Date: 20071214

Docket: A-502-06

Citation: 2007 FCA 404

CORAM: **RICHARD C.J.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

THE MINISTER OF ENVIRONMENT CANADA

Appellant

and

THE INFORMATION COMMISSIONER OF CANADA

Respondent

Heard at Ottawa, Ontario, on October 30, 2007.

Judgment delivered at Ottawa, Ontario, on December 14, 2007.

REASONS FOR JUDGMENT BY: RICHARD C.J.

CONCURRED IN BY: NADON J.A.
CONCURRING REASONS BY: PELLETIER J.A.

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REASONS FOR JUDGMENT

RICHARD C.J.

[1] This appeal is the latest chapter of a lengthy saga surrounding the release of information related to a Cabinet decision made public on May 19, 1995 when the government introduced C-94, the *Manganese-based Fuel Additives Act* which was later adopted by Parliament on April 25, 1997.

[2] Perhaps Homer had in mind this prolonged proceeding for the disclosure of information dating back over 12 years when he penned this famous line in *The Iliad*, "The fates have given mankind a patient soul".

Relevant Facts

[3] The following is an abridged description of the proceedings, the details of which can be found in paragraphs 1-35 of the Federal Court judge's decision.

[4] The request for disclosure was made to the Minister under section 6 of the *Access to Information Act*, R.S.C. 1985 [*Access Act*] by Ethyl Canada Inc. on September 16, 1997 for discussion papers with respect to Methylcyclopentadienyl Manganese Tricarbonyl (MMT) that had been presented by the Minister of the Environment to Cabinet in 1995.

[5] The Minister refused Ethyl Canada Inc. access to four records which the Minister claimed were excluded from the scope of the *Access Act* under paragraphs 69(1)(a) and (e) because they constituted “confidences of the Queen’s Privy Council for Canada”.

[6] Following the Minister’s refusal, the Commissioner conducted an investigation and concluded that a portion of the Memorandum, namely the Analysis Section, fell within the scope of “discussion paper” material and therefore recommended that the Minister disclose portions of the requested records.

[7] The Minister rejected the Commissioner’s recommendation. The Commissioner then applied to the Federal Court for a review of the Minister’s refusal to disclose the requested records.

[8] On April 2, 2001, the Federal Court allowed the Commissioner's application for review and issued an Order requiring the Clerk of the Privy Council (the Clerk) to sever and release portions of the requested records containing background explanations or analyses of problems of policy options (*Canada (Information Commissioner)* v. *Canada (Minister of Environment),* [2001] 3 F.C. 514.

[9] This order was appealed to the Federal Court of Appeal in February 7, 2003. It upheld the Federal Court's decision (*Canada (Information Commissioner)* v. *Canada (Minister of Environment),* [2003] F.C.J. 197, 2003 FCA 68, but varied the order to allow the Minister of the Environment the opportunity to consider and claim any exemption that might apply to the analysis section of the Memorandum to Cabinet.

[10] The Clerk then reviewed the documents pursuant to paragraph 39(2) (a) of the *Canada Evidence Act* [the *CEA*] and found that one particular document, the Memorandum, contained "a corpus of works the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions." The Clerk then referred the documents to the Minister for review and to claim any remaining grounds for exempting disclosure under the *Access Act*.

[11] The Commissioner initiated another complaint under the *Access Act* in respect of the Minister's failure to process the Analysis Section of this Memorandum on June 2, 2003.

[12] The Minister then informed the Commissioner and Ethyl of his decision to invoke the exemptions provided in the *Access Act* in respect of portions of a document. Some portions of the Analysis Section that were not subject to the exemptions were provided by the Minister to Ethyl Canada Inc. at that time.

[13] On February 20, 2004, the Minister maintained her reliance on the exemptions under subsection 21(1)(a) and (b) and 23 of the *Access Act*, despite another investigation by the Commissioner.

[14] On September 30, 2004, the Commissioner completed his investigation of the complaint, concluding that the portions of the Analysis Section withheld under paragraphs 21(1)(a) and (b) of the *Access Act* were not exempt and recommended that the Minister disclose the corresponding portions of the Analysis Section. The Minister rejected the Commissioner's recommendation to disclose additional information.

[15] The Commissioner again applied to the Federal Court for a review of the Minister's refusal to disclose the disputed passages on March 25, 2005. Justice Kelen of the Federal Court allowed the application for review. It is this decisions that is now before us on appeal by the Minister.

[16] Kelen J. found that the Minister did not have the authority to refuse disclosure of the information and, according to section 49 of the *Access Act*, ordered the Minister to disclose to Ethyl portions of the disputed passages which are *not* subject to section 21 discretionary exemptions. He

also returned to the remaining portions of the disputed passages to the Minister to re-determine with reasons whether disclosure to Ethyl is warranted.

[17] It is this latter question which is at issue in the Respondent's cross-appeal before this Court.

Analysis

[18] As the matter stands before us, the sections of text which are the subject of the request for access are comprised of nine brief paragraphs. The original document is 106 pages long. Of this, seven complete sentences and 51 words forming parts of sentences remain to be disclosed. It is these passages which have been returned to the Minister.

[19] The Appellant argues that the portions of the passages ordered to be disclosed by Kelen J. must be returned to the Minister to give him or her a chance to invoke further exemptions under the *Access Act*.

[20] On the cross-appeal the Respondent argues that the discretion given to the courts by section 49 of the *Access Act* should be exercised and the totality of the undisclosed portions of the documents at issue should be disclosed to Ethyl Canada Inc. given the unreasonable manner by which the Minister of Environment has approached this particular request for disclosure.

[21] I agree with the Respondent's arguments on the cross-appeal.

[22] The jurisdiction of the Court to return portions of the undisclosed document to the Minister does not preclude the Court from exercising the discretion granted to it pursuant to s. 49 of the *Access to Information Act*.

Order of Court where no authorization to refuse disclosure found	Ordonnance de la Cour dans les cas où le refus n'est pas autorisé
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**.	**49.** La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; **la Cour rend une autre ordonnance si elle l'estime indiqué.**

[23] This section allows the Court to order the disclosure of the requested record in either of two circumstances. First, disclosure is ordered by the Court when it determines that the head of the government institution was not authorized to refuse its disclosure, which is not the case in the present situation. Second, the Court can also make any other order as it deems appropriate.

[24] This statutory language is clearly broad enough to permit the Court to order disclosure of a record rather than sending the matter back to be determined once again by the head of the government institution.

[25] I believe that the particular circumstances of this case warrant an order for disclosure of these remaining sentences and fragments.

[26] First, the records have already been returned to the head of the institution for re-determination of applicable exemptions under the *Access Act* following the decision of the Federal Court of Appeal in (*Canada (Information Commissioner)* v. *Canada (Minister of Environment)*, [2003] F.C.J. 197, 2003 FCA 68.

[27] Furthermore, the Appellant has failed to demonstrate any reasons that would justify another opportunity to make a determination of whether a portion of the records is exempt from disclosure under the *Access Act*. I am convinced that the integrity of the Government's decision-making process would not be compromised by the release of these sentences and words.

[28] I have reviewed the remaining sentences, and sentence fragments, and find it difficult to believe that any of the enclosed material would warrant an additional return to the Minister.

[29] In these circumstances, the Minister should not be entitled a further opportunity to claim that portions of the record at issue are exempt from disclosure.

[30] Kelen J., in refusing to exercise his discretion to order the disclosure of the totality of the material, did not give sufficient weight to these significant circumstances. In *Elders Grain Co. v. M/V Ralph Misener (The)*, [2005] F.C.J. No. 612, 2005 FCA 139, this Court reiterated at paragraph 13 that "[…] if the appellate court reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant

considerations or that the trial judge considered irrelevant factors or failed to consider relevant factors, then an appellate court is entitled to exercise its own discretion".

[31] In exercising this discretion, I order disclosure of the remaining sentences and fragments in the record.

[32] Concerning the issue of costs raised in the cross-appeal and based on the application of subsection 53(2) of the *Access Act*, I cannot agree with the Appellant that Kelen J. erred in law in refusing costs to the Commissioner.

[33] The decision to award costs to an applicant who has raised an important new principle is clearly a discretionary decision made "where the Court is of the opinion" that such an award is warranted. This Court will interfere with such a decision only where the judge is clearly misdirected in law, considered non-relevant elements or did not justify a decision that is clearly contrary to the practice generally followed.

[34] I cannot find any circumstances in the case at bar that would allow the Court to interfere with Kelen J.'s decision on this issue.

[35] The questions in the main appeal are now moot and the appeal will be dismissed. The cross-appeal will be allowed in part and the Appellant will be ordered to divulge all remaining portions of the records for which the Appellant claims an exemption from disclosure. That part of the cross-

appeal, in which the Respondent claims costs, will be dismissed and the parties will bear their own costs in these proceedings.

"J. Richard"
Chief Justice

“I agree
M. Nadon J.A.”

PELLETIER J.A. (Concurring)

[36] I agree with the disposition of this appeal and cross-appeal proposed by the Chief Justice but I arrive at that conclusion by a slightly different route.

[37] The essential steps which bring us to present file can be very summarily described as follows:

> In *Canada (Information Commissioner) v. Canada (Minister of the Environment)*, 2001 FCT 277, [2001] 3 F.C. 514 (MMT No. 1), Blanchard J. decided that discussion papers, as defined in paragraph 69(1)(*b*) of the Act were subject to the Act. The learned judge sent the matter back to the Clerk to determine if any part of the records in issue fell within the statutory definition and if so, to sever them from the balance of the record and to disclose them.

[38] In *Canada (Information Commissioner) v. Canada (Minister of the Environment)*, 2003 FCA 68, (2003), 224 D.L.R. (4th) 498 (MMT No. 2), this Court decided that the Clerk or the Minister were entitled to claim the benefit of the exemptions set out at sections 13 to 25 of the Act in relation to the portions of the disputed records which fell within the definition of discussion papers.

[39] In *Canada (Information Commissioner) v. Canada (Minister of the Environment)*, 2006 FC 1235, [2007] 3 F.C.R. 125 (MMT No. 3), Kelen J. decided that the Minister was entitled to invoke the exemption in favour of Ministerial advice found at section 21 of the Act in relation to the portions of the disputed record which fell within the definition of discussion papers. In the course of

his decision, the learned applications judge disallowed certain instances of the exemption claimed by the Minister and sent some portions of the record back for redetermination.

[40] The Minister appeals from the manner in which the applications judge applied the section 21 exemption. The Commissioner cross-appeals from the finding that the Minister was entitled to claim the section 21 exemption in relation to material which was found to constitute discussion papers. If the Commissioner's cross-appeal succeeds, the Minister's appeal becomes moot.

[41] I would allow the Commissioner's cross-appeal. The starting point for this entire exercise was Blanchard J.'s finding in MMT No.1 that the Act applied to discussion papers, followed by the Clerk's acknowledgement that record which is in issue here fell within the statutory definition of discussion papers. As a result, the Minister's claim that the material is exempt from disclosure pursuant to paragraphs 21(1)(*a*) or (*b*) is made in relation to a record which is subject to the Act only by reason of having been found to be discussions papers.

[42] The basis of the Minister's claim is that, before the material contained in the discussion papers was brought forward to Cabinet, it was raised and discussed in his office as part of the process leading to the preparation of a Memorandum to Cabinet. With respect, this amounts to an argument that for purposes of the exclusion in section 69, the records were prepared for Cabinet but for purposes of the exemption in section 21, the records were prepared for the Minister. Such a double-barreled plea is contrary to logic and to the spirit of the Act.

[43] The decision to claim the benefit of section 69 is inconsistent with a claim for an exemption under section 21 of the Act because the two grounds are mutually exclusive. The fact that, as a matter of process, the material which finds its way into a discussion paper was marshaled in the Minster's office does not change the identity of the intended consumer of that information. If it was the Cabinet, then the exclusion in section 69 applies, subject to the exception in favour of discussion papers and the effect of this Court's decision in MMT No. 2. If it was the Minister, then the Act applies in all respects and the Minister can claim the benefit of section 21. It cannot be both. Having chosen to rely on the exclusion set out at section 69 of the Act, the Minister cannot, as a back up position, claim the benefit of section 21 of the Act.

[44] For those reasons, I would dispose of the cross-appeal and the appeal as proposed by the Chief Justice.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-502-06
APPEAL FROM A JUDGMENT OF JUSTICE KELEN, DATED OCTOBER 17, 2006, IN FILE NO. T-555-05.	
STYLE OF CAUSE:	**THE MINISTER OF ENVIRONMENT CANADA AND THE INFORMATION COMMISSIONER OF CANADA**
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 30, 2007
REASONS FOR JUDGMENT BY:	Richard C.J.
CONCURRED IN BY:	Nadon J.A.
CONCURRING REASONS BY:	Pelletier J.A.
DATED:	December 14, 2007

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