Federal Court of Appeal

Cour d'appel fédérale

Date: 20110527

Docket: A-198-09

Citation: 2011 FCA 182

CORAM: **BLAIS C.J.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

AMIR ATTARAN

Appellant

and

MINISTER OF FOREIGN AFFAIRS

Respondent

Heard at Ottawa, Ontario, on December 8, 2010.

Judgment delivered at Ottawa, Ontario, on May 27, 2011.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: BLAIS C.J.
TRUDEL J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] Professor Amir Attaran, the appellant, asked the Department of Foreign Affairs and International Trade (DFAIT) to give him copies of its annual human rights report concerning Afghanistan for the years from 2001 to 2006. In response, Professor Attaran was told that no report existed for 2001. He was given redacted reports for the years from 2002 to 2006. Professor Attaran then complained to the Information Commissioner (Commissioner) under the *Access to Information Act*, R.S.C. 1985, c. A-1 (Act) that the redactions to the reports were excessive. Later, he received less redacted versions of the reports from DFAIT. Still not satisfied, Professor Attaran brought an

application in the Federal Court for judicial review of DFAIT's decision to redact portions of the reports.

[2] A Judge of the Federal Court, in reasons cited 2009 FC 339, ordered the disclosure of one excerpt found at page 117 of the 2005 report and also found at page 140 of the 2006 report. This disclosure was ordered because the excerpt had been reported in *The Globe and Mail* newspaper on April 25, 2007 and had also been disclosed in other proceedings in the Federal Court. Apart from ordering this disclosure, the Judge dismissed the application for judicial review without costs to either party. Professor Attaran now appeals from the decision of the Federal Court.

[3] At the hearing of this appeal, Professor Attaran's counsel advised that only one of the grounds of appeal advanced in the appellant's memorandum of fact and law would be pursued. The sole issue before this Court is whether the Federal Court erred in finding that the respondent's discretion under subsection 15(1) of the Act was exercised and, if so, whether the discretion was exercised reasonably.

[4] For the following reasons, I would allow the appeal with costs both here and in the Federal Court because of the respondent's failure to exercise the discretion conferred by subsection 15(1) of the Act. I would return the matter to the respondent for the purpose of allowing the respondent to exercise the discretion conferred under subsection 15(1) of the Act.

1. Factual Background

[5] For the purpose of this appeal, it is sufficient to set out the following facts to supplement those contained in the above introduction:

1. Professor Attaran made his access request on January 24, 2007. DFAIT responded to Professor Attaran's access request on April 23, 2007 by providing redacted copies of the Afghanistan Human Rights Report for the years 2002 to 2006. The initial redactions to the reports were based upon the provisions of section 17, subsections 13(1) and 15(1), and paragraphs 21(1)(*a*) and 21(1)(*b*) of the Act. These provisions are set out in the appendix to these reasons.
2. Professor Attaran complained to the Commissioner on April 24, 2007.
3. On November 15, 2007, DFAIT provided Professor Attaran with versions of the reports which contained fewer redactions. This production was explained by DFAIT to be the result of "the production of documents for litigation under section 38 of the *Canada Evidence Act*." More specifically, DFAIT advised that it had:

> […] made available to the public on November 14, 2007 more information from these reports as part of the court process and even though the exemption test is broader under the *Access to Information Act*, it was felt that within the spirit and intent of the *Access to Information Act*, these reports previously processed by my office should now mirror each other as much as possible.
>
> In other words, no information that was made public yesterday as a result of the court process is now being withheld under an exempting provision of the *Access to Information Act*.

4. By letter dated November 19, 2007, the Commissioner's office reported to Professor Attaran about the result of the investigation into his complaint. The Commissioner's office advised that:

   a. No report on Afghanistan was produced for the year 2001.

   b. DFAIT had been asked to reconsider the redactions made on certain pages of the reports. As a result, additional information had been disclosed by DFAIT in its letter of November 15, 2007.

   c. DFAIT no longer relied upon paragraphs 21(1)(*a*) and (*b*) of the Act in order to withhold information from disclosure.

   d. All information withheld under subsection 13(1) of the Act was also withheld under subsection 15(1) of the Act. Therefore, the Commissioner's findings were restricted to subsection 15(1) of the Act.

   e. The Commissioner was of the opinion that all of the information withheld under subsection 15(1) of the Act "could reasonably be expected to be injurious to the conduct of international affairs if released." In the Commissioner's view, the provision was properly invoked and he was satisfied that DFAIT properly exercised its discretion in the application of the exemption.

   f. With respect to the exemptions claimed under section 17 of the Act, the Commissioner noted that this exemption was used sparingly. The Commissioner was of the view that there were sufficient grounds to warrant the invocation of this provision and that the exemption was properly invoked.

g. To conclude, the Commissioner would record the complaint as having been resolved.

5. Before the Federal Court, Professor Attaran clarified that he only sought disclosure of any references in the reports to torture. He accepted that references to individuals, agencies or allies in Afghanistan were exempt from disclosure under the Act because such disclosure could reasonably be expected to be injurious to Canada's international relationships with those individuals or agencies.

6. On November 25, 2010, counsel for the respondent provided counsel for the appellant and this Court with revised copies of 4 pages from the human rights reports in issue. Each page contained fewer redactions. The respondent also disclosed a less redacted version of a relevant document entitled “Afghanistan – 2006: Good Governance, Democratic Development and Human Rights.” This less redacted document had been disclosed by the Deputy Minister of Foreign Affairs to the Military Police Complaints Commission in the context of a proceeding before that body.

7. In view of the appellant’s limitation on the scope of his requested disclosure and the November 25, 2010 disclosure, only 3 redactions found on two pages of the relevant records are at issue in this appeal.

8. Subsection 15(1) of the Act permits, but does not mandate, the head of a government institution to refuse to disclose a record that contains “information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs.” No challenge is made by Professor Attaran on this appeal as to whether the

> redacted information falls within that description. At issue is whether DFAIT lawfully exercised its discretion not to disclose the information.

2. The Decision of the Federal Court

[6] After reviewing the background facts and describing the affidavit evidence, the Judge set out the issues before the Court and the legislative framework.

[7] The Judge went on to review the standard of review to be applied to the decision to redact portions of the reports and the burden of proof. Relying upon the decision of this Court in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254; [2002] 1 F.C. 421 (*Telezone*), he found that the Court must apply the standard of correctness to the question of whether a requested record falls within a provision of the Act which exempts a record from disclosure. Where a discretion is conferred to refuse disclosure, the lawfulness of the exercise of discretion is to be reviewed on the reasonableness standard.

[8] With respect to the burden of proof, the Judge quoted the following extract from paragraph 89 of this Court's decision in *Telezone*:

> […] when in review proceedings instituted under section 41 or 42 the Minister has discharged the burden of establishing that a document falls within an exemption, the proceeding must be dismissed unless the applicant satisfies the Court that the Minister failed lawfully to exercise the discretion to refuse to disclose an exempted document.

[9] Relying upon this authority the Judge wrote at paragraph 31 of his reasons:

> 31. Thus, initially the burden of proof is on the respondent to show that the record falls within the exemption. If the respondent's evidence meets this burden, the obligation shifts to the applicant to rebut this evidence by showing that the Minister's exercise of his discretion was unreasonable.

[10] Turning to his analysis of the issues, the Judge noted that in addition to the public evidence, the Court had received confidential *ex parte* affidavit evidence, as permitted by section 52 of the Act (this section is also set out in the appendix to these reasons). A brief summary of the nature of that evidence was provided by the Judge. The Judge observed that the confidential information showed that the Commissioner had performed a thorough investigation of the appellant's complaint in which a number of probing questions had been put to DFAIT.

[11] With respect to the redactions at issue, setting aside the excerpt that the Judge ordered be disclosed on the ground that it was already in the public domain, the Judge wrote that he was satisfied that “the decision not to disclose portions of the reports was reasonably open to the decision-maker under sub-section 15(1) of [the Act], so that the Court cannot set aside this decision” (reasons at paragraph 46). He then went on, at paragraphs 47 to 49 of his reasons, to write:

> 47. There is clear and direct evidence from a senior officer of the Canadian Forces and from a senior official at the Department of Foreign Affairs and International Trade that disclosure of the redacted portions of the documents involving the Afghan military, the Afghan intelligence agency, and the Afghan police forces could reasonably be expected to be injurious to the conduct of Canada's international affairs with these agencies of the Afghan government. The confidential evidence points to specific examples of where public criticisms by a Canadian official have strained Canada's ability to work with the Afghan authorities for some time thereafter. Accordingly, there is evidence of repercussions or reactions from the Afghans when Canada has publicly and officially criticised an Afghan official or Afghan agency.

> 48. The Court cannot ignore, discount or substitute the Court's opinion for the clear evidence and opinion of a commander in the Canadian forces and a senior official at the Department of Foreign Affairs and International Trade that public disclosure of the redactions in these documents can reasonably be expected to be injurious to the conduct of Canada's international affairs with Afghanistan. […]
>
> 49. If reports of torture in Afghanistan from the U.S., the United Nations and the Afghan Independent Human Rights Commission are on the public record, this does not mean that such comments from Canada in an official report, would not be injurious to Canada's relationships in Afghanistan.

[12] While the Judge noted the existence of the discretion to refuse disclosure, and applied the reasonableness standard of review, the Judge did not expressly consider whether the respondent had considered both the applicability of subsection 15(1) of the Act to the redacted information and the exercise of discretion with respect to the application of the exemption.

3. The Legislative Framework

[13] This case turns upon the proper application of subsection 15(1) of the Act. While the subsection is set out in full in the appendix to these reasons, for ease of reference the relevant portion of subsection 15(1) is set out below:

15. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information [emphasis added]	15. (1) Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements dont la divulgation risquerait vraisemblablement de porter préjudice à la conduite des affaires internationales, à la défense du Canada ou d'États alliés ou associés avec le Canada ou à la détection, à la prévention ou à la répression d'activités hostiles ou subversives, notamment : [Non souligné dans l'original.]

4. Analysis

i) The Standard of Review

[14] I begin by observing that it is important to understand the exercise mandated by subsection 15(1) of the Act. The subsection provides that the head of a government institution "may refuse" to disclose any record. This requires a two-step exercise. The first step the head must take is to determine whether disclosure could reasonably be expected to be injurious to the conduct of international affairs. If the determination is that it may, the second step is to decide whether having regard to the significance of the risk and other relevant factors, disclosure should be made or refused. See, by parity of reasoning, *Ontario (Public Safety and Security) v. The Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 (*Criminal Lawyers' Association*) at paragraph 48.

[15] In the present case, no challenge is made to the determination that disclosure could reasonably be expected to be injurious to the conduct of international affairs. The appellant argues, however, that there is no evidence in the public record that the respondent turned its mind to the exercise of discretion under subsection 15(1) of the Act.

[16] Therefore, the first question for this Court is, on the entirety of the record (both public and *ex parte*), can the Court be satisfied that the respondent turned its mind to the exercise of discretion? As noted above, this was not an issue considered by the Judge.

[17] As stated by the Supreme Court in *Criminal Lawyers' Association* at paragraph 46, a discretion conferred by statute must be exercised consistently with the purposes underlying its grant. This is consistent with *Telezone* where this Court stated, at paragraph 47, "when the Act confers on the head of a government institution a discretion to refuse to disclose an exempted record, the lawfulness of its exercise is reviewed on the grounds normally available in administrative law for the review of administrative discretion, including unreasonableness." One ground of administrative review is that a discretion conferred by statute must be exercised within the boundaries imposed by the statute. See: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 56. Thus, the parties do not dispute that this Court may intervene if the respondent did not consider the exercise of discretion.

[18] If the Court is satisfied that the discretion was exercised, the second question is whether the discretion was exercised reasonably.

ii) The Burden of Proof

[19] The parties did not address in any detail the Judge's conclusion with respect to the burden of proof. Accordingly, the Court sought and received supplementary written submissions on the burden of proof. Relying upon *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589, the appellant argued that the burden of proof was on the respondent to demonstrate that section 15 of the Act applied to the records at issue and that the discretion was exercised in a reasonable manner. The respondent submitted that the Judge was correct to state that once it is established that section 15 of the Act applies, the burden of proof shifts to Professor Attaran to demonstrate

that the exercise of discretion was unreasonable. The respondent did, however, draw the attention of the Court to the *obiter* statements of the Supreme Court of Canada in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773 at paragraphs 60 and 65. There Justice Gonthier, writing for the Court, spoke of the requirement placed upon a government institution to justify the exercise of its discretion not to disclose a record.

[20] In my respectful view, the Judge erred in law in relying upon paragraph 89 of this Court's decision in *Telezone* to place the burden of proof upon the appellant. The Court's reasons in *Telezone*, read in their entirety, show that the burden of proof is dependent upon the particular circumstances before the Court. My reasons for this conclusion follow.

[21] Consideration of the burden of proof must begin with this Court's decision in *Ruby*. While the decision was varied on appeal to the Supreme Court, 2002 SCC 75, [2002] 4 S.C.R. 3, this Court's analysis of the burden of proof was not the subject of any adverse comment in the Supreme Court.

[22] *Ruby* was an application for access to personal information under the *Privacy Act*, R.S.C. 1985, c. P-21. The provisions of the *Privacy Act* are closely related to the provisions of the Act. As in the present case, not all of the evidence before the Court in the application was disclosed to Mr. Ruby, and an *in camera ex parte* hearing was held. This was relevant to the Court's conclusion with respect to the burden of proof and led to its conclusion that the burden of proof

should not be imposed on Mr. Ruby because of his lack of access to the entire record. At paragraphs 36 to 39 the Court wrote:

> 36. […] Even if a person is informed that a bank does contain personal information about him or her, how can that person, who does not know what the information is, meet an evidential burden of questioning the exercise of discretion by the government authority who refuses access to it?
>
> 37. The situation of the appellant or of a person in his position is further aggravated by the fact that the *a posteriori* judicial review before the Federal Court pursuant to section 41 of the Act, whose purpose is to review the discretion exercised by the authorities, may take the form of an *in camera* and *ex parte* hearing at which secret affidavit evidence can be filed by the head of the government institution. An applicant like the appellant does not and cannot know if that new evidence offered in support of a claim that the institution's discretion was properly exercised contains irrelevant considerations or fails to disclose relevant considerations which could have affected the exercise of discretion by the authorities.
>
> 38. In our view, in these peculiar circumstances—where accessibility to personal information is the rule and confidentiality the exception, where an applicant has no knowledge of the personal information withheld, no access to the record before the court and no adequate means of verifying how the discretion to refuse disclosure was exercised by the authorities, and where section 47 of the Act clearly puts on the head of a government institution the burden of establishing that it was authorized to refuse to disclose the personal information requested and, therefore, that it properly exercised its discretion in respect of a specific exemption it invoked—an applicant cannot be made to assume an evidential burden of proof. As this Court said in *Rubin v. Canada (Canada Mortgage and Housing Corp.)*[9] in relation to closely related legislation, the *Access to Information Act*, R.S.C., 1985, c. A-1, which contains a provision similar, if not identical,[10] to section 47 of the Act:
>
> > This section places the onus of proving an exemption squarely upon the government institution which claims that exemption.
> >
> > The general rule is disclosure, the exception is exemption and the onus of proving the entitlement to the benefit of the exception rests upon those who claim it.

> 39. It is the Court's function on an application for review under section 41 of the Act to ensure that the discretion given to the administrative authorities "has been exercised within proper limits and on proper principles."[11] This is why the reviewing Court is given access to the material in issue by section 45 of the Act. In our view, an applicant who, pursuant to section 41 of the Act, applies for judicial review of an institution's refusal to disclose the personal information requested, by definition, questions the validity of the exercise of discretion by that institution and nothing more is required from him or her. In such circumstances, this is the best an applicant can do. This is the most an applicant should be held to.
>
> [emphasis added and footnotes omitted]

[23] The *Ruby* decision was considered, and distinguished in *Telezone*. At paragraphs 93 to 96 the Court wrote:

> 93. In reasons concurred in by Sexton J.A., Létourneau and Robertson JJ.A. explained (at paragraph 30) why the normal rule imposing the burden of proof on the party seeking judicial review did not apply to the case before them:
>
> > However, the situation is different in matters of access to confidential information since section 47 of the Act puts on the head of a government institution the burden of proving an exemption. We shall come back to the scope of this burden later on. Suffice it to say for the time being that, in our view, it encompasses both the burden of proving that the conditions of the exemptions are met and that the discretion conferred on the head of a government institution was properly exercised.
>
> Sections 47 and 48 of the *Privacy Act* are not materially different from sections 48 and 49 of the *Access to Information Act*.
>
> 94. After noting that the appellant in that case had not been told whether the personal information banks to which he had requested access contained information about him, the Court stated (at paragraph 36) the rationale for its conclusion on the burden of proof:
>
> > Even if a person is informed that a bank does contain personal information about him or her, how can that person, who does not know what the information is, meet an evidential burden of questioning the exercise of discretion by the government authority who refuses access to it?

> 95. In my opinion, however, the statements in *Ruby*, *supra*, on the burden of proof must be read in light of what the Court regarded (at paragraph 38) as the "peculiar circumstances" of the case, namely,
>
> > ... where accessibility to personal information is the rule and confidentiality the exception, where an applicant has no knowledge of the personal information withheld, no access to the record before the court and no adequate means of verifying how the discretion to refuse disclosure was exercised by the authorities, and where section 47 of the [*Privacy*] *Act* clearly puts on the head of a government institution the burden of establishing that it was authorized to refuse to disclose the personal information requested and, therefore, that it properly exercised its discretion in respect of a specific exemption it invoked ...
>
> 96. Some of these circumstances are not present in the case before us. In particular, the Commissioner and Telezone are well aware of the nature of the information about the decision-making process that Industry Canada has refused to disclose. In addition, the Commissioner and counsel for Telezone know the content of the material filed in confidence with the Court, including explanations by officials of Industry Canada of the factors considered in the exercise of the discretion to disclose. The essence of the appellants' complaint is that, in the absence of an affidavit by the Minister's delegate who decided not to disclose the requested documents, they have effectively been deprived of an opportunity to conduct a cross-examination. [emphasis added]

[24] *Telezone* did not purport to overturn *Ruby*. Rather, in *Telezone* the Court recognized that the burden of proof would depend upon the circumstances before the Court.

[25] The respondent argues that the case at bar is distinguishable from *Ruby* because the appellant knows the "general nature of the information at issue," the majority of the reports in issue have been released, and because he was able to cross-examine two officials from the responsible government institution on their public affidavits.

[26] However, the appellant is unaware of the precise content of the unredacted record, unaware of the *ex parte* evidence filed by the respondent and unaware of the *ex parte* submissions made by the respondent in the *in camera* hearing. The public affidavits were silent on what if any factors were considered in the exercise of discretion. The Federal Court provided no explanation for its conclusion that the respondent had considered the exercise of discretion. The appellant argues there is no evidence in the public record that consideration was given to the exercise of discretion. He has no means of verifying from the *ex parte* record if the discretion was exercised.

[27] In my view, the circumstances in this case are analogous to those before this Court in *Ruby*. The appellant cannot be required in this case to bear the burden of establishing on a confidential record he cannot access that the respondent failed to give consideration to the exercise of discretion. The burden of proof is on the respondent to establish that the discretion was exercised in a reasonable manner.

iii) Did the respondent turn its mind to the exercise of discretion?

[28] The respondent argues that the Court should infer from the following evidence that the decision-maker considered her discretion to disclose information:

a. The affidavit evidence of Monique McCulloch to the effect that there was discussion between the Access and Human Rights divisions of DFAIT between March 5 and April 13, 2007. The purpose of this dialog “was to ensure that as much information

as possible could be released to the requester while still ensuring that the exemptions in the *Access Act* were properly applied."

b. The process of the Commissioner's investigation. The Commissioner's role is to ensure the release of as much information as is possible.

c. The continued release of information.

Each will be considered in turn.

[29] First, Ms. McCulloch's statement is generic in nature and by itself cannot satisfy the Court that the discretion conferred by subsection 15(1) of the Act was exercised. Moreover, her statement that the purpose of the internal DFAIT discussions was to see that "the exemptions in the *Access Act* were properly applied" is consistent with an exercise where the concern was whether particular information fell within an exemption. Such an inquiry is insufficient if consideration is not also given to whether information falling within the exemption may nonetheless be disclosed.

[30] Second, I agree that the Commissioner's role is to further the purpose of the Act. Thus, the Commissioner's role includes seeing that there is a right of access to information in the records of government institutions in accordance with the principle that such information should be available to the public, and that exceptions to the right of access are limited and specific. See: subsection 2(1) of the Act. That said, as this Court noted in *Telezone* at paragraph 42, the Court is entitled to differ from the Commissioner on questions of law or mixed fact and law without first having to satisfy itself that the Commissioner's conclusion was unreasonable. This is because the Court's mandate is to review the refusal of access by the head of a government institution. The Court does not review

the decision of the Commissioner. Indeed, the information put before the Court may be less extensive than that obtained by the Commissioner in the course of her investigation. In this case information was provided to the Commissioner not only in writing, but also in telephone conversations and at a meeting.

[31] Finally, turning to the inference (discussed in paragraph 28(c)) that the respondent asks this Court to draw, I agree that on the record before the Court the most compelling evidence is found in the respondent's conduct in continuing to release, or not release, information to the appellant. This is because here, unlike the record in *Telezone*, there are no internal memoranda dealing with specific explanations or recommendations with respect to disclosure of the requested documents. There is nothing to show that consideration was given to the existence of any factors which may have favored disclosure. Thus, the question is whether the Court can infer from the subsequent release or non-release of information that the decision-maker considered her discretion to release information, notwithstanding that the information otherwise fell within subsection 15(1) of the Act.

[32] Before turning to the evidentiary record, it is helpful to consider the nature of an inference. Drawing an inference is a matter of logic. As stated by the Newfoundland Supreme Court (Court of Appeal) in *Osmond v. Newfoundland (Workers' Compensation Commission)* (2001), 200 Nfld. & P.E.I.R. 203 at paragraph 134:

> […] Drawing an inference amounts to a process of reasoning by which a factual conclusion is deduced as a logical consequence from other facts established by the evidence. Speculation on the other hand is merely a guess or conjecture; there is a gap in the reasoning process that is necessary, as a matter of logic, to get from one

> fact to the conclusion sought to be established. Speculation, unlike an inference, requires a leap of faith.

[33] In *Squires v. Corner Brook Pulp and Paper Ltd.* (1999), 175 Nfld. & P.E.I.R. 202 (C.A.) the same court reviewed early Supreme Court of Canada and House of Lords jurisprudence which discussed the distinction between inference and conjecture. Justice Cameron, writing for the Court, stated:

> 113. In *Canadian Pacific Railway Company v. Murray*, [1932] S.C.R. 112 at pp. 115-117 the Court approved the following from *Jones v. Great West Railway Co.* (1930), 47 T.L.R. 39:
>
> > The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability.
>
> 114. The House of Lords in *Caswell v. Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 152 noted the difference between conjecture and the drawing of an inference in these terms at pp. 169-70.
>
> > Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.
>
> 115. This statement has been approved by the British Columbia Court of Appeal in *Lee v. Jacobson* (1994), 120 D.L.R. (4th) 155 and by the Saskatchewan Court of Appeal in *Kozak v. Funk* (1997), 158 Sask. R. 283. [emphasis added]

[34] An inference cannot be drawn where the evidence is equivocal in the sense that it is equally consistent with other inferences or conclusions.

[35] In the present case, there is nothing in the public or the *ex parte* record before the Court, including the affidavits filed on behalf of the respondent, which expressly demonstrates that the decision-maker considered the existence of her discretion. However, the absence of such evidence is not determinative of the issue. The same situation existed in *Telezone* where the Court examined the record before it, including internal departmental documents, in order to be satisfied that the decision-maker understood that there was a discretion to disclose documents.

[36] Conversely, just as the absence of express evidence about the exercise of discretion is not determinative, the existence of a statement in a record that a discretion was exercised will not necessarily be determinative. To find such a statement to be conclusive of the inquiry would be to elevate form over substance, and encourage the recital of boilerplate statements in the record of the decision-maker. In every case involving the discretionary aspect of section 15 of the Act, the reviewing court must examine the totality of the evidence to determine whether it is satisfied, on a balance of probabilities, that the decision-maker understood that there was a discretion to disclose and then exercised that discretion. This may well require the reviewing court to infer from the content of the record that the decision-maker recognized the discretion and then balanced the competing interests for and against disclosure, as discussed by the Court in *Telezone* at paragraph 116.

[37] Turning now to the evidence, I consider the following information from the record to be helpful.

1. On April 23, 2007, DFAIT responded to the appellant's access request by providing redacted copies of the human rights reports for the years 2002 to 2006.

2. As explained by the Judge, redacted from the 2006 report was the phrase:

> Extra-judicial executions, disappearances, torture and detention without trial are all too common.

3. On April 25, 2007, *The Globe and Mail* published a story that printed a portion of the information redacted in the 2006 report provided to the appellant alongside non-redacted portions of the same 2006 report which the newspaper had obtained from a confidential source. The paper reported that:

> Among the sentences blacked out by the Foreign Affairs Department in the report's summary is "Extrajudicial executions, disappearances, torture and detention without trial are all too common," according to full passages of the report obtained independently by The Globe. [emphasis added]

See: Appeal Book, Volume II at page 328.

4. As the Judge noted at paragraph 11 of his reasons, on July 11, 2007 an employee of the respondent "was cross-examined in another Federal Court proceeding and authenticated under oath one excerpt of the disclosure in *The Globe and Mail*. [He] confirmed that the 2006 report contained the words: Extra-judicial executions, disappearances, torture and detention without trial are all too common."

5. On November 15, 2007, following the Commissioner's investigation, DFAIT provided less redacted versions of the reports to the appellant (Exhibit D to the

appellant's affidavit). The version of the 2006 report provided to the appellant still maintained redaction of the phrase “Extra-judicial executions, disappearances, torture and detention without trial are all too common.” See: page 150 of the Appeal Book.

6. On February 7, 2008, the Federal Court released its reasons in *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FC 162. At paragraph 105 of those reasons, Justice Mactavish wrote as follows:

> 105. Moreover, Canada's own Department of Foreign Affairs and International Trade has recognized the pervasive nature of detainee abuse in Afghan prisons in its annual reviews of the human rights situation in Afghanistan. For example, DFAIT's 2006 report, released in January of 2007, concluded that “Extra-judicial executions, disappearances, torture and detention without trial are all too common”. [emphasis added]

7. On April 2, 2009, the Judge required the respondent to disclose the phrase “Extra-judicial executions, disappearances, torture and detention without trial are all too common” found in the 2005 and 2006 reports.

[38] For the following reasons, on the whole of the evidence, I am unable to infer from this conduct that the decision-maker understood and considered that subsection 15(1) of the Act confers a discretion upon her to disclose or refuse to disclose information described therein.

[39] To begin, the record contains no explanation as to why the respondent did not release the phrase “Extra-judicial executions, disappearances, torture and detention without trial are all too common” to the appellant with its November 15, 2007 second disclosure. By that time the phrase had been reported by *The Globe and Mail* and a DFAIT employee had confirmed in a public

proceeding that such a phrase was contained in the 2006 report. Further, the record is silent as to why the redaction was not later lifted following the release of the Federal Court's reasons in the proceedings commenced by Amnesty International which again confirmed the phrase was included in the 2006 report.

[40] In her affidavit, Ms. McCulloch deposes that:

> 20. I am aware that the Globe and Mail newspaper ran an article on April 25, 2007, in which it revealed a portion of the 2006 record at issue in this proceeding. To my knowledge, DFAIT did not authorize or permit the release of that information to the Globe and Mail. I am also aware that some, or all, of the 2006 record at issue has been obtained by members of the Standing Committee on Access to Information, Privacy and Ethics. Again, I am not aware of the source of the record to the Committee.

[41] This provides no explanation as to why DFAIT continued to protect information that had entered the public domain. Ms. McCulloch's evidence seems to suggest that DFAIT was of the view it could still assert the need to protect the information because it was not the source of the leak. There is no indication that the respondent considered at any time after the initial release of information to the appellant whether the prior public disclosure of redacted information was a relevant factor when considering the discretion to disclose documents that otherwise fell within the scope of subsection 15(1). While this may not be true in all cases, the prior public disclosure of information provided an incentive for the exercise of discretion to release the information to the appellant. This is particularly true in the present circumstances, where a DFAIT employee had publicly confirmed the phrase was in the report. The prior public disclosure might not have been sufficient to lead the respondent to release the information to the appellant. However, if the

respondent understood that such discretion existed one would expect to find something in the record that manifested consideration of the discretion.

[42] The DFAIT disclosure of November 15, 2007, was explained on the basis that it made the disclosure to the appellant conform to disclosure made in another proceeding under section 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

[43] Most recently, some of the information released in 2010 was released to the appellant because DFAIT had tendered less redacted versions of the documents to the Military Police Complaints Commission.

[44] In these instances where further disclosure was made, the appellant received the further information because it had previously been provided in other forums.

[45] In my view, the record before the Court is equally consistent with the decision-maker considering whether the release of specific information could reasonably be expected to be injurious to the conduct of international affairs without regard to the existence of a discretion to release as it is with the decision-maker having regard to the discretion. Such equivocal evidence does not support the drawing of the requested inference. Therefore I am not satisfied that the decision-maker considered the exercise of discretion. As explained above at paragraph 17, failure to consider the exercise of discretion is a ground of review because the Act requires the respondent to consider the exercise of discretion.

5. Conclusion

[46] It follows that I would allow the appeal with costs both here and in the Federal Court because of the respondent's failure to exercise the discretion conferred by subsection 15(1) of the Act. Except to the extent that the judgment of the Federal Court ordered the disclosure of two redacted portions of the records, I would set aside the judgment of the Federal Court and return the matter to the respondent for the purpose of allowing the respondent to exercise the discretion conferred under subsection 15(1) of the Act with respect to the three remaining relevant redactions.

6. Postscript

[47] Paragraph 52(2)(*a*) of the Act requires an application for judicial review brought to the Federal Court under the Act to be heard *in camera* if the application is in respect of a refusal to disclose a document by reason of section 15 of the Act. Paragraph 52(2)(*a*) of the Act also requires an appeal from such an application to be heard *in camera* by the Federal Court of Appeal.

[48] The only submissions heard *in camera* on this appeal were the respondent's submissions based upon the *ex parte* record. This was in accordance with the decision of Chief Justice Lutfy in *Kitson v. Canada (Minister of National Defence)*, [2010] 3 F.C.R. 440 (F.C.).

[49] In *Kitson*, Chief Justice Lutfy found paragraph 52(2)(*a*) and other provisions of the Act to infringe rights or freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*. Chief Justice Lutfy went on to read down paragraph 52(2)(*a*) to apply only to the *ex parte* representations made on behalf of the government institution. The effect of this was to bring section 52 of the Act

into line with the parallel provision of the *Privacy Act* which was considered by the Supreme Court in *Ruby v. Canada (Solicitor General)* above.

"Eleanor R. Dawson"
J.A.

"I agree.
Pierre Blais C.J."

"I agree.
Johanne Trudel J.A."

APPENDIX

Subsections 13(1) and 15(1), section 17, paragraphs 21(1)(*a*) and (*b*) and section 52 of the *Access to Information Act* read as follows:

13. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained in confidence from (*a*) the government of a foreign state or an institution thereof; (*b*) an international organization of states or an institution thereof; (*c*) the government of a province or an institution thereof; (*d*) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government; or (*e*) an aboriginal government.	13. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements obtenus à titre confidentiel : *a*) des gouvernements des États étrangers ou de leurs organismes; *b*) des organisations internationales d'États ou de leurs organismes; *c*) des gouvernements des provinces ou de leurs organismes; *d*) des administrations municipales ou régionales constituées en vertu de lois provinciales ou de leurs organismes; *e*) d'un gouvernement autochtone.
[…]	. . .
15. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information (*a*) relating to military tactics or strategy, or relating to military exercises or operations undertaken in preparation for hostilities or in	15. (1) Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements dont la divulgation risquerait vraisemblablement de porter préjudice à la conduite des affaires internationales, à la défense du Canada ou d'États alliés ou associés avec le Canada ou à la détection, à la prévention ou à la répression d'activités hostiles ou subversives, notamment : *a*) des renseignements d'ordre tactique ou stratégique ou des renseignements relatifs aux manoeuvres et opérations destinées à la préparation d'hostilités

connection with the detection, prevention or suppression of subversive or hostile activities;

(*b*) relating to the quantity, characteristics, capabilities or deployment of weapons or other defence equipment or of anything being designed, developed, produced or considered for use as weapons or other defence equipment;

(*c*) relating to the characteristics, capabilities, performance, potential, deployment, functions or role of any defence establishment, of any military force, unit or personnel or of any organization or person responsible for the detection, prevention or suppression of subversive or hostile activities;

(*d*) obtained or prepared for the purpose of intelligence relating to

(i) the defence of Canada or any state allied or associated with Canada, or

(ii) the detection, prevention or suppression of subversive or hostile activities;

(*e*) obtained or prepared for the purpose of intelligence respecting foreign states, international organizations of states or citizens of foreign states used by the Government of Canada in the process of deliberation and consultation or in the conduct of international affairs;

(*f*) on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (*d*) or (*e*) or

ou entreprises dans le cadre de la détection, de la prévention ou de la répression d'activités hostiles ou subversives;

b) des renseignements concernant la quantité, les caractéristiques, les capacités ou le déploiement des armes ou des matériels de défense, ou de tout ce qui est conçu, mis au point, produit ou prévu à ces fins;

c) des renseignements concernant les caractéristiques, les capacités, le rendement, le potentiel, le déploiement, les fonctions ou le rôle des établissements de défense, des forces, unités ou personnels militaires ou des personnes ou organisations chargées de la détection, de la prévention ou de la répression d'activités hostiles ou subversives;

d) des éléments d'information recueillis ou préparés aux fins du renseignement relatif à :

(i) la défense du Canada ou d'États alliés ou associés avec le Canada,

(ii) la détection, la prévention ou la répression d'activités hostiles ou subversives;

e) des éléments d'information recueillis ou préparés aux fins du renseignement relatif aux États étrangers, aux organisations internationales d'États ou aux citoyens étrangers et utilisés par le gouvernement du Canada dans le cadre de délibérations ou consultations ou dans la conduite des affaires internationales;

f) des renseignements concernant les méthodes et le matériel technique ou scientifique de collecte, d'analyse ou de traitement des éléments

on sources of such information;

(*g*) on the positions adopted or to be adopted by the Government of Canada, governments of foreign states or international organizations of states for the purpose of present or future international negotiations;

(*h*) that constitutes diplomatic correspondence exchanged with foreign states or international organizations of states or official correspondence exchanged with Canadian diplomatic missions or consular posts abroad; or

(*i*) relating to the communications or cryptographic systems of Canada or foreign states used

(i) for the conduct of international affairs,
(ii) for the defence of Canada or any state allied or associated with Canada, or
(iii) in relation to the detection, prevention or suppression of subversive or hostile activities.

[…]

17. The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to threaten the safety of individuals.

[…]

d’information visés aux alinéas *d*) et *e*), ainsi que des renseignements concernant leurs sources;

g) des renseignements concernant les positions adoptées ou envisagées, dans le cadre de négociations internationales présentes ou futures, par le gouvernement du Canada, les gouvernements d’États étrangers ou les organisations internationales d’États;

h) des renseignements contenus dans la correspondance diplomatique échangée avec des États étrangers ou des organisations internationales d’États, ou dans la correspondance officielle échangée avec des missions diplomatiques ou des postes consulaires canadiens;

i) des renseignements relatifs à ceux des réseaux de communications et des procédés de cryptographie du Canada ou d’États étrangers qui sont utilisés dans les buts suivants :

(i) la conduite des affaires internationales,
(ii) la défense du Canada ou d’États alliés ou associés avec le Canada,
(iii) la détection, la prévention ou la répression d’activités hostiles ou subversives.

. . .

17. Le responsable d’une institution fédérale peut refuser la communication de documents contenant des renseignements dont la divulgation risquerait vraisemblablement de nuire à la sécurité des individus.

. . .

21. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains

(*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,

[…]

52. (1) An application under section 41 or 42 relating to a record or a part of a record that the head of a government institution has refused to disclose by reason of paragraph 13(1)(*a*) or (*b*) or section 15 shall be heard and determined by the Chief Justice of the Federal Court or by any other judge of that Court that the Chief Justice may designate to hear those applications.

(2) An application referred to in subsection (1) or an appeal brought in respect of such application shall
(*a*) be heard *in camera*; and
(*b*) on the request of the head of the government institution concerned, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.
(3) During the hearing of an application referred to in subsection (1) or an appeal brought in respect of such application, the head of the government institution

21. (1) Le responsable d’une institution fédérale peut refuser la communication de documents datés de moins de vingt ans lors de la demande et contenant :
a) des avis ou recommandations élaborés par ou pour une institution fédérale ou un ministre;
b) des comptes rendus de consultations ou délibérations auxquelles ont participé des administrateurs, dirigeants ou employés d’une institution fédérale, un ministre ou son personnel;

. . .

52. (1) Les recours visés aux articles 41 ou 42 et portant sur les cas où le refus de donner communication totale ou partielle du document en litige s'appuyait sur les alinéas 13(1) *a*) ou *b*) ou sur l'article 15 sont exercés devant le juge en chef de la Cour fédérale ou tout autre juge de cette Cour qu'il charge de leur audition.

(2) Les recours visés au paragraphe (1) font, en premier ressort ou en appel, l’objet d’une audition à huis clos; celle-ci a lieu dans la région de la capitale nationale définie à l’annexe de la *Loi sur la capitale nationale* si le responsable de l’institution fédérale concernée le demande.

(3) Le responsable de l’institution fédérale concernée a, au cours des auditions, en première instance ou en appel et sur demande, le droit de présenter des arguments en l’absence

concerned shall, on the request of the head of the institution, be given the opportunity to make representations *ex parte*.

d’une autre partie.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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