Federal Court of Appeal | Cour d'appel fédérale

Date: 20111123

Docket: A-391-10

Citation: 2011 FCA 326

CORAM: **NOËL J.A.**
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN:

CANADIAN BROADCASTING CORPORATION

Appellant

and

INFORMATION COMMISSIONER OF CANADA

Respondent

Heard at Montréal, Quebec, on October 18, 2011.

Judgment delivered at Ottawa, Ontario, on November 23, 2011.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: TRUDEL J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal by the Canadian Broadcasting Corporation (the appellant or the CBC) from a decision of the Federal Court in which Justice Boivin (the Federal Court judge) dismissed the CBC's application for judicial review. More specifically, the Federal Court judge refused to declare that the Information Commissioner of Canada (the respondent or the Commissioner) does not have the power to order the CBC to produce for examination records excluded under section 68.1 of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the Act), specifically those relating to its journalistic, creative or programming activities.

[2] The appellant submits that the Federal Court judge's decision is based on a misinterpretation of section 68.1. It is asking this Court to issue the declaration it was denied.

[3] It is my opinion that the Federal Court judge interpreted section 68.1 correctly and that the appeal should be dismissed, for the reasons that follow.

RELEVANT FACTS

[4] Since becoming subject to the Act in 2007, the CBC has received many access to information requests. According to the affidavit of Pierre Nollet, the CBC's former head of Legal Services, 893 requests were made between September 2007 and September 2009 (Appeal Book, at page 69). Of these 893 requests, 834 had been processed on the date the affidavit was filed (October 15, 2009). Of the 834 requests processed, a total of 188 requests resulted in a refusal to disclose under section 68.1 of the Act; of the refused requests, 94 are the subject of complaints to the Commissioner (Appeal Book, at page 69).

[5] Section 68.1 was brought into force at the same time as the CBC became subject to the Act. It creates exclusions for three types of information, which are, however, subject to an exception:

Canadian Broadcasting Corporation	*Société Radio-Canada*
68.1 This Act does not apply to any information that is under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities, other than information that	**68.1** La présente loi ne s'applique pas aux renseignements qui relèvent de la Société Radio-Canada et qui se rapportent à ses activités de journalisme, de création ou de programmation, à l'exception des

relates to its general administration.	renseignements qui ont trait à son administration.

[Emphasis added]

[6] The debate before the Court has arisen from 16 access requests that were refused by the CBC and that were the subject of complaints to the Commissioner. On September 15, 2009, the appellant filed this application. On the same day, the respondent formally served the appellant with an order requiring it to provide the respondent with all the records related to the 16 access requests. In doing so, the Commissioner exercised the authority vested in her under section 36 of the Act. It is useful here to reproduce the relevant aspects of this provision:

Powers of Information Commissioner in carrying out investigations	*Pouvoirs du Commissaire à l'information pour la tenue des enquêtes*
36. (1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power	**36.** (1) Le Commissaire à l'information a, pour l'instruction des plaintes déposées en vertu de la présente loi, le pouvoir :
(*a*) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems 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;	*a*) d'assigner et de contraindre des témoins à comparaître devant lui, à déposer verbalement ou par écrit sous la foi du serment et à produire les pièces qu'il juge indispensables pour instruire et examiner à fond les plaintes dont il est saisi, de la même façon et dans la même mesure qu'une cour supérieure d'archives;
…	[…]

Access to records	*Accès aux documents*
(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine <u>any record to which this Act applies</u> that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.	(2) Nonobstant toute autre loi fédérale et toute immunité reconnue par le droit de la preuve, le Commissaire à l'information a, pour les enquêtes qu'il mène en vertu de la présente loi, accès <u>à tous les documents</u> qui relèvent d'une institution fédérale et <u>auxquels la présente loi s'applique</u>; aucun de ces documents ne peut, pour quelque motif que ce soit, lui être refusé.
. . .	[…]

[Emphasis added]

[7] The parties have conflicting interpretations of the scope of section 68.1 of the Act. The appellant submits that the three types of information described there are excluded from the Act and that, consequently, records containing such information are not "record[s] to which this Act applies" within the meaning of subsection 36(2). The Federal Court judge, adopting the respondent's position, found that the Commissioner had to examine the information excluded under section 68.1 to determine whether the exception applied.

[8] The September 15, 2009, order describes the 16 requests. Although the requests pertain to a variety of information, the CBC has, for the purposes of this proceeding, opted to treat them indiscriminately. Most of the requests concern the disclosure of information directly or indirectly related to programming or creative activities but that also touches on financial matters, such as,

for example, the cost of producing the program *Le Club des Ex* or the fees paid to people participating in current affairs shows.

[9] For 13 of the requests, no records were provided to the access requesters (Appeal Book, at page 68). For the 3 remaining requests, certain records were disclosed, after the appellant had removed information it considered to be excluded under section 68.1 of the Act.

[10] The evidence reveals the procedure set up by the CBC to process access to information requests. The CBC created an office tasked with access to information requests. According to the testimony of Pierre Nollet, when a member of this office found that [TRANSLATION] "requested information might be covered by the section 68.1 exclusion", the file was referred to him (Examination of Pierre Nollet, Appeal Book, at page 1029). Mr. Nollet then determined whether the request was subject to the exclusion. His decision was final.

[11] Mr. Nollet explained that no particular criteria were used to apply the exclusions of section 68.1. However, opinions were sometimes issued by Legal Services (Examination of Pierre Nollet, Appeal Book, at pages 1029 to 1034). Mr. Nollet is now retired and does not know who has succeeded him (Examination of Pierre Nollet, Appeal Book, at pages 1025 and 1026).

[12] Despite the distinct and separate nature of the three exclusions, Mr. Nollet seems to have treated them as one. The majority of access requests were refused on the ground that the information requested was related to "journalistic, creative or programming activities" without

explanation as to the exact nature of the exclusion being invoked (Affidavit of Pierre Nollet, Appeal Book, Volume 1, at paragraphs 38 to 40).

[13] Lastly, for 13 of the 16 files, no records were examined to justify the refusals, the CBC having determined that the exclusion under section 68.1 of the Act applied from a simple reading of the access requests (Appellant's Memorandum, at paragraph 13; Examination of Pierre Nollet, Appeal Book, at pages 1056 to 1058).

[14] In the application for judicial review filed before the Federal Court, the appellant is asking the Court to declare, as a matter of principle, that its invocation of the exclusions set out in section 68.1 has the effect of depriving the Commissioner of her power to examine the documents that are the subject of the refusal. After the appellant filed its application for judicial review, the respondent suspended her investigation pending the Court's final decision.

[15] The statutory provisions that are relevant to the analysis, including those already quoted, are reproduced in an appendix to these reasons.

FEDERAL COURT DECISION

[16] The Federal Court judge first determined the applicable standard of review (Reasons, at paragraph 11). He concluded that the issue of whether the Commissioner could compel the CBC to provide her with the records so that she could determine whether the information they revealed was excluded under section 68.1 of the Act raised a "true" jurisdiction question and that

the appropriate standard of review was therefore correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*]).

[17] The Federal Court judge then engaged in an exercise of statutory interpretation to determine the meaning of section 68.1. Drawing attention to sections 2 and 4, the Federal Court judge found that "(t)he spirit of the Act is based on the principle of disclosure. Under the Act, non-disclosure of information under the control of government institutions is the exception" (Reasons, at paragraph 14).

[18] With respect to the Commissioner's role, the Federal Court judge rejected the argument that she lacked objectivity to determine the scope of the exclusions established under section 68.1. Citing the Federal Court in *Rowat v. Canada (Information Commissioner)*, [2000] F.C.J. No. 832, he noted that the Commissioner was neutral and independent. She has no decision-making or coercive power and can only make recommendations to government institutions (Reasons, at paragraph 35). The Commissioner's investigations are private and confidential. If there is a disagreement between the parties, the appellant can turn to the Federal Court. In short, "(d)isclosing records to the Commissioner does not amount to revealing them" (Reasons, at paragraph 36).

[19] The Federal Court judge rejected the CBC's submission that the parliamentary debates demonstrated that Parliament had not wanted to grant the Commissioner the power to examine

requested records. In his opinion, the weight of these debates is limited and not conclusive. In the case at bar, he determined that they were not conclusive (Reasons, at paragraph 25).

[20] The Federal Court judge then addressed the argument regarding the expression "[t]his Act does not apply . . ." at the beginning of section 68.1. Contrary to the appellant's submissions, the Federal Court judge found that section 68.1 contained "a double negative, that is, an exception to the exclusion" (Reasons, at paragraph 27). Even though he recognized the distinction between the schemes for exemptions and exclusions in the Act (Reasons, at paragraph 28), he concluded that the Commissioner's power can be inferred from the fact that she has to examine the records in question in order to determine whether or not the information falls under the exception (Reasons, at paragraph 29).

[21] According to the Federal Court judge, a different interpretation would exempt the CBC from the Act, even though it is expressly subject to it (*idem*). Lastly, he was of the opinion that the appellant's argument had the effect of making the CBC judge and party in access to information requests, thus denying the person who has requested information one level of review in respect of a complaint and leaving judicial review as the only option. In passing, he noted that the CBC had not established any guidelines to govern the processing of requests.

[22] Finally, the Federal Court Judge rejected the analogy to *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574 [*Blood Tribe*], noting

that *Blood Tribe* did not involve an exclusion and concerned another statute (the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5).

[23] At the end of his analysis, the Federal Court Judge dismissed the application for judicial review in the following terms (Reasons, at paragraph 37) :

> . . . the Commissioner has authority under section 68.1 to order the CBC to disclose records, including records that, in the opinion of the CBC, relate to its journalistic, creative or programming activities, in order to determine whether those records fall under the exception and consequently whether they are subject to the exclusion.
>
> [Emphasis added]

APPELLANT'S POSITION

[24] The appellant's main argument, on appeal and before the Federal Court, is based on how section 68.1 and subsections 36(2) and 2(1) of the Act should be interpreted. It argues that the Federal Court judge did not correctly apply the relevant rules of statutory interpretation.

[25] According to the appellant, the application of recognized principles of interpretation to the provisions at issue leads to the conclusion that the Commissioner's power of examination does not extend to the records targeted by the 16 access requests. The appellant is relying, among other things, on the apparent conflict between the words ". . . any record to which this Act applies . . ." at subsection 36(2) – which deals with the Commissioner's investigative powers – and "This Act does not apply to . . ." at section 68.1. In this case, since the appellant claims that

the records requested by the order relate to its journalistic, creative or programming activities, the Act does not apply.

[26] The appellant emphasizes the distinction between “exclusions” and “exemptions” under the Act. Section 68.1 appears under the heading of “exclusions”. Sections 13 to 26 sets out the mandatory and discretionary exemptions that can be invoked by the government institution, which then has the burden of demonstrating that the exemption invoked applies. In contrast, records which are subject to exclusions have a special status: the Act does not apply to them.

[27] The appellant submits that the Commissioner cannot order the disclosure of excluded records and that only the Federal Court has this power, through judicial review (Appellant’s Memorandum, at paragraphs 77 to 84). In support, it refers to *Gogolek v. Canada (Attorney General)*, [1996] F.C.J. No. 154 [*Gogolek*], and *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2010 NLTD 19.

[28] By comparison, the appellant points out that the Commissioner does not have the power to order the production of confidences of the Privy Council Office in order to determine whether that information is excluded under section 69 of the Act. The same applies to records excluded by a certificate issued under the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (*Evidence Act*).

[29] In response to the analysis by the Federal Court judge, who had described section 68.1 as “an exception to the exclusion”, the appellant puts forward three arguments. First, it submits that

the alleged exception is actually a clarification establishing the parameters of the exclusion; for this, it relies on the English text, which, contrary to the French text, does not contain the word "exception" but uses the words "other than information that relates to its general administration". Second, the appellant argues that all the exclusions provided for under sections 68.1 and following are "exceptions" to the general rule, which does not, however, reduce their scope. Last, the appellant submits that the dispute as to the scope of the exclusion cannot result in allowing the Commissioner to compel the disclosure of records excluded by the Act (Appellant's Memorandum, at paragraphs 34 to 36).

[30] Noting that in *Blood Tribe* the Supreme Court decided that the Privacy Commissioner did not have the power to compel the production of records protected by solicitor-client privilege, the appellant submits that, similarly, the Commissioner does not have the power required to determine whether a record is excluded within the meaning of the Act. Moreover, the appellant submits that like the Privacy Commissioner, the Commissioner is not an independent tribunal (Appellant's Memorandum, at paragraph 87).

[31] The appellant is also relying on parliamentary proceedings to demonstrate Parliament's intention. The former Commissioner appeared before the committees of the House of Commons and the Senate, where he commented on the wording of section 68.1 before it came into force. He testified that section 68.1 of the Act as enacted would prevent him from examining records for which the CBC would invoke an exclusion (Appellant's Memorandum, at paragraphs 89 to 104).

[32] Finally, the appellant points out that the courts have recognized the CBC's journalistic independence from any government interference in many decisions (Appellant's Memorandum, at paragraphs 109 to 112). The words "journalistic, creative or programming" come from the *Broadcasting Act*, S.C. 1991, c. 11, which enshrines the CBC's independence. Counsel for the appellant stated during the proceeding that his client was particularly concerned about revealing its journalistic sources. In his opinion, this major concern, as he called it, explains why the issue is now under appeal.

[33] Having said that, counsel is not arguing that the requests at issue in this case are aimed at the disclosure of journalistic sources. He submits, however, that according to the Federal Court judge's reasoning, his client would be compelled to reveal these sources if a request was made towards that end.

[34] The appellant alleges that this is likely to cause it serious harm. Even though the information gathered by the Commissioner in the course of an investigation is private and confidential (subsection 35(1) of the Act), this rule is not absolute. The appellant refers to subsection 63(2), which compels the Commissioner to disclose information brought to her attention in the course of an investigation if that information is likely to reveal the commission of a criminal offence involving federal public servants.

[35] According to the appellant, the harm caused by revealing its sources would be serious, and the Federal Court judge did not consider this consequence when he concluded that the

disclosure of information excluded by section 68.1 to the Commissioner was not likely to be prejudicial (Reasons, at paragraph 36).

RESPONDENT'S POSITION

[36] The respondent submits that the Federal Court judge interpreted section 68.1 correctly for the reasons that he gave (Respondent's Memorandum, at paragraphs 86 to 92). She notes in particular that in putting forward the opposite position, the appellant has failed to distinguish between the words "information" in section 68.1 and "records" in section 36 (Respondent's Memorandum, at paragraphs 76 to 79).

[37] In what seems to be a form of a cross-appeal directed against the reasons, the respondent asks this Court to conclude that, regardless of the Federal Court judge's decision, her power of examination is not subject to any exclusions provided under the Act, except for certificates issued under the *Evidence Act*, and that, in any case, her power of examination is not limited to records to which the Act applies.

[38] According to the respondent, the well-established rule that the Commissioner does not have access to records excluded under the Act, including confidences of the Privy Council Office, is no longer valid. In so saying, the respondent relies on the decisions of the Federal Court in *Canada (Information Commissioner) v. Canada (Minister of the Environment)*, 2001 FCT 277, [2001] F.C.J. No. 454, at paragraph 26 [*Minister of the Environment*], and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2008 FC 766, [2008]

F.C.J. No. 938, at paragraphs 120 to 122 [*Minister of National Defence*]. She submits that even with regard to documents which reveal Privy Council confidences, only certificates issued under the *Evidence Act*, as contemplated by section 69.1 of the Act can preclude the Commissioner from compelling the production of such records (Respondent's Memorandum, at paragraphs 53 to 55, 57 to 59, and 72). The claim of an exclusion under section 69 by the Clerk of the Privy Council is no longer enough.

[39] In any event, the respondent submits that, contrary to what the Federal Court judge assumed in his analysis (Reasons, at paragraph 30), her power to compel the production of records is not limited to the records to which the Act applies. Paragraph 36(1)(*a*) gives her access to all the records that she "deems requisite" ("les pièces qu'elle juge indispensables" in the French text), whether or not they are subject to the Act (Respondent's Memorandum, at paragraphs 25, 65 and 69). In support of this argument, the Commissioner relies on the decision of this Court in *Canada (Attorney General) v. Canada (Information Commissioner),* 2001 FCA 25, [2001] F.C.J. No. 282 [*Information Commissioner]*.

ANALYSIS AND DECISION

[40] At issue in this appeal is whether the Commissioner has the power to order the production of records containing information related to journalistic, creative or programming activities within the meaning of section 68.1 of the Act. The Commissioner invites the Court to answer this question in the affirmative. In contrast, the appellant submits that the task of determining whether information relates to journalistic, creative or programming activities

belongs to the appellant, and that it is not up to the Commissioner to review the records on which the appellant bases its decisions.

[41] The parties have agreed that the question raised here is one of "true jurisdiction" and is therefore reviewable on a standard of correctness. The Federal Court judge, quoting from paragraph 59 of *Dunsmuir*, agreed with this suggestion.

[42] In a recent decision, this Court suggested that the Supreme Court had, in *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, abandoned the approach set out in *Dunsmuir* such that even a "true" question of jurisdiction no longer needs to be reviewed on a standard of correctness (*Canada (Attorney General) v. Public Service Alliance of Canada*, 2011 FCA 257, [2011] F.C.J. No. 1325, at paragraphs 30 and 31).

[43] It is unnecessary to dwell on this issue since, regardless of the approach used, the issue here is a pure matter of statutory construction, and no deference is owed to the Commissioner since the Court is not reviewing a decision for which reasons were provided. It follows that the Federal Court judge properly applied the standard of correctness.

[44] Turning to the analysis, I must first address the Commissioner's alternative argument that the appeal must be dismissed, irrespective of the Federal Court judge's reasons. In support of this contention, she argues that her power of examination extends to any record she "deems requisite" within the meaning of paragraph 36(1)(*a*), regardless of whether it is subject to the Act

and that, in any event, the Federal Court's recent case law allows her to have access to all excluded records, with the exception of records containing information that is subject to a certificate issued under the *Evidence Act*.

[45] As to her power of examination, the Commissioner was unable to refer the Court to a single case where this power had been used to compel the production of an excluded record or part of a record containing excluded information. This is no accident. A contextual reading of section 36 as a whole leads to the conclusion that the documents ("pieces" in the French text) referred to in paragraph 36(1)(*a*) must be subject to the Act, or, at least, capable of being viewed as such at the time of their examination, otherwise, the words "to which this Act applies" in subsection 36(2) would be superfluous. An excluded record does not meet this requirement (see, for example, *Gogolek*, at paragraphs 9 to 14; *Canada (Information Commissioner) v. Canada (Immigration Appeal Board)*, [1988] 3 F.C. 477, at paragraphs 24 and 25; *Auditor General of Canada (Plaintiff) v. Minister of Energy, Mines and Resources; Minister of Finance; Deputy Minister of Energy, Mines and Resources and Deputy Minister of Finance (Defendants)*, [1985] 1 F.C. 719, at pages 16 to 23; *Canada Post Corp. v. Canada (Minister of Public Works)* (T.D.), [1993] 3 F.C. 320, at paragraphs 21 and 22); *Quinn v. Canada (Prime Minister)*, 2011 FC 379, [2011] F.C.J. No. 488, at paragraph 32 [*Quinn*].

[46] This Court's decision in *Information Commissioner* does not support the Commissioner's position. The context was a judicial review before the Federal Court to determine whether certain records – the agendas of the then prime minister – were under the control of the Privy Council

Office (an entity subject to the Act) or the Prime Minister's Office (an entity not subject to the Act). The Commissioner wanted to obtain the records to be in a better position to answer this question and a *subpoena duces tecum* was issued for that purpose. A reading of the reasons reveals that the Privy Council Office had yet to invoke the section 69 exclusion when the appeal was heard.

[47] For our purposes, the only issue of interest before the Federal Court of Appeal was whether the trial judge had been correct to stay the *subpoena* on the ground that its execution would cause irreparable harm to the respondent within the meaning of *RJR MacDonald Inc. v. Canada (A.G.)*, [1974] 1 S.C.R. 311 (*Information Commissioner*, at paragraph 10). The Court answered this question in the negative, thus allowing the *subpoena* to be enforced and the records to be reviewed.

[48] This decision does not help the Commissioner's argument. As noted, no exclusion had been claimed, so that, if they were under the control of the Privy Council Office, the records in question were subject to the Act or at least capable of coming within that description.

[49] The argument that the Commissioner now has access to all excluded records unless a certificate is issued under the *Evidence Act* must also be rejected. Counsel for the respondent recognized at the hearing that the Commissioner's official position has always been that she cannot access records and information excluded by the Act under the heading "exclusions". He claims, however, that this position changed at some point in time—he could not say exactly

when—after the Federal Court's decisions in *Minister of the Environment* and *Minister of the National Defence*, issued in 2001 and 2008 respectively.

[50] Regarding the first of these decisions, the Commissioner's position rests entirely on her reading of it. According to this reading, the Court would have [TRANSLATION] "necessarily" given itself the power to examine Privy Council confidences had it not been for the fact that a certificate had been filed under section 39 of the *Evidence Act* (Respondent's Memorandum, at paragraph 59). This assertion is without merit. It is true that, in *Minister of the Environment*, the Court did authorize itself to review the decision refusing the production of the requested records despite the fact that the section 69 exclusion and the one resulting from the issuance of a certificate had both been claimed (*Minister of the Environment*, at paragraph 26**)**. However, the judicial review was conducted by reference to evidence surrounding the method used to compile the excluded records—a method whereby records which come within the ambit of the Act were incorporated into records that are excluded from its application—without their contents being examined (compare the decision of the Supreme Court in *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3).

[51] For our purposes, suffice it to say that the fact that a certificate had also been issued does not support the conclusion that the Court would have authorized itself to examine the records had it not been for the certificate. Nothing in the reasons of Justice Blanchard supports the Commissioner's reading of this decision.

[52] As to the Federal Court's decision in *Minister of National Defence,* the Commissioner, at paragraph 58 of her memorandum, relies on a brief excerpt, in which Justice Kelen simply asserts (paragraph 124):

> Under section 69, the Court reviews the records. The protection will attach if the records fit within the meanings ascribed under paragraphs 69(1)(*a*)-(*g*). (Section 120 is to similar effect.)
>
> [Emphasis added]

She fails to specify that, in this case, the records at issue had been obtained by the Commissioner in the circumstances described in *Information Commissioner* (see paragraphs 46 and 47, above) and were part of the record before the Federal Court judge. It is in that context that the Federal Court judge stated that the records are reviewed. It goes without saying that when the contested records are produced, the judge is free to examine them.

[53] The only recent Federal Court decision that deals with the issue raised by the Commissioner is *Quinn,* in which the information access requester alleged, as the Commissioner is now doing before this Court, that only a certificate issued under the *Evidence Act* could exclude a document containing confidences of the Privy Council from the reach of the Act. Justice Lemieux dealt with this argument as follows (*Quinn*, at paragraph 32):

> . . .
>
> . . . I agree with counsel for the respondent that there is no need for a separate section 39 [*Canada Evidence Act* (CEA)] certification. The [*Access to Information Act* (ATIA)] defines in a non limitative way, what is a confidence of

> the Queen's Privy Council. The enumerations under section 69(1) are only examples of such confidences. If a particular access request falls within the definition of a confidence of the Queen's Privy Council, the right of access is not contemplated because the ATIA does not apply to such request. In other words, the ATIA is self contained in its operation and does not require the support of section 39 of the CEA.
>
> [Emphasis added]

[54] In my opinion, this conclusion accurately reflects the state of the law.

[55] It follows that if the Commissioner has the power to order the CBC to produce the records at issue in the case at bar, it is because section 68.1, by its wording so provides, as was found by the Federal Court Judge.

[56] Before addressing the arguments advanced by the appellant against this finding, three comments are in order. Throughout its memorandum and its submissions, the appellant failed to distinguish between "records" that are subject to the Act and the "information" which they contain ("renseignements" in the French text). Even though the investigative power provided under subsection 36(2) of the Act allows the Commissioner to examine "any record to which this Act applies", the exclusions invoked by the appellant to refuse to disclose the requested records are limited to the information contained in these records, as described in section 68.1. In that regard, section 25 of the Act requires the CBC to examine all the requested records and disclose any part that does not come within the exclusions. Inasmuch as the CBC believes that it is authorized to refuse to disclose entire records without examining them, it is ignoring this duty.

[57] It is also important to note that the three categories of information excluded under section 68.1 and the excepted information relating to the CBC's general administration can overlap. For the purposes of the Act, the phrase "information that relates to … general administration" ("administration" in the French text) is defined non-exhaustively in section 3.1 and includes, for greater certainty, information such as travel or lodging expenses. It follows, for example, that the same information could at once relate to both programming activities and general administration. This possibility means that the release of information cannot be automatically refused because it relates to one or the other of the three excluded subjects. The scope of the exception must also be considered.

[58] Lastly, the appellant must specify which exclusion it is invoking when refusing to disclose a record. Programming and creative activities are distinct exclusions, and the requesters are entitled to know which exclusion is being invoked to refuse them access. Similarly, when a refusal is based on the broader category of "journalistic activities", the requesters are entitled to know the precise activity on which the appellant relies.

[59] I now turn to the issues raised by the appellant on appeal. The gist of the Federal Court judge's reasoning for refusing to issue the declaration sought by the appellant hinges on the particularity which section 68.1 embodies (Reasons, at paragraph 27):

> Section 68.1, as worded, contains a double negative, that is, an exception to the exclusion. That exception to the exclusion, which refers to information that relates to the general administration of the CBC, may shed light with respect to the authority of the Commissioner. How can the Commissioner determine whether information relates to the general administration of the CBC, and thus falls under

> the exception set out in section 68.1, if she does not have authority to review all the records in question, including records relating to the journalistic, creative or programming activities of the CBC?

[60] In so saying, the Federal Court judge recognizes that section 68.1 appears in the "exclusions" section of the Act, which covers records and information that have always escaped the Commissioner's power of examination. However, by reason of its wording, the categories of information set out in section 68.1 are not shielded from independent examination by the Commissioner. According to the Federal Court judge, drawing the opposite conclusion would result in the CBC being exempt from the application of the Act, even though it has been subject to it since 2007 (Reasons, at paragraph 29). The appellant acknowledges that this is the [TRANSLATION] "cornerstone" of the decision under appeal.

[61] The Federal Court judge's reasoning is hard to challenge. The exclusion is subject to an exception. This exception is generic and is capable of reducing the scope of the exclusions. The existence of the exception invites the Commissioner to exercise her power of examination. Absent a contrary demonstration, a record that is under the control of a government institution and that can reveal information that is not excluded from the application of the Act is a record to which the Act applies.

[62] Despite this obvious logic, the appellant submits that the Federal Court judge's reasoning cannot be accepted for three distinct reasons (Appellant's Memorandum, at paragraph 29). First, it argues that the exception at the end of section 68.1 is not actually an exception. Relying on the

English wording, which does not use the word “exception”, the appellant submits that the exception is rather a [TRANSLATION] “clarification” establishing the parameters of the exclusion (Appellant’s Memorandum, at paragraph 34).

[63] This distinction, even if it were accepted, does not affect the Federal Court judge’s reasoning. According to the Federal Court judge, a review of the records is required to demonstrate that the information in question does not come within the exception or the limitation, as clarified. Nothing hinges on this distinction.

[64] The appellant argues that, even if the exception was to be treated as such, its existence does not indicate that Parliament intended to grant the Commissioner a power of examination. For comparison, it asks the Court to consider the manner in which the Act deals with confidences of the Privy Council Office, as described in subsection 69(1), which are subject to the three exceptions provided in subsection 69(3). The appellant points out that these exceptions have never been viewed as providing the Commissioner with a right of examination.

[65] However, these exceptions are of an entirely different nature. Subsection 69(3) removes from the exclusion pertaining to Privy Council Office confidences under subsection 69(1), documents that have been in existence for more than 20 years and discussion papers relating to decisions that have been made public or, if they have not been made public, were made at least four years previously. The existence of any of these exceptions can be demonstrated on the face of the record, without it being necessary to examine its contents. The opposite is true, however,

when the time comes to determine whether information falls outside of the exclusion under section 68.1 because it relates to CBC's general administration.

[66] Third, the appellant submits that the question raised in this proceeding concerns the Commissioner's power to compel the disclosure of "records" excluded under the Act. The existence of this power cannot, according to the appellant, depend on the scope of the "records" excluded from it (Appellant's Memorandum, at paragraph 36).

[67] As noted earlier, the exclusions provided under section 68.1 do not pertain to records but to information, which is subject to an exception (or a clarification according to the appellant). As stated above, the nature of the exception is such that it may overlap with the excluded information with the result that a review by the Commissioner is required to give effect to the exception.

[68] I also do not believe that the Federal Court judge's interpretation of section 68.1 can be challenged on the basis of the parliamentary committee debates that preceded the enactment of this provision. The appellant is relying on certain statements by the former Commissioner, who warned committee members that section 68.1 as drafted would not allow him access to records containing the excluded information.

[69] It is easy to see why the Commissioner might have had this concern. As pointed out by the Federal Court judge, section 68.1 is not a model of clarity. A provision that appears under a

part of the Act entitled “exclusions” and which provides for an exception capable of overlapping with the excluded information is a recipe for controversy. The Commissioner’s opinion undoubtedly demonstrates that section 68.1 is open to various readings, but, in such a case, it is the courts’ role to determine the reading that best reflects Parliament’s intention.

[70] In my opinion, the Federal Court judge correctly concluded that, despite the fact that it appears under the heading “exclusions”, the exception which section 68.1 embodies requires that recourse be had to the Commissioner’s power of examination in order to give effect to this provision. Although Parliament intended that information related to journalistic, creative or programming activities be excluded from the application of the Act, it also wanted that information related to the CBC’s general administration – as defined in section 3.1 – not be excluded. Subject to what is said in paragraphs 73 and 74, below, it is the Commissioner’s role to initially determine whether the exception applies and to exercise the recommendation power vested in her by the Act.

[71] In the event that a recommendation to disclose is made and that the appellant maintains its refusal, it will be open to the appellant to bring the matter before the Federal Court while taking the necessary measures to preserve the confidentiality of the disputed information in the meantime. As explained by the Federal Court judge, it is difficult to see the prejudice that would be caused if the Commissioner was to take cognizance of the records.

[72] I do not share the concerns expressed by counsel for the appellant about the harm that might result from the revelation of journalistic sources. In my opinion, this concern is based on a misreading of the decision at first instance. I do not read the Federal Court decision as requiring that all exclusions be treated in the same manner or that the Commissioner is entitled to be given access to records regardless of the exclusion being claimed.

[73] The Federal Court judge's reasoning for limiting the effect of the exclusions in this case is based on the possible conflict between these exclusions and the exception under section 68.1. In his opinion, it is the Commissioner's role to initially address this conflict, and Parliament necessarily wanted the Commissioner to have access to records to be able to fulfill that role. This ruling was made in response to the broad declaration which the appellant was asking the Federal Court judge to issue.

[74] No such conflict can arise between a refusal based on what is best described as the "journalist-source privilege" (*Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592) and the exception provided for in section 68.1. The identity of journalistic sources cannot clash with the exception relating to general administration, regardless of the scope attributed to this exception. In these circumstances, the only conclusion possible if one gives effect to the Federal Court judge's reasoning is that the exclusion for journalistic sources, like the exclusions provided in sections 69 and 69.1, is absolute. It follows that in the event that a request seeking the disclosure of journalistic sources was made, a record – or the part thereof –

revealing this type of information would be exempt from the Commissioner's power of examination.

[75] Before concluding, I would add that the other decisions on which the appellant relies were not rendered under the legislation with which we are concerned and that none of the statutory provisions underlying those decisions include the particularity which section 68.1 bears. There is therefore no need to address them

[76] Finally, counsel for the appellant advised the panel during the deliberations that her client had been compelled to turn over to the committee of the House of Commons responsible for access to information, the records that are the subject of the appeal. He asks that the appeal be disposed in accordance with the arguments submitted by the parties irrespective of this occurrence.

[77] As noted earlier, the Commissioner agreed to stay her production order so as to allow the judicial process to follow its course. It is useful to recall in this respect that, absent exceptional circumstances, courts do not deal with issues which become moot during the judicial process (*Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342). It goes without saying that the disclosure of the records to the members of the Committee runs the risk of rendering the matter moot if the members choose to comment on them or otherwise reveal their contents (see also the pronouncement of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 114 with respect to the *sub judice* rule).

[78] For the time being, we understand from counsel's letter that the contested records have been turned over under seal and we have no reason to believe that their confidentially has been breached. In these circumstances, the controversy between the parties remains live and the Court should therefore dispose of the appeal on the basis of the arguments advanced by the parties.

[79] For the above reasons, I would dismiss the appeal. The Commissioner is seeking costs. Given the rejection of the alternative position which she has put forth, I believe that the parties should assume their respective costs.

"Marc Noël"

J.A.

"I agree.
Johanne Trudel J.A."

"I agree.
Robert M. Mainville J.A."

Certified true translation
Johanna Kratz, Translator

APPENDIX

RELEVANT PROVISIONS

For greater certainty	*Précision*
3.1 For greater certainty, for the purposes of this Act, information that relates to the general administration of a government institution includes information that relates to expenses paid by the institution for travel, including lodging, and hospitality.	**3.1** Il est entendu que, pour l'application de la présente loi, les renseignements se rapportant à l'administration de l'institution fédérale comprennent ceux qui ont trait à ses dépenses en matière de déplacements, d'hébergement et d'accueil.
Powers of Information Commissioner in carrying out investigations	*Pouvoirs du Commissaire à l'information pour la tenue des enquêtes*
36. (1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power	**36.** (1) Le Commissaire à l'information a, pour l'instruction des plaintes déposées en vertu de la présente loi, le pouvoir :
(*a*) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems 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;	*a*) d'assigner et de contraindre des témoins à comparaître devant lui, à déposer verbalement ou par écrit sous la foi du serment et à produire les pièces qu'il juge indispensables pour instruire et examiner à fond les plaintes dont il est saisi, de la même façon et dans la même mesure qu'une cour supérieure d'archives;
(*b*) to administer oaths;	*b*) de faire prêter serment;

(*c*) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;

(*d*) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;

(*e*) to converse in private with any person in any premises entered pursuant to paragraph (*d*) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and

(*f*) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (*d*) containing any matter relevant to the investigation.

Access to records

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

c) de recevoir des éléments de preuve ou des renseignements par déclaration verbale ou écrite sous serment ou par tout autre moyen qu'il estime indiqué, indépendamment de leur admissibilité devant les tribunaux;

d) de pénétrer dans les locaux occupés par une institution fédérale, à condition de satisfaire aux normes de sécurité établies par l'institution pour ces locaux;

e) de s'entretenir en privé avec toute personne se trouvant dans les locaux visés à l'alinéa *d*) et d'y mener, dans le cadre de la compétence que lui confère la présente loi, les enquêtes qu'il estime nécessaires;

f) d'examiner ou de se faire remettre des copies ou des extraits des livres ou autres documents contenant des éléments utiles à l'enquête et trouvés dans les locaux visés à l'alinéa *d*).

Accès aux documents

(2) Nonobstant toute autre loi fédérale et toute immunité reconnue par le droit de la preuve, le Commissaire à l'information a, pour les enquêtes qu'il mène en vertu de la présente loi, accès à tous les documents qui relèvent d'une institution fédérale et auxquels la présente loi s'applique; aucun de ces documents ne peut, pour quelque motif que ce soit, lui être refusé.

Evidence in other proceedings

(3) Except in a prosecution of a person for an offence under section 131 of the Criminal Code (perjury) in respect of a statement made under this Act, in a prosecution for an offence under section 67, in a review before the Court under this Act or in an appeal from such proceedings, evidence given by a person in proceedings under this Act and evidence of the existence of the proceedings is inadmissible against that person in a court or in any other proceedings.

Witness fees

(4) Any person summoned to appear before the Information Commissioner pursuant to this section is entitled in the discretion of the Commissioner to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court.

Return of documents, etc.

(5) Any document or thing produced pursuant to this section by any person or government institution shall be returned by the Information Commissioner within ten days after a request is made to the Commissioner by that person or government institution, but nothing in this subsection precludes the Commissioner from again requiring its production in accordance with this section.

Inadmissibilité de la preuve dans d'autres procédures

(3) Sauf dans les cas de poursuites pour infraction à l'article 131 du Code criminel (parjure) se rapportant à une déclaration faite en vertu de la présente loi ou pour infraction à l'article 67, ou sauf dans les cas de recours en révision prévus par la présente loi devant la Cour ou les cas d'appel de la décision rendue par la Cour, les dépositions faites au cours de toute procédure prévue par la présente loi ou le fait de l'existence de telle procédure ne sont pas admissibles contre le déposant devant les tribunaux ni dans aucune autre procédure.

Frais des témoins

(4) Les témoins assignés à comparaître devant le Commissaire à l'information en vertu du présent article peuvent recevoir, si le Commissaire le juge indiqué, les frais et indemnités accordés aux témoins assignés devant la Cour fédérale.

Renvoi des documents, etc.

(5) Les personnes ou les institutions fédérales qui produisent des pièces demandées en vertu du présent article peuvent exiger du Commissaire à l'information qu'il leur renvoie ces pièces dans les dix jours suivant la requête qu'elles lui présentent à cette fin, mais rien n'empêche le Commissaire d'en réclamer une nouvelle production.

Canadian Broadcasting Corporation

68.1 This Act does not apply to any information that is under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities, other than information that relates to its general administration.

Société Radio-Canada

68.1 La présente loi ne s'applique pas aux renseignements qui relèvent de la Société Radio-Canada et qui se rapportent à ses activités de journalisme, de création ou de programmation, à l'exception des renseignements qui ont trait à son administration.

Confidences of the Queen's Privy Council for Canada

69. (1) This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,

(*a*) memoranda the purpose of which is to present proposals or recommendations to Council;

(*b*) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(*c*) agenda of Council or records recording deliberations or decisions of Council;

(*d*) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(*e*) records the purpose of which is

Documents confidentiels du Conseil privé de la Reine pour le Canada

69. (1) La présente loi ne s'applique pas aux documents confidentiels du Conseil privé de la Reine pour le Canada, notamment aux :

a) notes destinées à soumettre des propositions ou recommandations au Conseil;

b) documents de travail destinés à présenter des problèmes, des analyses ou des options politiques à l'examen du Conseil;

c) ordres du jour du Conseil ou procès-verbaux de ses délibérations ou décisions;

d) documents employés en vue ou faisant état de communications ou de discussions entre ministres sur des questions liées à la prise des décisions du gouvernement ou à la formulation de sa politique;

e) documents d'information à l'usage des ministres sur des questions portées ou qu'il est prévu de porter devant le Conseil,

to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (*d*);

(*f*) draft legislation; and

(*g*) records that contain information about the contents of any record within a class of records referred to in paragraphs (*a*) to (*f*).

Definition of "Council"

(2) For the purposes of subsection (1), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

Exception

(3) Subsection (1) does not apply to

(*a*) confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or

(*b*) discussion papers described in paragraph (1)(*b*)

(i) if the decisions to which the discussion papers relate have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

ou sur des questions qui font l'objet des communications ou discussions visées à l'alinéa *d*);

f) avant-projets de loi ou projets de règlement;

g) documents contenant des renseignements relatifs à la teneur des documents visés aux alinéas *a*) à *f*).

Définition de « Conseil »

(2) Pour l'application du paragraphe (1), « Conseil » s'entend du Conseil privé de la Reine pour le Canada, du Cabinet et de leurs comités respectifs.

Exception

(3) Le paragraphe (1) ne s'applique pas :

a) aux documents confidentiels du Conseil privé de la Reine pour le Canada dont l'existence remonte à plus de vingt ans;

b) aux documents de travail visés à l'alinéa (1)*b*), dans les cas où les décisions auxquelles ils se rapportent ont été rendues publiques ou, à défaut de publicité, ont été rendues quatre ans auparavant.

Certificate under *Canada Evidence Act*

69.1 (1) Where a certificate under section 38.13 of the *Canada Evidence Act* prohibiting the disclosure of information contained in a record is issued before a complaint is filed under this Act in respect of a request for access to that information, this Act does not apply to that information.

Certificate following filing of complaint

(2) Notwithstanding any other provision of this Act, where a certificate under section 38.13 of the *Canada Evidence Act* prohibiting the disclosure of information contained in a record is issued after the filing of a complaint under this Act in relation to a request for access to that information,

(*a*) all proceedings under this Act in respect of the complaint, including an investigation, appeal or judicial review, are discontinued;

(*b*) the Information Commissioner shall not disclose the information and shall take all necessary precautions to prevent its disclosure; and

(*c*) the Information Commissioner shall, within 10 days after the certificate is published in the *Canada Gazette*, return the information to the head of the government

Certificat en vertu de la *Loi sur la preuve au Canada*

69.1 (1) Dans le cas où a été délivré au titre de l'article 38.13 de la *Loi sur la preuve au Canada* un certificat interdisant la divulgation de renseignements contenus dans un document avant le dépôt d'une plainte au titre de la présente loi à l'égard d'une demande de communication de ces renseignements, la présente loi ne s'applique pas à ces renseignements.

Certificat postérieur au dépôt d'une plainte

(2) Par dérogation aux autres dispositions de la présente loi, dans le cas où a été délivré au titre de l'article 38.13 de la *Loi sur la preuve au Canada* un certificat interdisant la divulgation de renseignements contenus dans un document après le dépôt d'une plainte au titre de la présente loi relativement à une demande de communication de ces renseignements :

a) toutes les procédures — notamment une enquête, un appel ou une révision judiciaire — prévues par la présente loi portant sur la plainte sont interrompues;

b) le Commissaire à l'information ne peut divulguer les renseignements et prend les précautions nécessaires pour empêcher leur divulgation;

c) le Commissaire à

institution that controls the information.

l’information renvoie les renseignements au responsable de l’institution fédérale dont relève le document dans les dix jours suivant la publication du certificat dans la *Gazette du Canada*.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-391-10
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE BOIVIN OF THE FEDERAL COURT DATED SEPTEMBER 24, 2010, DOCKET T-1552-09	
STYLE OF CAUSE:	Canadian Broadcasting Corporation and Information Commissioner of Canada
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 18, 2011
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	TRUDEL J.A. MAINVILLE J.A.
DATED:	November 23, 2011

APPEARANCES:

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Yannick Landry Emily McCarthy	FOR THE RESPONDENT

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