to aboriginal peoples in the 2011 NHS. They submitted that the cancellation of the mandatory long-form census and its substitution with a voluntary NHS would violate the obligations owed by the Crown to aboriginal peoples. They claimed that this change would compromise the quality, accuracy, reliability and comparability of data on aboriginal peoples, particularly off-reserve and non-status aboriginal peoples. The applicants further claimed that the changes to the census would result in differential and disadvantageous treatment of aboriginal peoples as compared to non-aboriginal peoples because the changes would cause an undercount of, and the collection of less accurate data about, the aboriginal population, which would deny users of the data the benefit of accurate, reliable, and comparable data about this group.

HELD: Application dismissed. The applicants relied on the honour of the Crown to ground their claim that there had been a violation of a constitutional right. The honour of the Crown arose only when there was a specific aboriginal interest or right at stake in the Crown's dealing. The applicants failed to establish the existence of an aboriginal right or title that may have been adversely affected by the Government's actions regarding the 2011 Census. Accordingly, the honour of the Crown was not engaged. Furthermore, s. 91(24) of the Constitution Act, 1867, did not oblige Canada to legislate on all issues concerning aboriginal peoples. In particular, it did not create a positive obligation on the Government to collect data about aboriginals in Canada at all, let alone in a specific and mandatory long-form census. The applicants failed to establish that the legislative provisions at issue created a distinction based on aboriginality or aboriginal residence. The changes to the census did not draw an explicit distinction on any of the alleged grounds of discrimination. Any decline in data quality that might have been occasioned by the changes to the census would not differentially affect the claimant groups. Any potential adverse effect on aboriginal response rates stemming from the decision to discontinue the mandatory long-form census and replace it with the voluntary NHS would not be the result of the inherent characteristics of the claimant groups. It would be the result of individual choice. Although this choice may have been influenced by social factors affecting aboriginals, lower response rates to surveys was not a true characteristic of aboriginals, non-status aboriginals, or aboriginals living off-reserve. The claimant groups were able to participate in the voluntary survey, to have their identity reflected in the statistics, and to use the results. Any decrease in response rates among aboriginals would not be the result of any distinction or differential treatment, and accordingly would not engage s. 15 of the Charter. The applicants provided no evidence that Statistics Canada prepared the census and survey questions inappropriately, or that the wording of the questions would result in confusion and under-reporting by the aboriginal peoples of Canada.

Statutes, Regulations and Rules Cited:

Canada Corporations Act, R.S.C. 1970, c. C-32, s. 129.3

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 15

Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 5, s. 40

Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 35, s. 52(1)

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 8, s. 91(6), s. 91(24)

Federal Court Rules, Rule 81(1)

Statistics Act, R.S.C. 1985, c. S-19, s. 3, s. 8, s. 9, s. 9(1), s. 19(1), s. 19(2), s. 21(1), s. 22, s. 31

Counsel:

Ann E. Smith and Derek A. Simon, for the Applicants.

Kathleen McManus and Melissa R. Chan, for the Respondent.

REASONS FOR JUDGMENT AND JUDGMENT

1 **ZINN J.**:-- The applicants ask the Court to declare that decisions of the Governor in Council and the Minister of Industry regarding the 2011 Census and National Household Survey are unconstitutional, to enjoin the Government of Canada from administering the 2011 Census and National Household Survey in the format proposed, and to direct the Government of Canada to administer the mandatory long-form census as it did in 2006.

2 The applicants, Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council, and Native Council of Prince Edward Island, are three self-governing organizations representing off-reserve aboriginal peoples in their respective provinces. Each is a member of the Maritime Aboriginal Peoples Council, an aboriginal Intergovernmental Council which advocates at the regional level. Chief Jamie Gallant is the President and Chief of the Native Council of Prince Edward Island. She is a Mi'kmaq and resides off-reserve. Chief Grace Conrad is the Chief and President of the New Brunswick Aboriginal Peoples Council. She is a Wolastoqiyik (Malecite) and a status Indian residing off-reserve. Chief Kim Nash-McKinley is the President and Chief of the Native Council of Nova Scotia. She is a Mi'kmaq and a status Indian residing off-reserve.

3 The applicants object to the manner in which the Government of Canada has ordered the 2011 Census to be taken and to the questions relating to aboriginal peoples that have been ordered to be asked in the National Household Survey. The decisions under review changed the 2011 Census methodology and format from that used in 2006. The applicants submit that these changes are contrary to the Crown's constitutional and legal obligations to aboriginal peoples, infringe the constitutional and legal rights of aboriginal peoples to equality and non-discrimination, and will result in the Crown being unable to fulfill its duties under the *Statistics Act*, R.S.C. 1985, c. S-19.

4 For the reasons that follow, this application is dismissed, with costs.

The Census versus a Voluntary Survey

5 There is a constitutional requirement that a census of the population of Canada be taken by the Government of Canada every ten years: *Constitution Act, 1867*, ss. 8 and 91(6). Since 1971 the Government of Canada, through Statistics Canada, has undertaken a census of the Canadian population every five years: *Statistics Act*, s. 19(1).

6 The *Constitution Act, 1867* offers no guidance as to the manner of taking the census or the information to be gathered. The first Canadian census of the population was taken in 1871; it recorded name, sex, age, whether the person was born within the last twelve months, country or province of birth, religion, origin, profession, occupation or trade, whether the person was married or

widowed or married within the last twelve months, as well as questions related to whether the person was in school or literate, and whether the person was deaf and dumb or blind.[1]

7 Subsection 19(2) of the *Statistics Act* provides the only direct legislative requirement as to the content of the census format. It provides that the census "shall be taken in such a manner as to ensure that counts of the population are provided for each federal electoral district of Canada." Pursuant to s. 21(1) of the *Statistics Act*, the "Governor in Council shall, by order, prescribe the questions to be asked in any census taken by Statistics Canada under section 19 or 20."

8 Given the constitutional nature of the census and the requirement that it record every person resident in Canada on the date it is taken, it is hardly surprising that s. 31 of the *Statistics Act* creates an offence for those who refuse or neglect to answer, or who willfully answer falsely, any census question. It is because of this provision that participation in the census is often described as being "mandatory."

9 Statistics Canada, which performs the census on behalf of the Government of Canada, is also empowered to perform surveys. Section 8 of the *Statistics Act* provides that "the Minister [of Industry] may, by order, authorize the obtaining, for a particular purpose, of information other than information for a census of population or agriculture, on a voluntary basis" and where such information is requested there is no offence for those who refuse or neglect to answer, or who wilfully answer falsely, any survey question. The fundamental distinction between the census and a survey is that the former is intended to count everyone and it is mandatory that persons in Canada complete it accurately, whereas surveys are voluntary and typically are only sent to a portion of the Canadian public.

10 In 2006, as in each census since 1971, there were two census forms used. Most households (80%) received the short-form census which contained eight questions on basic topics such as age, sex, marital status, and mother tongue. The remaining 20% of households received the long-form census, which contained the eight questions from the short-form census plus 53 additional questions on topics such as education, ethnicity, mobility, income, employment and dwelling characteristics. Completion of these forms was mandatory and failure to complete them accurately was an offence.

11 In 2010 the Government of Canada determined that the long-form census would be eliminated but that the mandatory short-form census would continue to be required to be completed by every household in the country. In addition, it was determined that Statistics Canada would conduct a voluntary survey to be called the National Household Survey (NHS) which would be distributed to one third of Canadian households. The questions posed in the NHS, with limited exceptions, will include those that were asked in the 2006 long-form census.

Questions Directed to Aboriginal Peoples

12 There are no questions regarding aboriginal peoples in either the 2006 short-form census or in the proposed 2011 Census.

13 The 2006 long-form census contained four questions concerning aboriginal identification and ancestry: Questions 17, 18, 20, and 21. The questions are reproduced in full in Appendix A, however, the questions, in brief, were as follows:

17. What were the ethnic or cultural origins of this person's ancestors?

18. Is this person an aboriginal person, that is, North American Indian, Métis or Inuit (Eskimo)?
20. Is this person a member of an Indian Band/First Nation?
21. Is this person a Treaty Indian or a Registered Indian as defined by the *Indian Act* of Canada?

14 The 2011 NHS will contain four questions concerning aboriginal identification and ancestry: Questions 17, 18, 20, and 21. Again, these questions are also reproduced in Appendix A, however, the questions, in brief, are as follows:

17. What were the ethnic or cultural origins of this person's ancestors?
18. Is this person an aboriginal person, that is, First Nations (North American Indian), Métis or Inuk (Inuit)?
20. Is this person a Status Indian (Registered or Treaty Indian as defined by the *Indian Act* of Canada)?
21. Is this person a member of a First Nation/Indian band?

15 As noted previously, the applicants object to the elimination of the long-form census and to the wording of the questions directed to aboriginal peoples in the 2011 NHS. These decisions were made in the two orders under review. The Governor in Council, by Order in Council P.C. 2010-1077 dated August 12, 2010, established that the 2011 Census was to take place in May 2011 and set out the ten questions that were to be asked. The Chief Statistician of Canada by order dated July 19, 2010, ordered the NHS and prescribed the 66 questions to be asked.

Preliminary Objection to the Evidence

16 The applicants filed the affidavits of the personal applicants as well as affidavits from Roger Hunka, Andrew J. Siggner and David A. Binder. Roger Hunka is the Director of Intergovernmental Affairs for the Maritime Aboriginal Peoples Council. Mr. Siggner is a demographer. His training is in sociology and demography. He graduated from the University of Western Ontario with a B.A. in sociology in 1969, and with an M.A. in sociology with a speciality in demographics in 1971. He is a member of the Canadian Population Society and its former secretary-treasurer. Mr. Binder is a mathematical statistician. He has a Ph.D. in mathematical statistics and a P.Stat. accreditation in mathematical statistics from the Statistical Society of Canada.

17 Prior to the hearing, the respondent moved to strike portions of each of the six affidavits filed by the applicants on the basis that the affidavits were "largely composed of extrinsic evidence not before the statutory decision-maker" and were not confined to the personal knowledge of the deponents, as required by Rule 81(1) of the *Federal Courts Rules*, SOR/98-106, but were "full of opinions, conclusions, speculation and irrelevancies." The ultimate disposition of the motion was left by the case management Prothonotary to the applications judge.

18 The general rule in this Court is that affidavits are to be confined to the personal knowledge of the deponent. Rule 81(1) of the *Federal Courts Rules* provides that:

81. (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.

* * *

81. (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête - autre qu'une requête en jugement sommaire ou en procès sommaire - auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

19 The applicants submit that Rule 81(1) does not apply to the admissibility of constitutional or legislative evidence. They say that Rule 81(1) reflects the general rule against hearsay but does not displace the common law exceptions to the rule: *Canadian Tire Corp. v. P.S. Partsource Inc.*, 2001 FCA 8. Relying on *Westergard-Thorpe v. Canada (Attorney General)*, [1999] F.C.J. No. 721 (T.D.), at para. 3, they submit that there are only two limitations on the admissibility of extrinsic evidence in constitutional cases: (i) evidence which is inherently unreliable or offends public policy and (ii) evidence used to aid in statutory construction. The applicants say that the evidence tendered is necessary and they point to the importance the Supreme Court of Canada has placed on ensuring that there is a proper factual foundation when one is challenging the validity of legislation on *Charter* grounds. In *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at paras. 8 and 9, the Court wrote that:

> Charter cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most Charter cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.
>
> Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

20 There is no question that a *Charter* challenge requires a proper factual foundation and I reject the submission of the respondent that the only materials properly before the Court in applications such as these are those that were before the decision-makers when the orders under review were made. However, I agree with the respondent that many of the paragraphs of the affidavits of

the applicants' affiants provide no factual information at all but rather consist of opinion and speculation.

21 The respondent submits that all or parts of the following paragraphs should be struck from the affidavits:

a. Affidavit of Nash-McKinley: paragraphs 16, 19, 20, 21, 22, 23, 24;
b. Affidavit of Conrad: paragraphs 19, 20, 21, 22, 23, 24;
c. Affidavit of Gallant: paragraphs 19, 20, 21, 22, 23, 24;
d. Affidavit of Hunka: paragraphs 11, 12, 13, 15, 16, 17, 28, 29, 33, 40, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 61, 62;
e. Affidavit of Binder: paragraphs 13, 14, 15, 17, 18, 19, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40; and f. Affidavit of Siggner: paragraphs 7, 9, 14, 22, 23, 24, 25, 26, 27, 28, 58, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 47, 48, 49, 50, 51.

22 The Federal Court of Appeal has recently confirmed the circumstances in which the Court ought to strike all or portions of affidavits. In *Canada (Attorney General) v. Quadrini*, 2010 FCA 47, at para 18, the Court wrote that:

> As a general rule, the affidavit must contain relevant information which would be of assistance to the Court in determining the application. As stated by our Court in *Dwyvenbode v. Canada (Attorney General)*, 2009 FCA 120, the purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation. The Court may strike affidavits, or portions of them, where they are abusive or clearly irrelevant, where they contain opinion, argument or legal conclusions....
>
> [Emphasis in the original].

23 In general, factual evidence in constitutional cases consists of either adjudicative facts or legislative facts. Adjudicative facts serve as the foundation for facts that concern the parties, which, given their specificity, must be proved by admissible evidence. Legislative facts demonstrate the purpose and the background of the legislation, including its social, economic, and cultural context, and are subject to less stringent evidentiary requirements: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086.

24 Extrinsic evidence is admissible in constitutional cases because often it is the only way to address a constitutional issue, particularly when it concerns want of jurisdiction: see *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 (C.A.) at para. 13.

25 Much of what is objected to by the respondent in the affidavits tendered by the applicants can be said to constitute legislative facts because its purpose is to lend context to the constitutional claims. In this regard, the applicants have tendered evidence that the 2006 census data was used by the government and others in making decisions on services for aboriginal peoples, that programs and services provided to aboriginal peoples through registered bands is often not available to those who live off-reserve, and that aboriginal peoples are less likely to complete a voluntary NHS than a mandatory census. The personal applicants state in their affidavits that these are their concerns. I find this to be unobjectionable, although it may be deserving of little weight. The evidence of the two experts offered by the applicants generally addresses the possible impact of the changes in the

methodology of the census and NHS compared to the 2006 Census and the possible consequences of the shift to the NHS in place of the mandatory long-form census. I find neither objectionable - they arguably provide legislative facts necessary for the applicants' constitutional challenge. However, there are occasions where the experts go beyond their expertise, become less than objective, and become too closely aligned with their clients' interests. Those paragraphs will be struck.

26 The statement that the funding received is inadequate to meet the needs of the off-reserve aboriginal peoples is irrelevant to any issue before the Court in these applications and accordingly paragraph 16 of the Nash-McKinley affidavit is struck.

27 Paragraphs 11, 12, 13, and 59 of the Hunka affidavit are statements of law and, while appropriate in a written submission by counsel, are inappropriate in an affidavit, especially when there is no evidence that the affiant has any legal training. Paragraphs 29, 33, and 35 of his affidavit are hearsay, being statements alleged to have been made by others, and they are struck. Paragraph 34 is struck as it purports to set out the reason for the resignation of the Chief Statistician. This is a matter that is not within the affiant's personal knowledge and, in any event, is irrelevant to these applications. Paragraphs 43 to 58 speculate as to the consequences of the changes objected to by the applicants; they constitute the affiant's opinion. No basis for these opinions is provided in the affidavit nor is there any indication that the affiant is qualified as an expert on the subjects on which he states his opinion. These paragraphs are struck.

28 Paragraph 38 of the Siggner affidavit, commencing with the words "in the hopes that ..." to the end of the paragraph, and paragraph 39, are struck. These passages speculate on the motives of the Government of Canada and provide a characterization of its actions which is unwarranted, prejudicial, and beyond the expertise or knowledge of the affiant.

29 Paragraph 17 of the Binder affidavit is struck as it provides a legal conclusion that is beyond the expertise of the affiant.

30 Ultimately, given my disposition of this application and the reasons for my decision, the evidence filed by the applicants was of marginal value and little weight was given to it.

Issues

31 The issues raised by the applicants and respondent are the following:

1. What is the appropriate standard of review?
2. Are the changes to the census contrary to the respondent's constitutional obligations to aboriginal peoples pursuant to s. 91(24) of the *Constitution Act, 1867* and s. 35 of the *Constitution Act, 1982*?
3. Do the changes to the census violate s. 15 of the *Canadian Charter of Rights and Freedoms*?
4. Do the changes to the census violate the *Canadian Human Rights Act*?
5. Do the changes to the census violate s. 9 of the *Statistics Act*?
6. Do the changes to the census result in the respondent being unable to fulfill its duties under the *Statistics Act*?
7. If there is a rights violation, what is the appropriate remedy?

Analysis

Standard of Review

32 The respondent submits that in making the orders under review the Government of Canada is exercising powers of a legislative nature and accordingly its decisions are entitled to deference from the Court. It is further submitted that the Court should not investigate the motive which caused the Governor in Council to pass the Order in Council as this falls within the Crown prerogative.

33 I agree that the Court is not a forum to examine the motives of the Government as its motives are irrelevant to the issues before the Court. However, there is no deference owed to the respondent when deciding whether or not the orders under review are constitutionally valid. Section 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11, provides that:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> * * *
>
> **52.** (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

The standard of review is therefore correctness. If the orders under review are inconsistent with the Constitution of Canada, then they must be declared to be of no force or effect. If they are not inconsistent with the Constitution, then the Court must not intervene.

Are the changes to the census contrary to the respondent's constitutional obligations to aboriginal peoples pursuant to s. 91(24) of the Constitution Act, 1867 and s. 35 of the Constitution Act, 1982?

34 The applicants submit that the duties that the Crown owes to aboriginal peoples are derived from s. 91(24) of the *Constitution Act, 1867*, which gives the federal government jurisdiction over "Indians and lands reserved for Indians," and s. 35 of the *Constitution Act, 1982*, which recognizes the "existing aboriginal and treaty rights of the aboriginal peoples of Canada." The applicants say that included in these Crown duties is the "honour of the Crown," as recognized by the Supreme Court in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, which requires the Crown to act honourably in its dealings with aboriginal peoples. Finally, they submit that these Crown duties must be interpreted in light of the *UN Declaration on the Rights of Indigenous Peoples*, which was endorsed by the Government of Canada on November 12, 2010.

35 The applicants submit that the cancellation of the mandatory long-form census and its substitution with a voluntary NHS will violate the obligations owed by the Crown to aboriginal peoples. They submit that this change will compromise the quality, accuracy, reliability and comparability of data on aboriginal peoples, particularly off-reserve and non-status aboriginal peoples. The applicants argue that census data is a key source of information used by the Government when designing programs and services to fulfill its constitutional duties to aboriginals. In short, the ultimate consequence of the changes, they assert, will be to compromise the programs and services available to aboriginal peoples and, most particularly, to those who live off-reserve.

36 Section 35 of the *Constitution Act, 1982* provides that:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

* * *

35. (1) Les droits existants -- ancestraux ou issus de traités -- des peuples autochtones du Canada sont reconnus et confirmés.
(2) Dans la présente loi, "peuples autochtones du Canada" s'entend notamment des Indiens, des Inuit et des Métis du Canada.
(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.
(4) Indépendamment de toute autre disposition de la présente loi, les droits -- ancestraux ou issus de traités -- visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

37 In order to demonstrate a violation of s. 35 of the *Constitution Act, 1982*, the applicants must demonstrate that there is an aboriginal or treaty right at stake. They have not done so. The applicants have not suggested that there is any treaty right at issue and they have failed to point to a possible aboriginal right that has been infringed. Instead, they rely on the general duty of the "honour of the Crown" to ground their claim that there has been a violation of a constitutional right.

38 The applicants submit that the Supreme Court in *Haida Nation* held that the honour of the Crown arises in all of the dealings of the Government of Canada with Canada's aboriginal peoples. In particular, they rely upon paragraphs 16 and 17 of the reasons:

> The government's duty to consult with aboriginal peoples and accommodate their interests is grounded in the honour of the Crown.
>
> The honour of the Crown is always at stake in its dealings with aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of

> the Crown": *Delgamuukw, [1997] 3 S.C.R. 1010, supra*, at para. 186, quoting *Van der Peet, [1996] 2 S.C.R. 507, supra*, at para. 31.
>
> [Emphasis added]

39 I am not convinced that the decision of the Supreme Court goes as far as the applicants submit. In my view, the Supreme Court's decision, properly interpreted, does not assert that the honour of the Crown arises whenever the Crown takes an action that may indirectly impact aboriginal peoples. Rather, in *Haida Nation* and other decisions, courts have observed that the honour of the Crown arises when there is a specific aboriginal interest or right at stake in the Crown's dealing. In *Haida Nation*, the right or interest was the assertion of the Haida Nation that it had aboriginal title to all of the lands of the Haida Gwaii and the waters surrounding it. In the *Badger* and *Marshall* cases referred to in the quote above, the individuals were asserting rights given to them through treaties entered into between the Crown and their aboriginal nations. This is evident, for example, in para. 41 of *Badger* where the Supreme Court states:

> ... the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.
>
> [Emphasis added]

40 In *Haida Nation* there was no proven aboriginal right but there was a claim to title supported by a good *prima facie* case that was found by the Supreme Court at para. 35 to be sufficient to engage the honour of the Crown and its duty to consult:

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it...
>
> [Emphasis added].

41 In this case, the applicants have failed to establish any case for the existence of an aboriginal right or title that may be adversely affected by the Government's actions regarding the 2011 Census. Accordingly, I find that the honour of the Crown is not engaged.

42 Furthermore, I agree with the respondent that although s. 91(24) of the *Constitution Act, 1867* assigns the Government of Canada jurisdiction to legislate regarding "Indians, and lands reserved for Indians," it does not oblige Canada to legislate on all issues concerning aboriginal peoples. In particular, it does not create a positive obligation on the Government of Canada to collect data about aboriginals in Canada at all, let alone in a specific and mandatory long-form census. I concur with the views expressed by Justice Addy in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development*, [1987] F.C.J. No. 1005, at para 54:

> ... [T]he provisions of our Constitution are of no assistance to the plaintiffs on this issue. The *Indian Act* was passed pursuant to the exclusive jurisdiction to do so granted to the Parliament of Canada by subsection 91(24) of the *Constitution Act 1867*. This does not carry with it the legal obligation to legislate or to carry out programs for the benefit of Indians anymore than the existence of various disadvantaged groups in society creates a general legally enforceable duty on the part of governments to care for those groups although there is of course a moral and political duty to do so in a democratic society where the welfare of the individual is regarded as paramount.

Do the changes to the census violate s. 15 of the Charter?

43 In *R. v. Kapp*, [2008] 2 S.C.R. 483, the Supreme Court rearticulated the test for a finding of discrimination under s. 15 of the *Charter* as originally developed in *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 and *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. At para. 17 of *Kapp* the Court stated the test as follows: "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"

44 The applicants correctly note that both aboriginality and aboriginality-residence have been recognized by the Supreme Court as prohibited grounds of discrimination: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. They submit that the changes to the census will result in discrimination on both of these grounds. They say that the changes will result in differential and disadvantageous treatment of aboriginal peoples as compared to non-aboriginal peoples because the changes will cause an undercount of, and the collection of less accurate data about, the aboriginal population, which will deny users of the data the benefit of accurate, reliable, and comparable data about this group.

45 The applicants claim the problem will be particularly acute for the off-reserve and non- status aboriginal population because the off-reserve population is geographically dispersed and it is difficult to locate, identify, and obtain data about this population without the mandatory long-form census and the Aboriginal Peoples Survey, which is based on the census results. They say that because this data is used to formulate and implement policies, programs, and services for aboriginal peoples, the decrease in the quality of data will likely impact the quality and availability of these programs and services, resulting in unequal treatment vis-à-vis the non-aboriginal population, with an especially egregious impact on off-reserve aboriginals. The applicants essentially allege discrimination on three intertwined but distinct grounds: aboriginality, not having Indian status, and off-reserve residence. The use of multiple comparator groups has been recognized as appropriate where an equality claimant alleges discrimination based on different personal characteristics: *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2002), 59 O.R. (3d) 481 (C.A.). Accordingly, here, the appropriate comparator groups would be non-aboriginals, status Indians, and aboriginals living on-reserve.

46 In my view, the applicants have failed to establish that the legislative provisions at issue create a distinction based on aboriginality or aboriginality-residence. The changes to the census do not draw an explicit distinction on any of the alleged grounds of discrimination; what the applicants allege here is, in essence, adverse effect discrimination. Adverse effect discrimination arises where a law which is on its face neutral, as the changes to the census are here, has a discriminatory effect.

47 The discrimination the applicants allege they would suffer under the new census is the denial of "equal benefit of the law" under s. 15, specifically the benefit of access to accurate data about their constituents. The problem with this submission is that any decline in data quality that might be occasioned by the changes to the census would not differentially affect the claimant groups. The alleged decline in data quality would affect all Canadians. If, as the affidavit evidence suggests, a number of social groups are less likely to respond to a voluntary survey, the reliability of the data as a whole, not just the data relating to aboriginals, would be impeached. Furthermore, the applicants' submission that data regarding aboriginal peoples will be skewed because aboriginals who respond to the NHS will tend to be educated, literate, of a high socioeconomic status, older, and less mobile does not assist them in establishing a distinction based on aboriginal identity or aboriginality-residence, since these factors would equally tend to influence response rates across the entire Canadian population.

48 Second, any potential adverse effect on aboriginal response rates stemming from the decision to discontinue the mandatory long-form census and replace it with the voluntary NHS would not be the result of the inherent characteristics of the claimant groups. It would be the result of individual choice. Although this choice may be influenced by social factors affecting aboriginals, lower response rates to surveys is not a true characteristic of aboriginals, non-status aboriginals, or aboriginals living off-reserve. The doctrine of adverse effect discrimination is intended to ensure the equality guarantee in s. 15 of the *Charter* results in substantive equality by recognizing that certain groups' characteristics may result in a distinction even when no such distinction is explicitly drawn by the law in question. Here, the government's action simply does not create a distinction.

49 The Supreme Court of Canada first addressed the concept of adverse effect discrimination in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536, where Justice McIntyre, in the context of human rights legislation, wrote, at para. 18:

> A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.
>
> [Emphasis added]

50 In *Egan v. Canada*, [1995] 2 S.C.R. 513, Justice Cory described adverse effect discrimination as follows at para. 138:

> Direct discrimination involves a law, rule or practice which on its face discriminates on a prohibited ground. Adverse effect discrimination occurs when a law, rule or practice is facially neutral but has a disproportionate impact on a group because of a particular characteristic of that group.
>
> [Emphasis added]

51 In *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, at para. 67, the Supreme Court wrote that:

> The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. ... The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.
>
> [Emphasis added]

52 This understanding of the indicia of adverse effect discrimination was affirmed in *Law* at para. 36:

> In such cases, it is the legislation's failure to take into account the true characteristics of a disadvantaged person or group within Canadian society (i.e., by treating all persons in a formally identical manner), and not the express drawing of a distinction, which triggers s. 15(1).
>
> [Emphasis added].

53 The tendency of a certain group not to respond to a voluntary survey cannot be said to be a "true characteristic" within the meaning ascribed to that term by the jurisprudence. The applicants have made no allegation that there is any characteristic of aboriginals, non-status aboriginals, or off-reserve aboriginals which would impede their completion of a voluntary survey, and that as such there has been no failure on the part of the respondent to recognize and accommodate the claimant groups' characteristics. What the applicants argue for is a positive duty on the government to compel participation in the census in order to compensate for an alleged tendency of certain groups not to respond to a voluntary survey. This is a creative submission but it must fail because the adverse effect analysis still requires a distinction in the way the claimant group is treated. As explained by Justice Fichaud, writing for the Nova Scotia Court of Appeal in *Boulter v. Nova Scotia Power Inc.*, 2009 NSCA 17, at para. 77:

> ... it remains necessary, even for adverse effect discrimination, that the claimants' group or subgroup be treated differently than the comparator group, whose

> members do not have the protected characteristic but are otherwise similar to those in the claimant group or subgroup.

54 Justice Fichaud's pithy description, at para. 81, of the cases where adverse effect discrimination has been established, *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 and *Vriend v. Alberta*, [1998] 1 S.C.R. 493, serves to further clarify why the applicants here are not victims of adverse effect discrimination:

> In *Eldridge* the deaf had no translation and those with hearing did not need translation. In *Vriend* homosexuals had no human rights protection and heterosexuals did not need protection. These were adverse effect distinctions, on protected grounds, between the claimants and comparator groups of persons without the protected trait but otherwise similar to the claimants.
>
> [Emphasis added]

55 In *Eldridge*, the claimants were treated differently because they could not access medical care. In *Vriend*, the claimants were treated differently because they were not granted human rights protection. Here the claimant groups are able to participate in the voluntary survey, to have their identity reflected in the statistics, and to use the ultimate results. Any decrease in response rates among aboriginals, would not be the result of any distinction or differential treatment, and accordingly would not engage s. 15 of the *Charter*. The alleged tendency not to complete a voluntary survey is not a characteristic of the claimant groups which prevents them from obtaining equal benefit of the law; rather, it is a behaviour existing independently of the changes to the census procedure. The applicants themselves submit that the response rates will be determined by factors such as education, literacy, socioeconomic status, and mobility. These factors, and the claimant groups' alleged lower response rates generally, are not effects caused by the changes to the census, they are independent social realities. Lower response rates are not the result of the applicants being treated differently. As Justice Iacobucci stated in *Symes v. Canada*, [1993] 4 S.C.R. 695, at para. 134:

> If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.

56 The above statement was further explained in *Eldridge*, above, at para. 76, where the Court wrote that:

> While this statement can be interpreted as supporting the notion that, in providing a benefit, the state is not required to eliminate any pre- existing "social" disadvantage, it should be remembered that it was made in the context of determining whether the legislation made a distinction based on an enumerated or analogous ground. ...

57 This case, as in *Symes*, concerns determining whether the impugned law draws a distinction based on enumerated grounds. *Symes*, as further explained in *Eldridge*, provides that in providing a benefit, here a census, the state is not required to eliminate pre-existing social disadvantage. The

applicants' failure to demonstrate that the changes to the census create a distinction means that they have not met the first branch of the test for discrimination.

Changes in the Wording of the Questions

58 Although the above comments regarding the honour of the Crown and the lack of a distinction necessary to found a s. 15 complaint effectively dispose of the applicants' claims that the change in the wording of the aboriginal questions adversely affects them, as much of the argument was devoted to this issue, a few comments are warranted.

59 For ease of reference, I set out again the changes to the questions:

> **The Aboriginal Identity Question**
>
> 2006 Census: "Is this person an aboriginal person, that is, North American Indian, Métis or Inuit (Eskimo)?"
>
> NHS: "Is this person an aboriginal person, that is, First Nations (North American Indian), Métis or Inuk (Inuit)?"
>
> **The First Nation/Indian Band Question**
>
> 2006 Census: Is this person a member of an Indian band/First Nation?
>
> NHS: Is this person a member of a First Nation/Indian Band?
>
> **The Registered or Treaty Indian Question**
>
> 2006 Census: Is this person a Treaty Indian or a Registered Indian as defined by the *Indian Act* of Canada?
>
> NHS: Is this person a Status Indian (Registered or Treaty Indian as defined in the *Indian Act* of Canada)?

60 The applicants' concern with the change of wording in the Aboriginal Identity Question is that the terms "North American Indian" and "First Nation (North American Indian)" will not necessarily be seen to mean the same thing. They submit that the term "First Nation" is primarily used to describe Indian bands registered under the *Indian Act*, whereas the term "North American Indian" would include non-status Indians as well as those residing off-reserve. Accordingly, they submit that the NHS is likely to undercount the aboriginal population as off-reserve and non-status aboriginals are likely to respond negatively to the question. They submit that the wording of the First Nation/Indian Band Question equates the terms "First Nation" and "Indian Band" and this question confirms their view that aboriginals will under-identify in response to the Aboriginal Identity Question.

61 This view must be balanced against the evidence offered by the respondent. Jane Bedets, the Director of the Social and Aboriginal Statistics Division of Statistics Canada, attests that "extensive qualitative testing" was conducted on questions proposed for inclusion in the 2011 NHS. Specifi-

cally, with respect to the Aboriginal Identity Question, she states that testing occurred between October 9, 2007 and June 5, 2008, and that this testing "included about 650 aboriginal and non-aboriginal participants in 23 locations across Canada." She attests that:

> [R]esults for the Aboriginal Identity question recommend the use of the terms 'First Nations (North American Indian)', 'Métis' and 'Inuk (Inuit)' in the question and response categories. It was also recommended that the instruction 'First Nations (North American Indian) comprises Status and Non-status Indians' be included.
>
> ...
>
> A fourth phase of qualitative testing for the aboriginal identification questions took place between November 3, 2008 to March 30, 2009 in 22 locations across Canada to test the terminology changes for populations living in remote and on-reserve areas. This testing included about 300 aboriginal people.
>
> The results of this testing showed that a majority of participants preferred the use of the term 'First Nations (North American Indian)' and the instruction that 'First Nations (North American Indian) includes Status and Non-Status Indians.

62 The result of the objective testing performed by Statistics Canada must be preferred over the subjective impression of the applicants' witnesses. In any event, as was noted by the respondent, whether there is an undercount as a consequence of the wording change will only be known after the NHS has been conducted. If it turns out that the change in the wording of the questions results in data that is statistically inaccurate, there is nothing that prevents the Government of Canada from discarding it or conducting another survey with different questions.

63 The applicants object to the use of the phrase "Treaty Indian" in the Registered or Treaty Indian Question. They say that it is not a defined word and that the question may be confusing and thus result in a skewed response rate. I note that the same term was used in the 2006 Census and there is no evidence before the Court that its inclusion then resulted in any deviation from the expected response.

64 One can always parse questions and challenge the use of a particular term or phrase and wonder whether a better term or phrase could have been selected. Given that Statistics Canada is in the business of conducting the census and surveys it must be assumed, absent compelling evidence to the contrary, that they do their job with as much accuracy as possible. In short, the Court should presume that Statistics Canada prepared the census and survey questions appropriately, and the burden is on those who allege otherwise to prove so with objective evidence. None was provided by the applicants and I dismiss their claims that the wording of the questions will result in confusion and under-reporting by the aboriginal peoples of Canada.

Do the changes violate the Canadian Human Rights Act?

65 The respondent submits that allegations that the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, has been breached fall within the exclusive jurisdiction of the Canadian Human Rights

Commission and Tribunal, and submit that judicial review cannot precede the process prescribed under that Act.

66 Section 40 of the *Canadian Human Rights Act* provides that:

> 40. (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.
>
> * * *
>
> 40. (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

67 Judicial review is a discretionary remedy and where an adequate alternative remedy exists, the Court may decline to exercise its jurisdiction: *Froom v. Canada (Minister of Justice)*, 2004 FCA 352, at para. 12, *McMaster v. Canada (Attorney General)*, 2008 FC 647, at para. 23, and *Giesbrecht v. Canada*, [1998] F.C.J. No. 621 (T.D.), at para. 13.

68 The Canadian Human Rights Commission is certainly able to deal with complaints relating to alleged discriminatory practices under its Act; it does so on a daily basis. Therefore, there is an adequate alternative remedy available to the applicants with respect to their alleged violations of that Act and, in my view, even if the Court has jurisdiction to issue a declaration that there is a breach of the *Canadian Human Rights Act*, the Court should decline to assume jurisdiction, absent an extraordinary and overriding circumstance.

69 I am not satisfied that there is any extraordinary circumstance in the facts before me. Given the reasons above, I am not even satisfied that the applicants have established that the changes of which they complain establish a strong *prima facie* case of a breach of that Act. Accordingly, I will not exercise my discretion to consider issuing any declaration involving the *Canadian Human Rights Act*.

Do the changes to the census violate s. 9 of the Statistics Act?

70 Section 9(1) of the *Statistics Act* provides as follows:

> 9. (1) Neither the Governor in Council nor the Minister shall, in the execution of the powers conferred by this Act, discriminate between individuals or companies to the prejudice of those individuals or companies.
>
> * * *
>
> 9. (1) Ni le gouverneur en conseil ni le ministre ne peuvent, dans l'exercice des pouvoirs conférés par la présente loi, établir de distinction entre des particuliers ou des compagnies au préjudice d'un ou plusieurs de ces particuliers ou compagnies.

71 The applicants acknowledge that there is little jurisprudential assistance as to the interpretation and application of that provision. They point only to *Re Armco Canada Ltd. and Minister of Department of Consumer and Corporate Affairs* (1975), 8 O.R. (2d) 741 (C.A.), as a decision that references the provision at issue. That decision related to a motion for an exemption from the disclosure requirement in s. 129.3 of the *Canada Corporations Act*, R.S.C. 1970, c. C-32. Justice Kelly granted the motion, in part, and in so doing, in *obiter*, noted the provision of the *Statistics Act* relied on by the applicants and stated:

> From this I would conclude that it is the intention of Parliament that the accumulation of statistical information shall not result in discrimination to the prejudice of anyone. I would feel that, having so provided in the *Statistics Act*, it would not intend that the [*Canada Corporations*] *Act* be so interpreted as to accomplish the discrimination it sought to avoid and tear away the secrecy attached to compliance with the *Statistics Act*. The use of the provisions of the [*Canada Corporations*] *Act* to acquire statistical information would have this effect and to me indicates that it was not the intention of Parliament that the provisions of the Act could be used as a medium for the collation of material having a purely statistical value.

72 The applicants submit that the analysis for discrimination under s. 9(1) of the *Statistics Act* is substantially similar to that under s. 5 of the *Canadian Human Rights Act* and that the proposed changes discriminate between aboriginals and non-aboriginals and between on-reserve and off- reserve aboriginals.

73 The respondent notes that the applicants' allegations with regards to s. 9(1) of the *Statistics Act* are virtually the same as those made in the context of its *Charter* challenge, and that in the absence of jurisprudence regarding discrimination under s. 9(1), it is appropriate to turn to the s. 15 *Charter* definition of discrimination in *Kapp* to maintain consistency in the interpretation of the law.

74 There is no principled basis for the respondent's argument that an analysis of discrimination under s. 9(1) of the *Statistics Act* should import the s. 15 *Charter* definition of discrimination in order to maintain consistency. Following the definition of discrimination in the *Canadian Human Rights Act* and the associated jurisprudence, as suggested by the applicants, would be equally effective in maintaining consistency. Given that the *Canadian Human Rights Act* and the *Statistics Act* are both pieces of legislation rather than constitutional documents, it would seem more consistent not to impose the additional constitutional burden of demonstrating that the disadvantage perpetuates prejudice or stereotyping under that second branch of the *Kapp* test.

75 Even with this lower standard the applicants have failed to demonstrate a distinction and hence discrimination, for the same reasons as they fail to meet the first branch of the *Kapp* test. Section 5 of the *Canadian Human Rights Act* provides that:

> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

* * *

5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :

a) d'en priver un individu;
b) de le défavoriser à l'occasion de leur fourniture.

76 There is simply no basis for an argument that there has been any denial or differentiation in the 2011 census or the NHS on the basis of aboriginal identity. Accordingly, even on the applicants' interpretation, there is no violation of s. 9(1) of the *Statistics Act*.

Do the changes result in the respondent being unable to fulfill its duties under the Statistics Act?

77 The applicants submit that the respondent has duties under the *Statistics Act*, particularly ss. 3 and 22, and that the proposed NHS fails to meet the requirements of these sections as it fails to provide accurate, reliable and comparable statistical data for many of the matters provided for in these sections. In their Notice of Application they also allege that this constitutes a refusal to exercise jurisdiction. Sections 3 and 22 of the *Statistics Act* provides as follows:

3. There shall continue to be a statistics bureau under the Minister, to be known as Statistics Canada, the duties of which are

(a) to collect, compile, analyse, abstract and publish statistical information relating to the commercial, industrial, financial, social, economic and general activities and condition of the people;
(b) to collaborate with departments of government in the collection, compilation and publication of statistical information, including statistics derived from the activities of those departments;
(c) to take the census of population of Canada and the census of agriculture of Canada as provided in this Act;
(d) to promote the avoidance of duplication in the information collected by departments of government; and
(e) generally, to promote and develop integrated social and economic statistics pertaining to the whole of Canada and to each of the provinces thereof and to coordinate plans for the integration of those statistics.

...

22. Without limiting the duties of Statistics Canada under section 3 or affecting any of its powers or duties in respect of any specific statistics that may otherwise be authorized or required under this Act, the Chief Statistician shall, under the di-

rection of the Minister, collect, compile, analyse, abstract and publish statistics in relation to all or any of the following matters in Canada:

(a) population;
(b) agriculture;
(c) health and welfare;
(d) law enforcement, the administration of justice and corrections;
(e) government and business finance;
(f) immigration and emigration;
(g) education;
(h) labour and employment;
(i) commerce with other countries;
(j) prices and the cost of living;
(k) forestry, fishing and trapping;
(l) mines, quarries and wells;
(m) manufacturing;
(n) construction;
(o) transportation, storage and communication;
(p) electric power, gas and water utilities;
(q) wholesale and retail trade;
(r) finance, insurance and real estate;
(s) public administration;
(t) community, business and personal services; and
(u) any other matters prescribed by the Minister or by the Governor in Council.

* * *

3. Est maintenu, sous l'autorité du ministre, un bureau de la statistique appelé Statistique Canada, dont les fonctions sont les suivantes :

a) recueillir, compiler, analyser, dépouiller et publier des renseignements statistiques sur les activités commerciales, industrielles, financières, sociales, économiques et générales de la population et sur l'état de celle-ci;
b) collaborer avec les ministères à la collecte, à la compilation et à la publication de renseignements statistiques, y compris les statistiques qui découlent des activités de ces ministères;
c) recenser la population du Canada et faire le recensement agricole du Canada de la manière prévue à la présente loi;
d) veiller à prévenir le double emploi dans la collecte des renseignements par les ministères;
e) en général, favoriser et mettre au point des statistiques sociales et économiques intégrées concernant l'ensemble du Canada et chacune des provinces, et coordonner des projets pour l'intégration de telles statistiques.

...

22. Sans pour autant restreindre les fonctions attribuées à Statistique Canada par l'article 3 ni porter atteinte à ses pouvoirs ou fonctions concernant des statistiques déterminées qui peuvent être par ailleurs autorisées ou exigées en vertu de la présente loi, le statisticien en chef doit, sous la direction du ministre, recueillir, compiler, analyser, dépouiller et publier, en ce qui concerne le Canada, des statistiques sur tout ou partie des sujets suivants :

a) population;
b) agriculture;
c) santé et protection sociale;
d) application des lois, administration de la justice et services correctionnels;
e) finances publiques, industrielles et commerciales;
f) immigration et émigration;
g) éducation;
h) travail et emploi;
i) commerce extérieur;
j) prix et coût de la vie;
k) forêts, pêches et piégeage;
l) mines, carrières et puits;
m) fabrication;
n) construction;
o) transport, entreposage et communications;
p) services d'électricité, de gaz et d'eau;
q) commerce de gros et de détail;
r) finance, assurance et immeuble;
s) administration publique;
t) services communautaires, commerciaux, industriels et personnels;
u) tous autres sujets prescrits par le ministre ou par le gouverneur en conseil.

78 The respondent submits that s. 3 of the *Statistics Act* does not require Statistics Canada to obtain data in any specific way and notes that no methodology is mandated as to how Statistics Canada is to "promote and develop integrated social and economic statistics." Similarly, the respondent says that s. 22 of the *Statistics Act* does not prescribe any specific methodology and, in any case, does not mention the aboriginal population. The respondent also notes that s. 8 of the *Statistics Act* authorizes the collection of information on a voluntary basis, other than for a census of population or agriculture.

79 The respondent argues that these sections do not create a legal duty to conduct a specific type of survey or mandate that there be specific content in the survey, and submits that there is no merit to the applicants' allegation that Statistics Canada is refusing to exercise any jurisdiction or duty. The respondent says Statistics Canada is discharging all its statutory obligations by conducting the 2011 mandatory short-form census and the voluntary NHS.

80 I agree with the respondent. Neither section of the *Statistics Act* prescribes any particular methodology for collecting statistics and the applicants have not advanced any cogent evidence that the changes amount to a refusal to exercise jurisdiction. I find that there is simply no basis for the suggestion that the planned 2011 Census fails to meet the requirements of the Act. I note that the questions to be asked in the 2011 Census questionnaire will capture most of the information that

was captured in the 1871 census of Canada. Statistics Canada will perform its duties under s. 3 of its Act through the mandatory short-form census and the NHS.

81 The parties agreed that the successful party should be awarded its costs, inclusive of any costs ordered to date, fixed at $3,700.00.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications are dismissed and the respondent is awarded its costs which are fixed at $3,700.00, inclusive of fees, disbursements and taxes.

ZINN J.

* * * * *

APPENDIX "A"

Census 2006 - 2B (Long Form)

Recensement 2006 - 2B (Formulaire long)

17. What were the ethnic or cultural origins of this person's ancestors?

An ancestor is usually more distant than a grandparent.

For example, Canadian, English, French, Chinese, Italian, German, Scottish, East Indian, Irish, Cree, Mi'kmaq (Micmac), Métis, Inuit (Eskimo), Ukrainian, Dutch, Filipino, Polish, Portuguese, Jewish, Greek, Jamaican, Vietnamese, Lebanese, Chilean, Salvadorean, Somali, etc.

Specify as many origins as applicable using capital letters.

_____

_____

_____

_____

17. Quelles étaient les origines ethniques ou culturelles des ancêtres de cette personne?

Habituellement, un ancêtre est plus éloigné qu'un grand-parent.

Par exemple, canadien, anglais, français, chinois, italien, allemand, écossais, indien de l'Inde, irlandais, cri, mi'kmaq (micmac), métis, inuit (esquimau), ukrainien, hollandais, philippin, polonais, portugais, juif, grec, jamaïquain, vietnamien, libanais, chilien, salvadorien, somalien, etc.

_____

_____

17. Quelles étaient les origines ethniques ou culturelles des ancêtres de cette personne?

Habituellement, un ancêtre est plus éloigné qu'un grand-parent.

Par exemple, canadien, anglais, français, chinois, italien, allemand, écossais, indien de l'Inde, irlandais, cri, mi'kmaq (micmac), métis, inuit (esquimau), ukrainien, hollandais, philippin, polonais, portugais, juif, grec, jamaïquain, vietnamien, libanais, chilien, salvadorien, somalien, etc.

_____

17. Quelles étaient les origines ethniques ou culturelles des ancêtres de cette personne?

Habituellement, un ancêtre est plus éloigné qu'un grand-parent.

Par exemple, canadien, anglais, français, chinois, italien, allemand, écossais, indien de l'Inde, irlandais, cri, mi'kmaq (micmac), métis, inuit (esquimau), ukrainien, hollandais, philippin, polonais, portugais, juif, grec, jamaïquain, vietnamien, libanais, chilien, salvadorien, somalien, etc.

Précisez toutes les origines qui s'appliquent en lettres majuscules.

17. Quelles étaient les origines ethniques ou culturelles des ancêtres de cette personne?

Habituellement, un ancêtre est plus éloigné qu'un grand-parent.

Par exemple, canadien, anglais, français, chinois, italien, allemand, écossais, indien de l'Inde, irlandais, cri, mi'kmaq (micmac), métis, inuit (esquimau), ukrainien, hollandais, philippin, polonais, portugais, juif, grec, jamaïquain, vietnamien, libanais, chilien, salvadorien, somalien, etc.

Précisez toutes les origines qui s'appliquent en lettres majuscules.

_____

_____

_____

_____

18. Is this person an Aboriginal person, that is, North American Indian, Métis or Inuit (Eskimo)?

If "Yes", mark the circle(s) that best describe(s) this person now.

- ○ No → **Continue with the next question**
- ○ Yes, North American Indian
- ○ Yes, Métis
- ○ Yes, Inuit (Eskimo)

Go to Question 20

18. Cette personne est-elle un Autochtone, c'est-à-dire un Indien de l'Amérique du Nord, un Métis ou un Inuit (Esquimau)?

Si «Oui», cochez le ou les cercles qui décrivent le mieux cette personne maintenant.

- ○ Non → **Continuez à la question suivante**
- ○ Oui, Indien de l'Amérique du Nord
- ○ Oui, Métis
- ○ Oui, Inuit (Esquimau)

Passez à la question 20

20. Is this person a member of an Indian band/First Nation?

- ○ No
- ○ Yes, member of an Indian band/First Nation

↓

Specify Indian band/First Nation (for example, Musqueam)

_____

---

20. Cette personne appartient-elle à une bande indienne ou à une Première nation?

- ○ Non
- ○ Oui, appartient à une bande indienne ou à une Première nation

↓

Précisez la bande indienne ou la Première nation (p. ex., Musqueam)

21. Is this person a Treaty Indian or a Registered Indian as defined by the *Indian Act* of Canada?

- ☐ No
- ☐ Yes, Treaty Indian or Registered Indian

21. Cette personne est-elle un Indien des traités ou un Indien inscrit aux termes de la *Loi sur les Indiens* du Canada?

- ☐ Non
- ☐ Oui, Indien des traités ou Indien inscrit

2011 National Household Survey Questions

Questions de l'Enquête nationale auprès des ménages de 2011

17. What were the ethnic or cultural origins of this person's ancestors?

An ancestor is usually more distant than a grandparent.

For example, Canadian, English, French, Chinese, East Indian, Italian, German, Scottish, Irish, Cree, Mi'kmaq, Salish, Métis, Inuit, Filipino, Dutch, Ukrainian, Polish, Portuguese, Greek, Korean, Vietnamese, Jamaican, Jewish, Lebanese, Salvadorean, Somali, Colombian, etc.
Specify as many origins as applicable using capital letters.

_____
_____
_____
_____

---

17. Quelles étaient les origines ethniques ou culturelles des ancêtres de cette personne?

Habituellement, un ancêtre est plus éloigné que les grands-parents.

Par exemple, canadien, anglais, français, chinois, indien de l'Inde, italien, allemand, écossais, irlandais, cri, mi'kmaq, salish, métis, inuit, philippin, hollandais, ukrainien, polonais, portugais, grec, coréen, vietnamien, jamaïquain, juif, libanais, salvadorien, somalien, colombien, etc.

Précisez toutes les origines qui s'appliquent en lettres majuscules.

_____
_____
_____
_____

---

18. Is this person an Aboriginal person, that is, First Nations (North American Indian), Métis or Inuk (Inuit)?

Note: First Nations (North American Indian) includes Status and Non-Status Indians.

If "Yes", mark the circle(s) that best describe(s) this person now.

- o No, not an Aboriginal person → **Continue with the next question**
- o Yes, First Nations (North American Indian) → **Go to Question 20**
- o Yes, Métis → **Go to Question 20**
- o Yes, Inuk (Inuit) → **Go to Question 20**

---

18. Cette personne est-elle un Autochtone, c'est-à-dire Première Nation (Indien de l'Amérique du Nord), Métis ou Inuk (Inuit)?

Nota : Première Nation (Indien de l'Amérique du Nord) comprend les Indiens avec statut et les Indiens sans statut.

Si « Oui », cochez le ou les cercles qui décrivent le mieux cette personne maintenant.

- o Non, pas un Autochtone → **Continuez à la question suivante**
- o Oui, Première Nation (Indien de l'Amérique du Nord) → **Passez à la question 20**
- o Oui, Métis → **Passez à la question 20**
- o Oui, Inuk (Inuit) → **Passez à la question 20**

---

20. Is this person a Status Indian (Registered or Treaty Indian as defined by the *Indian Act* of Canada)?

- o No
- o Yes, Status Indian (Registered or Treaty)

---

20. Cette personne est-elle un Indien avec statut (Indien inscrit ou des traités aux termes de la *Loi sur les Indiens* du Canada)?

- o Non
- o Oui, Indien avec statut (Indien inscrit ou des traités)

---

21. Is this person a member of a First Nation/Indian band?

If "Yes", which First Nation/Indian band?

For example, Musqueam Indian Band, Sturgeon Lake First Nation, Atikamekw of Manawan.

- o No
- o Yes, member of a First Nation/Indian band

Specify name of First Nation/Indian band

_____

_____

---

21. Cette personne est-elle membre d'une Première Nation/bande indienne?

Si « Oui », de quelle Première Nation/bande indienne?

Par exemple, Atikamekw de Manawan, Première Nation de Sturgeon Lake, bande indienne Musqueam.

- Non
- Oui, membre d'une Première Nation/bande indienne

Précisez la Première Nation/bande indienne.

_____

_____

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1 http://www.collectionscanada.gc.ca/genealogy/022-911.010.010-e .html.

Tab 8

Nault v. Canada (Public Works and Government Services), 2011 FCA 263 (CanLII)

Date: 2011-09-22 (Docket: A-266-10)
Citation: Nault v. Canada (Public Works and Government Services), 2011 FCA 263 (CanLII), <http://canlii.ca/t/fpg79> retrieved on 2014-11-05

Federal Court of Appeal

Cour d'appel fédérale

Date: 20110922
Docket: A-266-10
Citation: 2011 FCA 263

CORAM: NADON J.A.
TRUDEL J.A.

MAINVILLE J.A.

BETWEEN:

JACQUES NAULT

Appellant

and

THE MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA

Respondent

Heard at Montréal, Quebec, on September 6, 2011.
Judgment delivered at Ottawa, Ontario, on September 22, 2011.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.
CONCURRED IN BY: NADON J.A.
TRUDEL J.A.

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Federal Court of Appeal | Cour d'appel fédérale

Date: 20110922
Docket: A-266-10
Citation: 2011 FCA 263

CORAM: NADON J.A.
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN:

JACQUES NAULT

Appellant

and

THE MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA

Respondent

REASONS FOR JUDGMENT

MAINVILLE J.A.

Overview

[1] The thorny question raised in this appeal is whether the prior employment history of an employee of a government institution is covered by the exception provided at paragraph (*j*) of the definition of "personal information" found in section 3 of the *Privacy Act*, R.S.C., 1985, c. P-21.

[2] Mr. Nault, whose candidacy for certain positions in the federal public service was unsuccessful, is requesting, under the *Access to Information Act*, R.S.C., 1985, c. A-1, the disclosure of the documents (curriculum vitae, letters, proof of education) submitted by each of the 61 candidates hired following the recruitment competitions in which he himself participated.

[3] According to Mr. Nault, the requested information must be disclosed to him as the disclosure of this type of information allows Canadian citizens to satisfy themselves that the hiring criteria for the federal public service positions in question were respected, thereby holding the Canadian State to account for its actions and decisions. Although the requested information concerns the history of individuals prior to their being hired in the federal public service, Mr. Nault submits that the information relates to the positions and functions of the public service employees in question since this information makes it possible to establish whether there is a correlation between the requirements advertised for the positions and the qualifications of the successful candidates. According to Mr. Nault, the information is therefore sufficiently related to the positions in question to be caught by the exception provided at paragraph (*j*) of the definition of "personal information" found in section 3 of the *Privacy Act* (paragraph 3(*j*)).

[4] Mr. Nault explains that his access request does not concern all diplomas obtained by the candidates selected for the positions or their entire employment history; rather, he is seeking information that will facilitate the correlation with the eligibility requirements advertised for the positions. The competition notices for the positions in question required an undergraduate degree with an appropriate specialization or eligibility for a recognized professional accounting designation, experience in the field of financial administration and knowledge of accounting principles and practices and of financial administration.

[5] The head of the concerned department refused to disclose to Mr. Nault the information relating to the education and employment history of the targeted candidates, except for their employment history within federal government institutions. In the opinion of the head of the department, this information was covered by paragraph (*b*) of the definition of "personal information" found in section 3 of the *Privacy Act* and could therefore not be disclosed under subsection 19(1) of the *Access to Information Act*.

[6] Mr. Nault's subsequent complaint to the Information Commissioner was rejected. Mr. Nault's application for judicial review under section 41 of the *Access to Information Act*, was also dismissed by Justice Gauthier of the Federal Court on the ground that the information in question was indeed "personal information" within the meaning of section 3 of the *Privacy Act*.

[7] The only issue in this appeal is whether the requested information is caught by the exception provided at paragraph 3(*j*) of the *Privacy Act*, which sets out that personal information within the meaning of that statute does not include information about an individual who is or was an officer or employee of a government institution and that relates to the position or functions of the individual.

[8] For the reasons that follow, it is my view that the requested information is not caught by this exception and that it is rather "personal information" within the meaning of paragraph (*b*) of the definition of "personal information" found in section 3 of the *Privacy Act*. Consequently, the head of a government institution must refuse to disclose such information under subsection 19(1) of the *Access to Information Act*. I would therefore dismiss this appeal; however, in light of subsection 52(2) of the *Access to Information Act*, I would ask the parties to file additional submissions concerning costs.

Statutory context

[9] As stated by the Supreme Court of Canada on several occasions, "[a]ccess to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance" (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815, at paragraph 1; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII) ("*National Defence*"), at paragraph 15). These principles arise out of subsection 2(1) of the *Access to Information Act*:

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.	**2.** (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

[10] The right to access any record under the control of a government institution is clearly provided for in subsection 4(1) of the *Access to Information Act*, but this right must be exercised "[s]ubject to this Act". One of the significant exceptions to this access right concerns personal information as defined in section 3 of the *Privacy Act*. Indeed, section 19 of the *Access to Information Act* provides as follows:

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.	**19.** (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels*.
(2) The head of a government institution may disclose any record requested under this Act that contains personal information if	(2) Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :
(*a*) the individual to whom it relates consents to the disclosure;	*a*) l'individu qu'ils concernent y consent;
(*b*) the information is publicly available; or	*b*) le public y a accès;
(*c*) the disclosure is in accordance with section 8 of the *Privacy Act*.	c) la communication est conforme à l'article 8 de la *Loi sur la protection des renseignements personnels*.

I note straightaway that subsection 19(2) of the *Access to Information Act* and section 8 of the *Privacy Act* are not at issue in this appeal.

[11] Section 2 of the *Privacy Act* states that the purpose of that statute is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information. For the purposes of that statute, section 3 sets out that all information about an identifiable individual is "personal information". This is a very broad definition that is nonetheless delimited by the various examples provided at paragraphs (*a*) to (*i*) of the definition. Undoubtedly, however, information relating to the education and employment history of an identifiable individual is "personal information" given that it is specifically referred to at paragraph (*b*) of the definition:

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3. In this Act,

...

"personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

(*a*) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,

(*b*) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(*c*) any identifying number, symbol or other particular assigned to the individual,

(*d*) the address, fingerprints or blood type of the individual,

(*e*) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

(*f*) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

(*g*) the views or opinions of another individual about the individual,

(*h*) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (*e*), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

(*i*) the name of the individual

3. Les définitions qui suivent s'appliquent à la présente loi.

[...]

« renseignements personnels » Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :

a) les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;

b) les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;

c) tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;

d) son adresse, ses empreintes digitales ou son groupe sanguin;

e) ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;

f) toute correspondance de nature, implicitement ou explicitement, privée ou confidentielle envoyée par lui à une institution fédérale, ainsi que les réponses de l'institution dans la mesure où elles révèlent le contenu de la correspondance de l'expéditeur;

g) les idées ou opinions d'autrui sur lui;

h) les idées ou opinions d'un autre individu qui portent sur une proposition de subvention, de récompense ou de prix à lui octroyer par une institution, ou subdivision de celle-ci, visée à l'alinéa *e*), à l'exclusion du nom de cet autre individu si ce nom est mentionné avec les idées ou opinions;

i) son nom lorsque celui-ci est mentionné avec d'autres

where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

...

[Emphasis added]

renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

[...]

[Non souligné dans l'original]

[12] However, paragraphs (*j*) and (*m*) of the definition of "personal information" found in section 3 of the *Privacy Act* provide some exceptions to the definition, including personal information about an individual who is or was an officer or employee of a government institution and that relates to the position or functions of the individual:

...

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include

(*j*) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

(*k*) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,

(*l*) information relating to any

[...]

toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant :

j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :

(i) le fait même qu'il est ou a été employé par l'institution,

(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,

(iii) la classification, l'éventail des salaires et les attributions de son poste,

(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi,

(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;

k) un individu qui, au titre d'un contrat, assure ou a assuré la prestation de services à une institution fédérale et portant sur la nature de la prestation, notamment les conditions du contrat, le nom de l'individu ainsi que les idées et opinions personnelles qu'il a exprimées au cours de la prestation;

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discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and	*l*) des avantages financiers facultatifs, notamment la délivrance d'un permis ou d'une licence accordés à un individu, y compris le nom de celui-ci et la nature précise de ces avantages;
(*m*) information about an individual who has been dead for more than twenty years;	*m*) un individu décédé depuis plus de vingt ans.

[13] The principles underlying the *Access to Information Act* and the *Privacy Act* may seem contradictory at first glance, but the two statutes must nonetheless be interpreted in relation to one another. The approach to interpreting the two statues was set out as follows in *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403 ("*Dagg*"), at paragraphs 1 and 45 to 57: (a) Parliament has not given access to information priority over privacy right; (b) the two statutes have equal status; and (c) the courts must have regard to the purposes of both statutes in considering whether information contained in a government record constitutes "personal information".

[14] The Supreme Court of Canada has more recently dealt with the interpretation of these two statutes in *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13 (CanLII), [2006] 1 S.C.R. 441 ("*Heinz*"), at paragraphs 2 and 22 to 31, where Justice Deschamps reiterated that a careful balance between the two statutes had to be struck, while emphasizing that specific attention must be given to privacy rights given the "quasi-constitutional" character of privacy in light of the role it plays in the preservation of a free and democratic society. Justice Deschamps wrote as follows at paragraph 31 of *Heinz*:

> It is apparent from the scheme and legislative histories of the *Access Act* and the *Privacy Act* that the combined purpose of the two statutes is to strike a careful balance between privacy rights and the right of access to information. However, within this balanced scheme, the Acts afford greater protection to personal information. By imposing stringent restrictions on the disclosure of personal information, Parliament clearly intended that no violation of this aspect of the right to privacy should occur. For this reason, since the legislative scheme offers a right of review pursuant to s. 44, courts should not resort to artifices to prevent efficient protection of personal information.

Federal Court decision

[15] Relying on the Supreme Court of Canada's decision in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 (CanLII), [2003] 1 S.C.R. 66 ("*Royal Mounted Police*"), Justice Gauthier identified correctness as the standard of review applicable to the decision of the head of a government institution who refuses to disclose information under section 3 of the *Privacy Act* and subsection 19(1) of the *Access to Information Act*.

[16] Relying on both *Dagg* and *Royal Mounted Police*, the judge then determined that the information Mr. Nault was seeking was "personal information" within the meaning of paragraph (*b*) of the definition of this expression at section 3 of the *Privacy Act*, given that it expressly includes information relating to education and that "employment history" had to be interpreted broadly to include the list of positions previously held by an individual, his or her places of employment and the tasks performed.

[17] Justice Gauthier also found that the purpose of the exception at paragraph 3(*j*) of the *Privacy Act* was to ensure that the State and its agents are held accountable. According to the judge, the requested information did not relate to an action taken by the successful candidates as part of their functions as State agents. She added that the requested information does not become public information simply by virtue of the fact that it was analyzed or examined by another federal public servant in order to decide which of the candidates would be hired for the positions in question. She also noted that Parliament did not use the expression "employment history" at paragraph 3(*j*), while using it expressly at paragraph (*b*) of the definition in question.

[18] Lastly, regarding costs, Justice Gauthier recognized the novelty of the issue raised by Mr. Nault's application for review and the particular circumstances of the case, concluding that each party should bear its own costs.

Standard of review

[19] The standard of review applicable to the decision of the head of a government institution who refuses to disclose documents containing personal information under section 3 of the *Privacy Act* and subsection 19(1) of the *Access to Information Act* is correctness. The interpretation of paragraph 3(*j*) of the *Privacy Act* is also reviewable on the standard of correctness: *Royal Mounted Police* at paragraphs 14 to 19; *National Defence* at paragraph 22.

[20] A Federal Court decision made as a result of a review of such issues may, in turn, be reviewed on appeal in accordance with the principles set out in *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, at paragraphs 8 to 9, and 31 to 36: *National Defence*, at paragraph 23.

[21] In this case, Justice Gauthier properly identified the applicable standard of review. The question in this appeal, therefore, is

whether she correctly interpreted the definition of "personal information" found in section 3 of the *Privacy Act*.

Analysis

[22] There is little doubt that the information asked for by Mr. Nault (curriculum vitae, letters, proof of education) is of a personal nature. Indeed, the information relates to the education and employment history of the candidates in question and is specifically contemplated by paragraph (*b*) of the definition of "personal information" found in section 3 of the *Privacy Act*. As pointed out by Justice Gonthier at paragraph 25 of *Royal Mounted Police*, "[t]he ordinary meaning of 'employment history' includes not only the list of positions previously held, places of employment, tasks performed and so on, but also, for example, any personal evaluations an employee might have received during his career. Such a broad definition is also consistent with the meaning generally given to that expression in the workplace."

[23] In *Royal Mounted Police*, Justice Gonthier concluded at paragraph 39 that the list of the RCMP members' historical postings, their status and dates; the list of ranks, and the dates they achieved those ranks; and their years of service were all elements that relate to the general characteristics associated with the position or functions of an RCMP member that are caught by the exception set out in paragraph 3(*j*) of the *Privacy Act*. This information is relevant to understanding the functions members of the RCMP perform without revealing anything about their competence or divulging any personal opinion they might have given outside the course of employment. Justice Gonthier however noted the following at paragraph 34 of *Royal Mounted Police*:

> . . Section 3(*j*) applies only to an "individual who is or was an officer or employee of a government institution", and only for the purposes of ss. 7, 8 and 26 and s. 19 of the *Access Act*. In contrast, s. 3(*b*) is of general application. Parliament has therefore chosen to give less protection to the privacy of federal employees when the information requested relates to their position or functions. It follows that if a federal institution has in its possession the employment history of an individual who has never worked for the federal government, that information remains confidential, whereas federal employees will see the information relating to their position and functions released. Section 3(*b*) therefore has a wider scope, as it applies to every "identifiable individual", and not just individuals who are or were officers or employees of a government institution.

[24] Consequently, a person's employment history in a government institution is covered by the exception set out at paragraph 3(*j*) of the *Privacy Act*. However, the employment history of an individual who has never worked for a government institution is not covered by this exception. Therefore, the employment history of an individual who applied unsuccessfully for a position in a government institution is "personal information" the disclosure of which must be denied.

[25] As I noted above, the thorny question raised in this appeal, and which Justice Gonthier did not answer in *Royal Mounted Police*, is whether the employment history of an employee of a federal government institution prior to his or her being hired by that government institution is covered by the exception set out at paragraph 3(*j*). In other words, as expressed by Justice Gonthier at paragraph 38 of *Royal Mounted Police*, is this information sufficiently related to the position or functions held by an employee of a government institution to make it possible to conclude that the exception applies?

[26] In my opinion, one must distinguish, as Justice Gauthier did, between information relating to the requirements and qualifications for holding a position in a government institution and information relating to the education and employment history of the candidate who fills the position.

[27] The requirements and qualifications for a position are indeed determined by the government institution, and their disclosure to the public meets the objectives of federal access to information legislation, namely, to increase transparency in government, contribute to an informed public and enhance an open and democratic society. However, past education and employment acquired prior to hiring by a government institution are an individual's personal assets which have been obtained without the involvement of the government institution that subsequently hires that individual. This is the type of information that the *Privacy Act* seeks to protect.

[28] In this respect, the list of examples provided at subparagraphs (i) to (v) of paragraph 3(*j*) of the *Privacy Act*, albeit not necessarily exhaustive (*Royal Mounted Police*, at paragraph 29), nonetheless properly illustrates that the information contemplated by the exception must relate to a position with a government institution rather than to activities at an educational institution or with another employer.

[29] The following are thus notably contemplated by the exception: the fact of being or having been an officer or employee of a government institution; the title, business address and business telephone number in a government institution; the classification, salary range and responsibilities of the position held in a government institution; the names of the individual on a document prepared by the individual in the course of employment with a government institution; and the personal opinions or views of the individual given in the course of employment with a government institution. In contrast, information related to an individual's activities outside his employment with a government institution are not covered by the exception, whether these activities were pursued before, during or after the concerned individual was employed by a government institution.

[30] As Justice Gonthier further pointed out at paragraph 35 of *Royal Mounted Police*:

> Further, only information relating to the position or functions of the concerned federal employee or falling within one of the examples given is excluded from the definition of "personal information". A considerable amount of information that qualifies as "employment history" remains inaccessible, such as the evaluations and performance reviews of a federal

> employee, and notes taken during an interview. Indeed, those evaluations are not information about an officer or employee of a government institution that relates to the position or functions of the individual, but are linked instead to the competence of the employee to fulfil his task. . . .

[31] Information concerning achievements at an educational institution or positions held prior to hiring by a government institution do not relate to a position or functions with a government institution, but rather concern a position or functions with another employer or activities at an educational institution.

[32] According to Mr. Nault, the requested information must nonetheless be disclosed to him so that the Canadian public can satisfy itself that the hiring criteria for the federal public service positions in question were respected. This argument is specious. One could as easily argue that the Canadian public must be able to satisfy itself that the incumbents of positions in the federal public service are competent. The courts have, however, decided that the evaluations of the employees of a government institution are "personal information" which are not contemplated by the exception set out at paragraph 3(*j*) of the *Privacy Act*: *Dagg*, at paragraph 94; *Royal Mounted Police*, at paragraph 35; *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551.

[33] In interpreting the *Access to Information Act* and the *Privacy Act*, one must focus on the statutory provisions at issue while at the same time considering simultaneously the purposes of the two statutes. In doing so, I conclude that information relating to the incumbent of a position in a government institution and concerning his education and employment history prior to being hired by a government institution is information that Parliament seeks to protect under the *Privacy Act*.

Costs

[34] Justice Gauthier recognized the novelty of the issue raised by the application for review filed by Mr. Nault and the particular circumstances of this application, concluding that each party had to bear its own costs. However, subsection 53(2) of the *Access to Information Act* provides that in cases where the Court is of the opinion that an application for review has raised an important new principle, costs must be awarded to the applicant even if the applicant has not been successful in the result:

53. (2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.	**53.** (2) Dans les cas où elle estime que l'objet des recours visés aux articles 41 et 42 a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

[35] As pointed out by this Court in *Statham v. Canadian Broadcasting Corp.*, 2010 FCA 315 (CanLII), 409 N.R. 350, 326 D.L.R. (4th) 228, at paragraph 71, subsection 53(2) of the *Access to Information Act* is a reflection of Parliament's intent that important issues concerning this statute be brought before the courts, and that a litigant who raises such issues is not to be deprived of an award of costs solely because he or she was unsuccessful. The provision ensures that litigants who raise important new questions in the context of applications for review under the statute are not penalized.

[36] The provisions of subsection 53(2) do not appear to have been raised before Justice Gauthier, nor were they raised before this Court. Although the mandatory nature of subsection 53(2) seems clear, I would nonetheless request that the parties file submissions on costs within 15 days of the judgment.

Conclusions

[37] For the foregoing reasons, I would dismiss the appeal, and I would request that the parties file written submissions with the Court on costs within 15 days of the judgment dismissing the appeal.

"Robert M. Mainville"

J.A.

"I agree.
M. Nadon J.A."

"I agree.
Johanne Trudel J.A."

Certified true translation
Johanna Kratz, Translator

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FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-266-10
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE JOHANNE GAUTHIER DATED JUNE 9, 2010, DOCKET NO. T-474-09)	
STYLE OF CAUSE:	Jacques Nault v. Minister of Public Works and Government Services Canada
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 6, 2011
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	NADON J.A. TRUDEL J.A.
DATED:	September 22, 2011

APPEARANCES:

Jacques Nault	THE APPELLANT, REPRESENTING HIMSELF
Caroline Laverdière	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT

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Indexed as:

Ontario (Public Safety and Security) v. Criminal Lawyers' Association

Ministry of Public Safety and Security (Formerly Solicitor General) and Attorney General of Ontario Appellants;

v.

Criminal Lawyers' Association Respondent, and Attorney General of Canada, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Newfoundland and Labrador, Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario, Canadian Bar Association, Information Commissioner of Canada, Federation of Law Societies of Canada, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers' Association, Canadian Association of Journalists and British Columbia Civil Liberties Association Interveners

[2010] 1 S.C.R. 815

[2010] 1 R.C.S. 815

[2010] S.C.J. No. 23

[2010] A.C.S. no 23

2010 SCC 23

File No.: 32172.

Supreme Court of Canada

Heard: December 11, 2008;
Judgment: June 17, 2010.

Present: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ.

(76 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Constitutional law -- Charter of Rights -- Freedom of expression -- Access to information -- Exemptions -- Minister refusing to disclose records relating to murder case, claiming exemptions under s. 14 (law enforcement) and s. 19 (solicitor-client privilege) of Ontario Freedom of Information and Protection of Privacy Act -- Whether [page816] s. 23 of Act violates guarantee of freedom of expression by failing to extend "public interest" balancing to exemptions found in ss. 14 and 19 -- Canadian Charter of Rights and Freedoms, s. 2(b) -- Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 14, 19, 23.

Constitutional law -- Charter of Rights -- Freedom of expression -- Scope -- Access to government held information -- Whether freedom of expression protects access to information -- If so, in what circumstances -- Canadian Charter of Rights and Freedoms, s. 2(b).

Access to information -- Access to records -- Exemptions -- Minister refusing to disclose records relating to murder case, claiming exemptions under freedom of information legislation -- Whether constitutional guarantee of freedom of expression protects access to information -- If so, in what circumstances -- Canadian Charter of Rights and Freedoms, s. 2(b) -- Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 14, 19, 23.

Summary:

The trial judge ordered a stay of proceedings in a murder trial, finding many instances of abusive conduct by state officials. The Ontario Provincial Police investigated and exonerated the police of misconduct without giving reasons for their finding. Concerned about the disparity between the findings at trial and the conclusion of the police investigation, the Criminal Lawyers' Association ("CLA") made a request under the Ontario *Freedom of Information and Protection of Privacy Act* ("*FIPPA*") to the responsible Minister for disclosure of records relating to the investigation. The records at issue were a lengthy police report and two documents containing legal advice. *FIPPA* exempts various categories of documents from disclosure, some of which may be disclosed pursuant to a discretionary ministerial decision, including law enforcement records under s. 14 and solicitor-client privileged records under s. 19. Some records in the ministerial discretion category, but not those under ss. 14 and 19, are subject to a further review to determine whether a compelling public interest in disclosure clearly outweighs the purpose of the exemption under s. 23 of *FIPPA*.

[page817]

The Minister refused to disclose any of the records without explanation, claiming exemptions under, among other provisions, ss. 14 and 19 of *FIPPA*. On review, the Assistant Information and Privacy Commissioner held, without inquiring into the Minister's exercise of discretion, that the

impugned records qualified for exemption under a number of sections of the Act, including ss. 14(2)(a) and 19. He noted that s. 23 did not apply to these two provisions of *FIPPA*, and accordingly, did not determine whether there was a compelling public interest at play. He also concluded that the omission of ss. 14 and 19 from the public interest override in s. 23 did not constitute a breach of the CLA's right to freedom of expression guaranteed under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The Divisional Court upheld the decision not to disclose the documents and agreed with the conclusion that the exclusion of ss. 14 and 19 from s. 23 did not violate s. 2(*b*) of the *Charter*. In a majority decision, the Court of Appeal allowed the CLA's appeal, concluding that the exemption scheme violated the *Charter*.

Held: The appeal should be allowed. The Assistant Commissioner's order confirming the constitutionality of s. 23 of *FIPPA* should be restored. The documents protected by s. 19 of *FIPPA* dealing with solicitor-client privilege should be exempted from disclosure. The claim under the law enforcement provision, s. 14 of *FIPPA*, should be returned to the Commissioner for reconsideration.

The real constitutional issue before the Court is whether the failure to extend the s. 23 public interest override to documents for which law enforcement or solicitor-client privilege are claimed violates the guarantee of freedom of expression in s. 2(*b*) of the *Charter*. Section 2(*b*) of the *Charter* guarantees freedom of expression, but it does not guarantee access to all documents in government hands. Determining whether s. 2(*b*) of the *Charter* protects such access is essentially a question of how far s. 2(*b*) protection extends. It asks whether s. 2(*b*) is engaged at all and is best approached by building on the methodology set out in *Irwin Toy*.

To demonstrate that there is expressive content in accessing these documents, a claimant must establish [page818] that the denial of access effectively precludes meaningful public discussion on matters of public interest. If this necessity is established, a *prima facie* case for production is made out, but the claimant must go on to show that there are no countervailing considerations inconsistent with production. A claim for production may be defeated, for example, if the documents are protected by a privilege, as privileges are recognized as appropriate derogations from the scope of protection offered by s. 2(*b*) of the *Charter*. It may also be that a particular government function is incompatible with access to certain documents, and these documents may remain exempt from disclosure because it would impact the proper functioning of affected institutions. If the claim survives this second step, then the claimant establishes that s. 2(*b*) is engaged, and the only remaining question is whether the government action infringes that protection.

The legislature's decision not to make documents under ss. 14 and 19 subject to the s. 23 public interest override does not violate the right to free expression guaranteed by s. 2(*b*) of the *Charter*. The CLA has not demonstrated that meaningful public discussion of the handling of the investigation and prosecution of the murder cannot take place under the current legislative scheme. Even if the first step were met, the CLA would face the further challenge of demonstrating that access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the proper functioning of relevant government institutions. Sections 14 and 19 are intended to protect documents from disclosure on these very grounds.

On the record before us, it is not established that the CLA could satisfy the requirements of the framework and, as a result, s. 2(*b*) is not engaged. In any event, the impact of the absence of a s. 23 public interest override in relation to documents under ss. 14 and 19 is so minimal that even if s. 2(*b*) were engaged it would not be breached. The ultimate answer to the CLA's claim is that the absence of a second-stage review, provided by the s. 23 override for documents within ss. 14 and 19,

does not significantly impair any hypothetical right to access government documents given that those sections, properly interpreted, already incorporate considerations of the public interest. The CLA therefore would not meet the test because it could not show that the state has infringed its rights to freedom of expression.

[page819]

In reviewing the Minister's decision not to disclose the records, the Commissioner must determine whether the exemptions were properly claimed and, if so, whether the Minister's exercise of discretion was reasonable. In this case, the order pertaining to the claim under s. 14 of *FIPPA* should be returned to the Commissioner for reconsideration. The Commissioner upheld the Minister's decision without reviewing the Minister's exercise of discretion under ss. 14 and 19 of *FIPPA* because s. 23 did not apply to these sections. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought raise concerns which should have been investigated by the Commissioner. Had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

The Commissioner's decision on the s. 19 claim, however, should be upheld. It is difficult to see how these records could have been disclosed under the established rules on solicitor-client privilege and based on the facts and interests at stake.

Cases Cited

Applied: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; **referred to:** *R. v. Court* (1995), 23 O.R. (3d) 321; *R. v. Court* (1997), 36 O.R. (3d) 263; *Ontario (Ministry of Finance) v. Ontario (Inquiry Officer)* (1998), 5 Admin. L.R. (3d) 175, rev'd (1999), 13 Admin. L.R. (3d) 1; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673; *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389; *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763; *R. v. Campbell*, [1999] 1 S.C.R. 565; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; [page820] *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185; *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advi-*

sor) (1999), 46 O.R. (3d) 395; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 22 C.P.R. (4) 447.

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Canada Evidence Act, R.S.C. 1985, c. C-5, s. 39.

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

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 10, 14, 19, 23, 50(1)(a).

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History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Juriansz, MacFarland and LaForme JJ.A.), 2007 ONCA 392, 86 O.R. (3d) 259, 224 O.A.C. 236, 280 D.L.R. (4) 193, 60 Admin. L.R. (4) 279, 220 C.C.C. (3d) 343, 58 C.P.R. (4) 298, 156 C.R.R. (2d) 1, [2007] O.J. No. 2038 (QL); 2007 CarswellOnt 3218, setting aside a decision of Blair R.S.J. and Gravely and Epstein JJ. (2004), 70 O.R. (3d) 332, [page821] 237 D.L.R. (4) 525, 184 O.A.C. 223, 13 Admin. L.R. (4) 26, 30 C.P.R. (4) 267, 116 C.R.R. (2d) 323, [2004] O.J. No. 1214 (QL), 2004 CarswellOnt 1172. Appeal allowed.

Counsel:

Daniel Guttman, *Sophie Nunnelley* and *Don Fawcett*, for the appellants.

David Stratas, *Brad Elberg*, *Trevor Guy* and *Ryan Teschner*, for the respondent.

Christopher Rupar and *Jeffrey G. Johnston*, for the intervener the Attorney General of Canada.

Dominique A. Jobin, for the intervener the Attorney General of Quebec.

Written submissions only by *Edward A. Gores*, *Q.C.*, for the intervener the Attorney General of Nova Scotia.

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Nathaniel Carnegie and *Deborah Carlson*, for the intervener the Attorney General of Manitoba.

Allan Seckel, *Q.C.*, and *Deanna Billo*, for the intervener the Attorney General of British Columbia.

Barbara Barrowman, for the intervener the Attorney General of Newfoundland and Labrador.

William S. Challis, *Stephen McCammon* and *Allison Knight*, for the intervener Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario.

Mahmud Jamal and *Karim Renno*, for the intervener the Canadian Bar Association.

Marlys Edwardh, *Daniel Brunet* and *Jessica Orkin*, for the intervener the Information Commissioner of Canada.

Guy J. Pratte and *Nadia Effendi*, for the intervener the Federation of Law Societies of Canada.

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Paul B. Schabas and *Ryder Gilliland*, for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers' Association and the Canadian Association of Journalists.

Catherine Beagan Flood and *Iris Fischer*, for the intervener the British Columbia Civil Liberties Association.

The judgment of the Court was delivered by

McLACHLIN C.J. and ABELLA J.:--

1. Overview

1 Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.

2 Both openness and confidentiality are protected by Ontario's freedom of information legislation, the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*" or the "Act"). The relationship between them under this scheme is at the heart of this appeal. At issue is the balance struck by the Ontario legislature in exempting certain categories of documents from disclosure.

3 The Act exempts various categories of documents from disclosure. This case concerns records that *may* be disclosed pursuant to a discretionary ministerial decision. More particularly, this case concerns records prepared in the course of law enforcement investigations (s. 14) and records protected by solicitor-client privilege (s. 19). The Act provides that some records in the ministerial discretion category are subject to a further review to determine whether a compelling public interest in disclosure clearly outweighs the purpose of the exemption under s. 23 of *FIPPA*. The Act does not [page823] require this additional public interest review for solicitor-client records or law enforcement records.

4 The Criminal Lawyers' Association ("CLA") is an advocacy group representing members of the criminal defence bar in Ontario. It is seeking records in the hands of the Crown relating to a murder case which gave rise to judicial expressions of concern: two documents containing legal advice and a 318-page report looking into alleged police misconduct. The Minister refused to disclose either the report or related documents, stating that the exemptions in the Act for solicitor-client

privilege and law enforcement privilege covered all the material. On review, the Assistant Information and Privacy Commissioner held, without inquiring into the Minister's exercise of discretion, that the impugned records qualified for exemption under a number of sections of the Act, including ss. 14(2)(a) and 19. He noted that s. 23 did not apply to these two provisions of the Act and, as such, he did not determine whether there was a compelling public interest at play here in the context of ss. 14 and 19.

5 Section 2(*b*) of the *Canadian Charter of Rights and Freedoms* guarantees freedom of expression, but it does not guarantee access to all documents in government hands. Access to documents in government hands is constitutionally protected only where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned.

6 The CLA argues that the Act's failure in s. 23 to include a public interest review for solicitor-client and law enforcement privileged documents [page824] violates freedom of expression in s. 2(*b*) of the *Charter*. For the reasons that follow, we conclude that there is no such violation.

7 This said, it is not clear on the material before us that the Assistant Commissioner, in applying the Act, fully considered the scope of his discretion under s. 14, the law enforcement provision. We therefore remit this matter to the Commissioner for reconsideration to determine whether any or all of the report should be disclosed.

2. Background

8 This case arises out of the murder of Domenic Racco in 1983, for which four men (Anthony Musitano, Domenic Musitano, Guiseppe Avignone, and William Rankin) were originally charged. They pled guilty to lesser charges in 1985. In 1990, two other individuals, Graham Rodney Court and Peter Dennis Monaghan, were alleged to have been hired to kill Racco. Court and Monaghan were convicted after a jury trial in 1991.

9 In 1995, the Ontario Court of Appeal ordered a new trial for Monaghan on the basis, *inter alia*, of fresh evidence (*R. v. Court* (1995), 23 O.R. (3d) 321). It was evidence that had been lost before trial, but the police did not reveal its loss to the defence until two-and-a-half years after the trial. A new trial was also ordered, for both Monaghan and Court, based on inadequate jury instructions at trial.

10 Both men applied for a stay of proceedings in 1997 on the grounds of a breach of their *Charter* rights. Glithero J. concluded that their rights under ss. 7, 11(*b*) and 11(*d*) of the *Charter* had been violated to such a degree that the proceedings should be stayed, stating:

[page825]

> ... I have found many instances of abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, negligent breach of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial. That prejudice is

> completed. The improper cross-examinations and jury address would not be repeated at a new trial and the completed prejudice with respect to those issues would not therefore be perpetuated in a new trial. The effects or prejudice caused by the abusive conduct in systematic non-disclosure, deliberate revision of materials so as to exclude useful information to the defence, and the unexplained loss, or breach of the duty to preserve, of so much original evidence would be perpetuated through a future trial in that the defence cannot be put back into the position they would originally have been, and which in my view they were entitled to maintain throughout the trial process. That evidence is gone, either entirely or to the extent of severely diminishing the utility of the evidence, and the prejudice thereby occasioned has only been exaggerated by the passage of time since the 1991 trial and prior to the belated disclosure of this information in 1996. [Emphasis added.]
>
> (*R. v. Court* (1997), 36 O.R. (3d) 263 (Gen. Div.), p. 300)

11 As a result of Glithero J.'s rebuke, the Ontario Provincial Police ("OPP") undertook an investigation into the conduct of the Halton Regional Police, the Hamilton-Wentworth Regional Police, and the Crown Attorney in the case. In a terse press release on April 3, 1998, the OPP exonerated the police on the grounds 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 withheld from defence was done deliberately and with the intent to obstruct justice". Despite the clear public interest in knowing why the misconduct found by Glithero J. did not merit criminal charges, the OPP offered no explanation for its conclusions.

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12 Concerned about the disparity between the findings of Glithero J. and the conclusions reached by the OPP, the CLA made a request under *FIPPA* to the Minister of the Solicitor General and Correctional Services (later the Minister of Public Safety and Security and now the Minister of Community Safety and Correctional Services) for disclosure of records relating to the OPP investigation. The records at issue were a 318-page police report detailing the results of the OPP's investigation; a March 12, 1998 memorandum from a Crown Attorney to the Regional Director of Crown Operations containing legal advice with respect to the police report; and a March 24, 1998 letter from the Regional Director of Crown Operations to a police official also containing legal advice on the OPP investigation.

13 The Minister refused to disclose any of these records, claiming several exemptions under the Act, including: s. 14 (law enforcement), s. 19 (solicitor-client privilege), s. 20 (danger to health and safety), and s. 21 (personal privacy). He did not explain how or why each of these exemptions applied to the material in question and did not address the possibility of partial disclosure.

14 The CLA appealed the Minister's decision not to disclose the records to the Commissioner pursuant to s. 50(1)(a) of *FIPPA*.

15 The Minister's decision was reviewed by the Assistant Information and Privacy Commissioner, Tom Mitchinson. Reliance on the s. 20 exemption was withdrawn. On May 5, 2000, Mr. Mitchinson upheld the propriety of the Minister's decision not to disclose the records (IPC Order PO-1779). He found that the public interest in disclosure "clearly outweigh[ed]" the purpose of the exemption on the facts of this case, and would have applied the s. 23 override with respect to the s. 21 personal privacy exemption; however, he upheld the Minister's [page827] refusal because the other claimed exemptions (ss. 14 and 19) are not included within the s. 23 override. He was also asked to consider whether the omission of ss. 14 and 19 from the public interest override constituted a breach of the CLA's *Charter* right to freedom of expression. He concluded that it did not.

16 At the Divisional Court, Blair R.S.J. upheld the decision not to disclose the documents and agreed with the conclusion that the *FIPPA* exemption scheme did not violate s. 2(*b*) of the *Charter*: (2004), 70 O.R. (3d) 332.

17 The appeal was allowed by the Court of Appeal: 2007 ONCA 392, 86 O.R. (3d) 259. LaForme J.A., for the majority, concluded that the exemption scheme in *FIPPA* violated the *Charter*. Juriansz J.A. dissented, concluding that there was no *Charter* violation, and questioned whether expression was genuinely at issue at all.

18 The Minister appealed the matter to this Court on the issue of the constitutionality of s. 23, given the exclusion of ss. 14 and 19 from its scope. Before this Court, and before the Court of Appeal for that matter, the CLA based its attack on the constitutionality of the statutory scheme and not on the Minister's exercise of discretion under either s. 14 or s. 19.

3. The Legislative Scheme

19 The Act provides for limited access to information in the government's hands. Section 10(1) provides for general rights of access to information, subject to a limited number of statutory exemptions:

> **10.**-(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,

[page828]

> (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.

20 The exemptions include Cabinet records (s. 12); advice to government (s. 13); law enforcement records (s. 14); records relating to relations with other governments (s. 15); defence records (s. 16); third-party information (s. 17); records related to Ontario's economic and other interests (s. 18); records to which solicitor-client privilege applies (s. 19); records whose disclosure might reasonably be expected to seriously threaten the safety or health of an individual (s. 20); personal information

(s. 21); records putting species at risk (s. 21.1); and information already or soon to be publicly available (s. 22).

21 There is no discretion, and disclosure must be refused in the case of some categories of exemptions, including Cabinet records, records containing certain third-party information, and records containing personal information. Other categories of exemptions are discretionary. They include the exemptions at issue in this case: law enforcement records under s. 14 and solicitor-client privileged records under s. 19.

22 Section 14, dealing with law enforcement records, states:

> **14.**-(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;

[page829]

> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
> (f) deprive a person of the right to a fair trial or impartial adjudication;
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
> (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
> (j) facilitate the escape from custody of a person who is under lawful detention;
> (k) jeopardize the security of a centre for lawful detention; or
> (l) facilitate the commission of an unlawful act or hamper the control of crime.
>
> (2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
(b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;
(c) that is a law enforcement record where the disclosure could reasonably be expected to expose [page830] the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or
(d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

(4) Despite clause (2) (a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

(5) Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections.

Section 19 deals with solicitor-client privilege. At the material time, it stated:

19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

23 The Minister asserting the exemption has the burden of demonstrating that it applies. Any decision made by a Minister is subject to review by the Commissioner. In reviewing ministerial decisions made pursuant to certain exemptions, the Commissioner considers the public interest pursuant to s. 23, the "public interest override":

23. An exemption from disclosure of a record under sections 13 [advice to government], 15 [relations with other governments], 17 [third-party information], 18 [economic and other interests of Ontario], 20 [danger to safety or health], 21 [personal privacy] and 21.1 [species [page831] at risk] does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

24 The s. 23 public interest override does not apply to documents exempted from disclosure for law enforcement (s. 14) and solicitor-client privilege (s. 19). The main issue in this case, as it was argued before us, is whether this renders s. 23 unconstitutional.

25 When an exemption is invoked by the head of an institution (the Minister) under ss. 13, 15, 17, 18, 20, 21 and 21.1, the effect of s. 23 is to require the Commissioner to not only review whether the exemption was validly claimed, but whether the public interest in the disclosure of the record "clearly outweighs the purpose of the exemption" (*Ontario (Ministry of Finance) v. Ontario (Inquiry Officer)* (1998), 5 Admin. L.R. (3d) 175 (Ont. Div. Ct.), rev'd (1999), 13 Admin. L.R. (3d) 1 (C.A.)).

26 This public interest override was a late addition to the legislation. The Attorney General took the position that it would undermine the context of the Act:

> You are just saying to them, ignore the standards of the *Act* that the Legislature has set up and do what you please by looking at the public interest.

27 Nevertheless, a public interest provision was eventually introduced for some but not all categories of exemptions on the insistence of some of the members of the legislature. This was despite the fact that the Williams Commission Report on which the Act was based had not specifically recommended its adoption (Ontario, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (1980) (the "Williams Commission" Report); Speech by Tom Mitchinson, Assistant Commissioner, Ontario Information and Privacy Commissioner, *"Public [page832] Interest" and Ontario's Freedom of Information and Protection of Privacy Act*, February 16, 2001).

28 This review of the general statutory scheme brings us to the specific challenge before us. The CLA argued that s. 23 of *FIPPA* infringes s. 2(*b*) of the *Charter* by failing to extend the "public interest" balancing to the exemptions found in ss. 14 and 19 concerning law enforcement and solicitor-client privileged records.

4. Is the Legislation Constitutional?

29 It is essential to correctly frame the real constitutional issue before the Court. That issue is whether the failure to extend the s. 23 public interest override to documents for which law enforcement or solicitor-client privilege are claimed violates the guarantee of freedom of expression in s. 2(*b*) of the *Charter*.

(a) Access to Information Under Section 2(b) of the Charter

30 The first question to be addressed is whether s. 2(*b*) protects access to information and, if so, in what circumstances. For the reasons that follow, we conclude that s. 2(*b*) does not guarantee access to all documents in government hands. Section 2(*b*) guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.

31 Determining whether s. 2(*b*) of the *Charter* requires access to documents in government hands in a particular case is essentially a question of how far s. 2(*b*) protection extends. A question arises as to how the issue should be approached. The courts [page833] below were divided on whether the analysis should follow the model adopted in *Dunmore v. Ontario (Attorney General)*,

2001 SCC 94, [2001] 3 S.C.R. 1016. In their argument before this Court, some of the parties also placed reliance on *Dunmore* and on this Court's subsequent decision in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673. In our view, nothing would be gained by furthering this debate. Rather, it is our view that the question of access to government information is best approached by building on the methodology set in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 967-68, and in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141. The main question in this case is whether s. 2(*b*) is engaged at all. We conclude that the scope of the s. 2(*b*) protection includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints. We further conclude, as discussed more fully below, that in this case these requirements are not satisfied. As a result, s. 2(*b*) is not engaged.

32 The *Irwin Toy* framework involves three inquiries: (1) Does the activity in question have expressive content, thereby bringing it within the reach of s. 2(*b*)? (2) Is there something in the method or location of that expression that would remove that protection? (3) If the activity is protected, does the state action infringe that protection, either in purpose or effect? These steps were developed in *Montréal (City)* (at para. 56) in the context of expressive activities, but the principles animating them equally apply to determining whether s. 2(*b*) requires the production of government documents.

33 This leads us to more detailed comments on the scope of s. 2(*b*) protection where the issue is access to documents in government hands. To [page834] demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary. If the claimant can show this, there is a *prima facie* case for the production of the documents in question. But even if this *prima facie* case is established, the claim may be defeated by factors that remove s. 2(*b*) protection, e.g. if the documents sought are protected by privilege or if production of the documents would interfere with the proper functioning of the governmental institution in question. If the claim survives this second step, then the claimant establishes that s. 2(*b*) is engaged. The only remaining question is whether the government action infringes that protection.

34 The first inquiry into expressive content asks whether the demand for access to information furthers the purposes of s. 2(*b*). In the case of demands for government documents, the relevant s. 2(*b*) purpose is usually the furtherance of discussion on matters of public importance.

35 Not every demand for government information serves this purpose. Thus the jurisprudence holds that there is no general right of access to information. The position is well put in *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.), *per* Adams J.:

> By contrast, our political access makes government bureaucracy accountable to elected officials who, in turn, conduct their business in the context of public elections and legislatures and where the media, again, play a fundamental reporting role... . Against this tradition, it is not possible to proclaim that s. 2(*b*) entails a general constitutional right of access to all information under the control of government and this is particularly so in the context of an application relating to an active criminal investigation. [Emphasis added; p. 204.]

36 To show that access would further the purposes of s. 2(*b*), the claimant must establish that access is necessary for the meaningful exercise [page835] of free expression on matters of public or political interest: see *Irwin Toy*, at pp. 976 and 1008; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. On this basis, the Court has recognized access to information under s. 2(*b*) in the judicial context: "members of the public have a right to information pertaining to public institutions and particularly the courts" (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1339). The "open courts" principle is "inextricably tied to the rights guaranteed by s. 2(*b*)" because it "permits the public to discuss and put forward opinions and criticisms of court practices and proceedings" (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23, *per* La Forest J.).

37 In sum, there is a *prima facie* case that s. 2(*b*) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded. As Louis D. Brandeis famously wrote in his 1913 article in *Harper's Weekly* entitled " What Publicity Can Do": "Sunlight is said to be the best of disinfectants ... ." Open government requires that the citizenry be granted access to government records when it is necessary to meaningful public debate on the conduct of government institutions.

38 If this necessity is established, a *prima facie* case for production is made out. However, the claimant must go on to show that the protection is not removed by countervailing considerations inconsistent with production.

39 Privileges are recognized as appropriate derogations from the scope of the protection offered by s. 2(*b*) of the *Charter*. The common law privileges, like solicitor-client privilege, generally represent [page836] situations where the public interest in confidentiality outweighs the interests served by disclosure. This is also the rationale behind common law privileges that have been cast in statutory form, like the privilege relating to confidences of the Queen's Privy Council under s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. Since the common law and statutes must conform to the *Charter*, assertions of particular categories of privilege are in principle open to constitutional challenge. However, in practice, the outlines of these privileges are likely to be well settled, providing predictability and certainty to what must be produced and what remains protected.

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

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(b) *The Constitutionality of Section 23*

41 The CLA argues that the failure of the legislature to make the s. 23 public interest override applicable to the exemptions in ss. 14 and 19 denies it access to the documents it seeks and thus violates s. 2(*b*) of the *Charter*. The CLA argues that if the override were applicable, the CLA would be entitled to the records in question due to their public interest nature.

42 We first address the question of the extent to which the absence of a s. 23 public interest override impairs the ability to obtain documents protected by ss. 14 and 19 of the Act. Against this background, we ask whether s. 2(*b*) is engaged in the case at bar, and if so, whether it is breached.

(i) The Impact of the Absence of the Section 23 Public Interest Override in This Case

43 In our view, it is not established that the absence of a s. 23 review for public interest significantly impairs the CLA's access to documents it would otherwise have had. Law enforcement privilege and solicitor-client privilege already take public interest considerations into account and, moreover, confer a discretion to disclose the information on the Minister. For the reasons that follow, we conclude that the public interest override contained in s. 23 would add little to what is already provided for in ss. 14 and 19 of the Act.

44 We turn first to records prepared in the course of law enforcement, which are dealt with under s. 14 of the Act. As jurisprudence surrounding concepts such as informer privilege and prosecutorial discretion attests, there is a strong public interest in protecting documents related to law enforcement: *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389; *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), at p. 769, cited in *R. v. Campbell*, [1999] 1 S.C.R. 565, [page838] at para. 33; *R. v. Power*, [1994] 1 S.C.R. 601, at p. 623, *per* L'Heureux-Dubé J.; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 64, *per* LeBel J.; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at para. 32; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 48, *per* Charron J. Section 14 of the Act reflects this. The legislature in s. 14(1) has in effect declared that disclosure of records described in subsets (a) to (l) would be so detrimental to the public interest that it presumptively cannot be countenanced.

45 However, by stipulating that "[a] head may refuse to disclose" a record in this category, the legislature has also left room for the head to order disclosure of particular records. This creates a discretion in the head.

46 A discretion conferred by statute must be exercised consistently with the purposes underlying its grant: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 53, 56 and 65. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.

47 By way of example, we consider s. 14(1)(a) where a head "may refuse to disclose a record where the disclosure could reasonably be expected to ... interfere with a law enforcement matter". The main purpose of the exemption is clearly to protect the public interest in effective law enforcement. However, the need to consider other interests, public and private, is preserved by the word "may" which confers a discretion on the head to make the decision whether or not to disclose the information.

48 In making the decision, the first step the head must take is to determine whether disclosure [page839] could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

49 The public interest override in s. 23 would add little to this process. Section 23 simply provides that exemptions from disclosure do not apply "where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption". But a proper interpretation of s. 14(1) requires that the head consider whether a compelling public interest in disclosure outweighs the purpose of the exemption, to prevent interference with law enforcement. If the head, acting judicially, were to find that such an interest exists, the head would exercise the discretion conferred by the word "may" and order disclosure of the document.

50 The same rationale applies to the other exemptions under s. 14(1) as well as to those under s. 14(2). Section 14(2)(a) is particularly relevant in the case at bar. It provides that a head "may refuse to disclose a record ... that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law". The main purpose of this section is to protect [page840] the public interest in getting full and frank disclosure in the course of investigating and reporting on matters involving the administration of justice; an expectation of confidentiality may further the goal of getting at the truth of what really happened. At the same time, the discretion conferred by the word "may" recognizes that there may be other interests, whether public or private, that outweigh this public interest in confidentiality. Again, an additional review under s. 23 would add little, if anything, to this process.

51 This interpretation is confirmed by the established practice for review of s. 14 claims which proceeds on the basis that, even in the absence of the s. 23 public interest override, the head has a wide discretion. The proper review of discretion under s. 14 has been explained as follows:

> The absence of section 14 from the list of exemptions that can be overridden under section 23 does not change the fact that the exemption is discretionary, and discretion should be exercised on a case-by-case basis. The LCBO's submission suggests that it would never be appropriate to disclose such records in the public interest, or in order to promote transparency and accountability, in the context of the exercise of discretion. I disagree, and in my view, such a position would be inconsistent with the requirement to exercise discretion based on the facts and circumstances of every case.
>
> (IPC Order PO-2508-I/September 27, 2006, at p. 6, *per* Senior Adjudicator John Higgins)

52 We therefore conclude that s. 14 already provides for adequate consideration of the public interest in the disclosure of the records. In reviewing a claim for an exemption under s. 14, the Commissioner, as discussed more fully below, focuses on the exercise of discretion under that

[page841] section. A further consideration under s. 23 would add essentially another level of review.

53 The same analysis applies, perhaps even more strongly, to the exemption for documents protected by solicitor-client privilege. Section 19 of the Act provides that a head "may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation". The purpose of this exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship: *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 836; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875; *Campbell*, at para. 49; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at paras. 35 and 41; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 36-37; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574. The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions: *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185.

54 Given the near-absolute nature of solicitor-client privilege, it is difficult to see how the s. 23 public interest override could ever operate to require disclosure of a protected document. This is particularly so given that the use of the word "may" would permit and, if relevant, require the head to [page842] consider the overwhelming public interest in disclosure. Once again, the public interest override in s. 23 would add little to the decision-making process.

55 The conclusion that the s. 23 override in the case of the law enforcement and solicitor-client exemptions adds little more than a second level of review is consistent with the legislative history of the Act. The Williams Commission Report, on which the Act was based, did not recommend a public interest override, presumably not finding such an override necessary. The Minister who spoke to the legislation resisted suggestions for a public interest override. It was tacked on by amendment, but made applicable only to certain exemptions. These are generally exemptions of a political or personal nature - advice to government; third-party information; economic and other interests of Ontario; danger to health and safety; personal privacy; and species at risk. These exemptions reflect a legislative choice that is not at issue in this appeal. But by way of comparison, it may be possible to argue that the s. 23 public interest override might serve a purpose with respect to these issues, since they may not inherently raise the need to balance all conflicting interests, raising the risk that the public interest in disclosure might be overlooked. But that cannot be said of the law enforcement and solicitor-client exemptions.

56 We conclude that the CLA has failed to establish that the inapplicability of the s. 23 public interest override significantly impairs its ability to obtain the documents it seeks. Sections 14 and 19 already incorporate, by necessity, the public interest to the extent it may be applicable.

[page843]

(ii) Is the Section 23 Public Interest Override Constitutionally Required?

57 Having examined the impact of the legislature's decision not to make documents under ss. 14 and 19 subject to the s. 23 public interest override, we are in a position to address the ultimate question: Does this decision violate the right to free expression guaranteed by s. 2(*b*) of the *Charter*? To answer this question, we must return to our earlier discussion of when disclosure of documents in government hands may be constitutionally required under the *Irwin Toy* framework.

58 The first question is whether any access to documents that might result from applying the s. 23 public interest override in this case would enhance s. 2(*b*) expression. This is only established if the access is necessary to permit meaningful debate and discussion on a matter of public interest. If not, then s. 2(*b*) is not engaged.

59 In our view, the CLA has not demonstrated that meaningful public discussion of the handling of the investigation into the murder of Domenic Racco, and the prosecution of those suspected of that murder, cannot take place under the current legislative scheme. Much is known about those events. In granting the stay against the two accused, Glithero J. stated:

> ... I have found many instances of abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, negligent breach of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial. [p. 300]

The record supporting these conclusions is already in the public domain. The further information sought relates to the internal investigation of the conduct of the Halton Regional Police, [page844] the Hamilton-Wentworth Regional Police and the Crown Attorney in this case. It may be that this report should have been produced under the terms of the Act, as discussed below. However, the CLA has not established that it is necessary for meaningful public discussion of the problems in the administration of justice relating to the Racco murder.

60 If necessity were established, the CLA, under the framework set out above (para. 33) would face the further challenge of demonstrating that access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the proper functioning of relevant government institutions. As discussed, ss. 14 and 19 are intended to protect documents from disclosure on these very grounds. On the record before us, it is not established that the CLA could satisfy the requirements of the above framework.

61 It is unnecessary to pursue this inquiry further because, in any event, the impact of the absence of a s. 23 public interest override in relation to documents under ss. 14 and 19 is so minimal that even if s. 2(*b*) were engaged, it would not be breached. The ultimate answer to the CLA's claim is that the absence of the second-stage review, provided by the s. 23 override for documents within ss. 14 and 19, does not significantly impair any hypothetical right to access government documents, given that those sections, properly interpreted, already incorporate consideration of the public interest. The CLA would not meet the test because it could not show that the state has infringed its rights to freedom of expression.

5. Exercise of the Discretion Under the Act

62 Having decided that s. 23 of the Act itself is constitutional, our focus shifts now to determining [page845] whether the decisions of the Minister (the head) and the Commission complied with the statutory framework established by the Act.

(a) *The Decisions*

63 The Minister's decision not to disclose the records in question was conveyed to the CLA in a letter dated November 27, 1998, citing a number of statutory exemptions as the reason for the denial, including s. 21 (the personal privacy exemption), s. 19, and a number of subsections of s. 14. The letter provided no explanation for applying these exemptions; nor did it explain why no part of the records sought would be disclosed.

64 On review, the Assistant Commissioner recognized that the documents contained personal information about people involved in the case, including police officers, Crown counsel, witnesses, the victim, the accused and others. He concluded, however, that there was "a compelling public interest" in disclosure that "clearly outweigh[ed]" the interest in non-disclosure. Therefore, if only the s. 21 personal privacy exemption were at issue, he would have ordered disclosure pursuant to the s. 23 override.

65 The Assistant Commissioner also determined that the discretionary exemptions in ss. 14 and 19 could be applied to the records at issue. Because s. 23 does not apply to ss. 14 and 19, he upheld the Minister's decision not to disclose without reviewing the Minister's exercise of discretion under ss. 14 and 19 of the Act.

(b) *The Duty of the "Head" (or Minister)*

66 As discussed above, the "head" making a decision under ss. 14 and 19 of the Act has a [page846] discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.

67 The head must consider individual parts of the record, and disclose as much of the information as possible. Section 10(2) provides that where an exemption is claimed, "the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions".

(c) *The Duty of the Reviewing Commissioner*

68 The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.

69 In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of

> law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, [page847] I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis added; p. 11.]

70 Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).

71 The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).

72 In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.

73 The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in [page848] accordance with the review principles discussed above.

74 Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

75 We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in *McClure*, stressed the categorical nature of the privilege:

> ... solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added; para. 35.]

(See also *Goodis*, at paras. 15-17, and *Blood Tribe*, at paras. 9-11.)

Accordingly, we would uphold the Commissioner's decision on the s. 19 claim.

6. Conclusion

76 We would allow the appeal, set aside the decision of the Court of Appeal, and restore the Assistant Commissioner's Order confirming the [page849] constitutionality of s. 23 of *FIPPA*. The documents protected by s. 19 of *FIPPA* are exempted from disclosure. We would, however, order that the claim under s. 14 of the Act be returned to the Commissioner for reconsideration in light of these reasons. In accordance with the request of the parties, there will be no order for costs.

Appeal allowed.

Solicitors:

Solicitor for the appellants: Attorney General of Ontario, Toronto.

Solicitors for the respondent: Heenan Blaikie, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Québec.

Solicitor for the intervener the Attorney General of Nova Scotia: Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Solicitor for the intervener Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario: Information and Privacy Commissioner of Ontario, Toronto.

[page850]

Solicitors for the intervener the Canadian Bar Association: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener the Information Commissioner of Canada: Information Commissioner of Canada, Ottawa.

Solicitors for the intervener the Federation of Law Societies of Canada: Borden Ladner Gervais, Ottawa.

Solicitors for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers' Association and the Canadian Association of Journalists: Blake, Cassels & Graydon, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Blake, Cassels & Graydon, Toronto.

Tab 10

Indexed as:

Smith Kline & French Laboratories Ltd. v. Novopharm Ltd. (F.C.A.)

IN THE MATTER OF an application for a license by Novopharm Limited, 1290 Ellesmere Road, Scarborough, Ontario, to manufacture, import and sell the medicine whose chemical or proper name is Cimetidine as prepared or produced under the following Canadian patent owned by Smith Kline & French Laboratories:
Patent No. Date of Issue Name of Invention
1,045,142 December 26, 1978 Cyanoguanidines
AND IN THE MATTER OF the decision of the Commissioner of Patents dated July 4, 1980, No. 468
Between
Smith Kline & French Laboratories Limited, Appellant, and
Novopharm Limited, Respondent, and
The Attorney General of Canada, Intervenant

[1984] F.C.J. No. 223

[1984] A.C.F. no 223

53 N.R. 68

2 C.I.P.R. 205

79 C.P.R. (2d) 103

25 A.C.W.S. (2d) 470

1984 CarswellNat 577

Appeal No. A-562-80

Federal Court of Appeal
Ottawa, Ontario

Heald, Mahoney and Ryan JJ.

Heard: March 6, 1984
Judgment: March 12, 1984

(9 pp.)

R.G. McClenahan, Q.C., and E. Hill, for the Appellant.
M.J. O'Grady, Q.C., for the Respondent.
D. Aylen, Q.C., for the Intervenant.

The judgment of the Court was delivered by

MAHONEY J.:-- The Appellant's Memorandum of Fact and Law raised a number of issues which were substantially identical to issues recently dealt with by this Court in Smith Kline & French Laboratories Limited v. Frank W. Horner Limited. [Decision rendered December 20, 1983, Court file A-563-80] The Appellant restricted its argument to a single issue: the alleged insufficiency of the affidavit supporting the Respondent's application for the license and the consequences of that alleged insufficiency. The Attorney General of Canada appeared, by leave, as an intervenor on that issue.

This is an appeal, pursuant to s. 41(11) of the Patent Act [R.S.C. 1978, c. 1250, as amended.] against the decision of the Commissioner of Patents to grant a licence made pursuant to s. 41(4) of the Act. The Patent Rules [R.R.C. 1978, c. 1250, as amended.] provide:

> 117. In this section and in sections 118 to 129,
>
> ...
>
> "application" means an application made to the Commissioner under subsection 41(4) of the Act together with any affidavit in support of such application;
>
> 118. (1) An application shall be made in duplicate in Form 21 of Schedule 1 and shall
>
> (a) be made only in respect of one or more patents (i) that, according to the records of the Office, are in the name of the same patentee, and
> (ii) that are for inventions that relate to or that may be used in the preparation or production of the same or substantially the same substance or thing, and
> b) specify, for each patent in respect of which the application is made, (i) the thing or things referred to in subsection 41(4) of the Act that the applicant seeks a licence to do, and
> (ii) which of the things, if any, specified pursuant to subparagraph (i) in respect of the patent will be done, in whole or in part, on the applicant's behalf by another person,

(c) contain the following information (i) the name of the applicant, the address of his principal office and his address for service,

(ii) the name of the patentee, according to the records of the Office,

(iii) a concise description of the nature of the business carried on by the applicant,

(iv) where the applicant has had experience in or possesses skills specially relevant to the importation, manufacture, distribution, sale or supply of drugs, a concise description of the nature and extent of such experience and skills,

(v) where the applicant employs, or proposes to employ if a licence is granted to him, persons with experience or skills described in subparagraph (iv), a concise description of the nature and extent of such experience and skills,

(vi) a concise description of the buildings equipment available to the applicant to do the thing or things referred to in subsection 41(4) of the Act that are specified in the application and of any additional buildings and equipment that he proposes to obtain to do such thing or things if a licence is granted to him,

(vii) where the invention is a drug, or is used in the preparation or production of a drug, that the applicant proposes to import,

(A) the chemical name or proper name of such drug,

(B) the name and address of every person from whom the applicant proposes to obtain the drug for importation and where any such person is not himself the manufacturer of the drug that the applicant proposes to obtain from him, the name and address of the manufacturer of such drug,

(C) the registration number, if any, of the formulated drug in each country from which the applicant proposes to import such drug,

(D) the form or forms in which the drug will be imported, and

(E) where there will be further preparation of the drug in Canada by the applicant or on his behalf, the nature of such further preparation and by whom it will be done,

(viii) where the applicant proposes to sell the invention or any medicine in the preparation or production of which the invention has been used, a concise description of the price structure that the applicant proposes to establish for the sale of such invention or medicine, including a description of the forms in which it will be sold, the classes of customers to whom it will be sold and the prices or approximate prices at which each such form will be sold to each such class of customer,

(ix) where the applicant has previously requested the patentee voluntarily to grant to the applicant a licence under any patent in respect of which the application is made application is made,

(A) the number of each such patent in respect of which a licence was requested, and

(B) in respect of each patent for which a number is given pursuant to clause (A), whether the licence was granted or refused, and

(x) the royalty or royalties or other consideration that the applicant recommends should be fixed by the Commissioner for a licence to do the thing or things referred to in subsection 41(4) of the Act that the applicant seeks a licence to do under the patent or patents in respect of which the application is made.

(2) Where the applicant has previously been granted a licence by the patentee under any patent in respect of which the application is made, a copy of each such licence shall be submitted to the Commissioner with the application.

119. An application shall be executed by the applicant and shall be supported by affidavit evidence of the material facts alleged in the application.

120.(1) Upon receipt of an application that, in his opinion, complies satisfactorily with sections 118 and 119, the Commissioner shall examine the application as soon as possible and

(a) if he sees good reason why the applicant should not be granted any license, reject the application and notify the applicant, the patentee and the Department of National Health and Welfare of his decision and the reasons therefor; or
(b) in any other case, instruct the applicant to serve a copy of the application on the patentee in the manner prescribed by subsection (2) and to file with the Commissioner proof satisfactory to him of such service.

...

134. An affidavit made under these Rules may contain a statement of the facts within the knowledge of the deponent or may be based on information and belief, but an affidavit based on information and belief shall set out the grounds for such belief.

The entire body of the affidavit tendered and accepted under Rule 119 in respect of the subject application follows:

1. I am the President and Managing Director of N0V0PHARM LIMITED, the applicant named in the attached application and as such have knowledge of the matters herein deposed to by me.
2. I have carefully read over the attached application and to the best of my knowledge all of the material facts alleged therein are true.

The Appellant's fundamental contention is that the affidavit is so flawed that the Commissioner had before him neither an application nor evidence of the material facts alleged in the so-called application. If he had no application at all, he had no jurisdiction to form the threshold opinion required of him by Rule 120(1) and all that ensued was a nullity. If he had no evidence of the material facts al-

leged, formation of the threshold opinion was necessarily an arbitrary act which, in the Appellant's submission, was equally fatal to what ensued.

I do not think that the latter proposition can be sustained independent of the first in view of the jurisprudence reviewed in the Horner appeal, which concluded that:

> ... the legislative scheme is such that the patentee has no interest in an application under s. 41(4) until the Commissioner forms the threshold opinion. There is, therefore, no reason whatever why the Commissioner ought not deal with the application, and permit the applicant to deal with it, by the procedure of his choice, so long as it is consistent with the purpose of s. 41(4).

The Horner decision was there dealing with an objection to a procedure that had been adopted which was neither prescribed nor proscribed by the Rules The Commissioner is, in my opinion, as entitled to exercise his discretion vis à vis the evidence supporting an application as he is vis à vis procedure. His discretion is limited only by the express provisions of the Rules and the purpose of s. 41(4). There can be no doubt that the Commissioner bona fide considered that he had the necessary evidence in the proper form as prescribed by Rule 119. Having regard to his discretion, he cannot, therefore, be found to have in fact acted arbitrarily in forming the threshold opinion. To hold that he had done so in law would require the same conclusion as demanded by the first proposition, namely that the affidavit was so flawed that it did not, in law, provide the evidence required of it by Rule 119, thereby rendering the application a nullity.

A number of the Appellant's basic premises can he accepted. The affidavit must provide evidence of the material facts alleged in the application. Rule 119 requires that. An application without a supporting affidavit would be no application at all. That necessarily flows from the requirement of Rule 119 and the definition of "application" in Rule 117. Depositions of fact in an affidavit are not evidence, unless deposed to as required by Rule 134, that is: a deposition on information and belief must set out the grounds for the belief.

One defect perceived in the affidavit is its failure to identify with particularity what facts the deponent considered to be material. As I understand the argument, there would be no defect perceived had the deponent sworn to the truth of all facts alleged in the application. However, having sworn to the truth of the material facts only, without particularising them, there is no basis upon which to identify which facts the deponent considered material and, thus, no basis upon which the Commissioner could possibly conclude that the facts he, the Commissioner, considered material had been supported by the affidavit evidence. It seems to me that the short answer to this argument is that, since the facts alleged in the application are all facts which Rule 118 requires to be alleged, they are all material and it ought not be inferred that either the Commissioner or the deponent concluded or intended otherwise. In any case, given the Commissioner's discretion, he was quite entitled to accept and construe the affidavit evidence as intended to support and as, in fact, supporting the material facts. He was entitled to resolve any doubts he may have entertained and ambiguities he may have perceived in favour of the sufficiency of the affidavit.

His discretion does not, however, extend to accepting as evidence that which is not evidence at all. This is the other perceived defect. It hinges entirely on the inclusion of the words "the best of" in paragraph 2 of the affidavit. Had they been omitted there would have been no basis for the argument because the deponent would, beyond question, have sworn to the truth of the material facts to his knowledge. The Appellant contends that, in swearing to the truth of those allegations to the best

of his knowledge, the deponent is to be taken to have qualified the basis upon which he had the information, that not all was within his knowledge, and that, failing to set out the grounds for his information and belief as required by Rule 134, the affidavit is not receivable by the Commissioner nor is it evidence of the material facts.

This argument, as the procedural argument dealt with in the earlier Horner appeal, appears clearly to have been prompted by a recent decision of the Trial Division, [The Upjohn Co. v. Commissioner of Patents 74 C.P.R. (2d) 228 at 232.] which held, inter alia, that an affidavit verifying the facts in an application under s. 41(4) to the best of the deponent's knowledge fell short of the requirement of Rule 134.

It is at least of interest to note that, in verifying its counter statement filed pursuant to Rule 121 (a), which requires that a counter statement be "supported by affidavit evidence of the material facts alleged in the counter statement", it was deposed as follows:

1. THAT I am the President of Smith, Kline & French Canada Ltd. and as such I have knowledge of the matters herein deposed to by me.
2. THAT I have read the attached counterstatement and the facts therein set out are true to the best of my knowledge and belief.

That affidavit, too, was subject to Rule 134.

I accept that when an affidavit attests to facts to "the best of" the deponent's knowledge, it is legitimate to question whether that is properly to be construed as tantamount to saying "to the best of my knowledge, information and belief". The answer to that is not, in my view, to be found in an abstract analysis of dictionary definitions. It is rather to be found in the reality of the surrounding circumstances. It depends, among other things, on the office or qualifications of the deponent and whether it is probable that a person holding such office or having such qualifications would, of his own knowledge, be aware of the particular facts. If such a probability is apparent on the face of the affidavit, its exhibits and the application to which it pertains, I think the Commissioner is quite entitled, in a proper exercise of his discretion, to accept the evidence as being facts within the deponent's personal knowledge.

Superficially, that conclusion may seem to be at odds with the reasons of Jessel, M.R., in Quartz Hill Consolidated Gold Mining Company v. Beall, [(1882) XX Ch.D 501 at 508] in which the other members of the court specifically concurred as to the particular point. That was an appeal from the grant of an interlocutory injunction prohibiting publication of an alleged libel. In allowing the appeal, Jessel, M.R., said:

> Now, in this instance, the only witness for the Plaintiffs is their secretary, who says not that the circular is untrue, but that the statements in the circular are to the best of his knowledge, information, and belief utterly untrue. He does not shew that he has any knowledge at all on the subject of these statements. He probably as secretary has some knowledge about them, but he does not shew it; and where an affidavit is made upon information and belief the rules of the Court require that the deponent should state what are the grounds of his information and belief, and that he does not do, he only says that they are untrue to the best of his knowledge, information, and belief, not saying what the best of his

> knowledge is, and it may be nothing at all. There is, therefore, no evidence as to the untruth of the allegations in the circular.

That is properly to be distinguished on the ground that the corporate secretary there deposed as he did to the best of his knowledge, information and belief, not just to the best of his knowledge. It was not a matter put in doubt by his saying the deposition was true to the best of his knowledge but, rather, a matter resolved by his saying that, to some undefined extent at least, it was true only to the best of his information and belief.

As stated, Rule 118 prescribes the form and content of an application under s. 41(4). The application here is in fact in the prescribed form and contains the prescribed information. The only information set out in the application that was not likely to have been within the personal knowledge of the Respondent's president and managing director is certain of the information contained in paragraphs 1 and 2 of Form 21 which responds to the requirements of paragraphs 118(1)(a)(i) and 118(1)(c)(ii). It provides the patent number, its date of issue, the name of the invention and the name of the patentee of record in the Patent Office. It is probable that the deponent did not personally conduct the search necessary to obtain that information. That is, however, information peculiarly within the knowledge of the Commissioner himself. The objection that it has not been properly proved to the Commissioner ought to be treated as trifling and frivolous. All the other information set forth in the application, the nature of which is plainly indicated by Rule 118, was probably within the personal knowledge of the deponent and, in my view, the Commissioner was entitled to accept it as such.

I would dismiss this appeal with costs.

MAHONEY J.

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

RECORD OF THE RESPONDENT
CANADIAN TRANSPORTATION AGENCY
VOLUME 2
(Appendix B – Book of Authorities)

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